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# Judges Henry J. Friendly and Benjamin Cardozo: A Tale of Two Precedents

David M. Dorsen\*

Judge Henry J. Friendly, who served on the United States Court of Appeals for the Second Circuit from 1959 to 1986, confronted two cases raising precisely the same issues that occupied Judge Benjamin N. Cardozo's attention forty years before, when he served on the New York Court of Appeals, the state's highest court. In 1923 Judge Cardozo wrote the court's opinion in *Murray v. Cunard S.S. Co.*,<sup>1</sup> examining whether Cunard could avoid liability when a passenger with a claim against it failed to send it a notification or file suit within the time required by language printed on the passenger's ticket. Five years later, soon after he became chief judge of that court, Cardozo wrote the court's majority opinion in *Palsgraf v. Long Island R.R.*,<sup>2</sup> "[p]erhaps the most celebrated of all torts cases' and one of the best-known American common law cases of all time,"<sup>3</sup> which concerned a railroad's liability for an arguably

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\* © 2011 by David M. Dorsen. A.B. Harvard, J.D. Harvard Law School. Dorsen is writing a biography of Judge Henry J. Friendly (1903-86). Dorsen wishes to thank James R. Zazzali, former Chief Justice of the New Jersey Supreme Court, for his constructive comments, and the law firm of Wallace King Domike & Reiskin, PLLC, for its generous support.

1. 139 N.E. 226 (N.Y. 1923).

2. 162 N.E. 99 (N.Y. 1928).

3. ANDREW L. KAUFMAN, *CARDOZO* 287 (1998) (quoting William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 1 (1953)). For a discussion of the reasons why the case is so famous, see RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 41-47 (1990). At the time Judge Cardozo wrote the *Palsgraf* opinion, the issue of foreseeability had been the subject of English opinions and had been extensively discussed by legal scholars, almost all of whom favored the view taken by the dissent (which supported Mrs. Palsgraf), by fixing on whether any force intervened between the tortious act and the harm. Arthur L. Goodhart, *The Unforeseeable Consequences of a Negligent Act*, 39 YALE L.J. 449 (1930). Thirty-four years later, Professor Goodhart wrote to Friendly that while a railroad might foresee that the package in

unforeseeable accident. Decades later, Friendly shed new light on Cardozo's venerable opinions.

Judge Friendly revered Judge Cardozo, listing him, along with Oliver Wendell Holmes, Jr., Louis Dembitz Brandeis, and Learned Hand, as the greatest judges of the twentieth century.<sup>4</sup> He also cited them frequently in his opinions, mentioning Cardozo more often than Brandeis, although less often than Holmes.<sup>5</sup> Most of all, Judge Friendly primarily referred to Cardozo as a judge, and not Justice, because his most famous opinions were handed down while on the New York Court of Appeals. Friendly appreciated Cardozo's pithy aphorisms and wove them into his opinions. Among Judge Cardozo's statements that Judge Friendly employed were: "[T]he criminal is to go free because the constable has blundered";<sup>6</sup> "Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior [for a fiduciary]";<sup>7</sup> "[W]e are not to close our eyes as judges to what we perceive as men";<sup>8</sup> and "It will not do to decide the same question one way between one set of litigants and the opposite way between another."<sup>9</sup> More technical Cardozo statements also attracted Judge Friendly's attention: "Our concern is to define the meaning [of the statutory term] for the purpose of a

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*Palsgraf* contained an explosive, "it would be unreasonable to require the railway in every instance to act as if the contents of the package were of this dangerous nature." Letter from Arthur L. Goodhart to Henry J. Friendly (Nov. 27, 1964) (on file with the Harvard Law School Library (Henry J. Friendly Collection, Box 95, Folder 5)).

4. Henry J. Friendly, *Judge Learned Hand*, 29 BROOK. L. REV. 6, 6-7 (1962), reprinted in HENRY J. FRIENDLY, BENCHMARKS 309 (1967).

5. According to my count, Friendly cited Holmes in 78 of his opinions, Cardozo in 57, and Brandeis in 53.

6. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926), quoted in *Collins v. Beto*, 348 F.2d 823, 831 (5th Cir. 1965).

7. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928), quoted in *Rosenfeld v. Black*, 445 F.2d 1337, 1344 (2d Cir. 1971).

8. *People ex rel. Alpha Portland Cement Co. v. Knapp*, 129 N.E.202, 208 (N.Y. 1920), quoted in *Donovan v. Bierworth*, 680 F.2d 263, 272 (2d Cir. 1982).

9. CARDOZO, THE NATURE OF JUDICIAL PROCESS 33 (1921), quoted in *Estate of Carter v. Comm'r*, 453 F.2d 61, 64 (2d Cir. 1971); see also Noonan v. *Cunard S.S. Co.*, 375 F.2d 69, 71 n.2 (2d Cir. 1967); *SEC v. Canandaigua Enters.*, 339 F.2d 14, 19 (2d Cir. 1964).

particular statute which must be read in light of the mischief to be corrected and the end to be attained”<sup>10</sup> and “We must know what a decision means before the duty becomes ours to say whether it is right or wrong.”<sup>11</sup>

While Judge Friendly’s respect for Judge Cardozo was enormous, he was not willing to follow uncritically the master’s precepts. He marched to his own internal judicial drummer. Part of the reason was that in dealing with two important problems, the usually prescient Judge Cardozo was more reluctant than usual to take a modern view, as he did in *MacPherson v. Buick Motor Company*.<sup>12</sup> Friendly wrote a liberating opinion in both *In re Kinsman Transit Company*,<sup>13</sup> which raised issues similar to *Palsgraf*, but in a fact pattern that many would have thought existed only in law-school examinations, and *Silvestri v. Italia Societa per Azioni di Navigazione*,<sup>14</sup> where the facts paralleled those in *Murray*. Judge Friendly, a judge best known for his statutory opinions, moved the common law forward in the best spirit of its development. Although frequently described as a conservative,<sup>15</sup> his perspective led him to be more generous to plaintiffs than was Judge Cardozo.

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10. *Warner v. Goltra*, 293 U.S. 155, 158 (1934), *quoted in* *United States v. Capanegro*, 576 F.2d 973, 979 n.6 (2d Cir. 1978). Friendly cited Cardozo frequently in his academic writing. *See, e.g.*, Henry J. Friendly, *Reactions of a Lawyer-Newly-Become-Judge*, 71 *YALE L.J.* 218 (1961), *reprinted in* FRIENDLY, *supra* note 4.

11. *United States v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 294 U.S. 499, 511 (1935), *quoted in* *ABC Air Freight Co. v. Civil Aeronautics Bd.*, 391 F.2d 295, 300 (2d Cir. 1968).

12. 111 N.E. 1050 (N.Y. 1916) (abolishing the requirement of privity to recover from the manufacturer of defective merchandise).

13. 338 F.2d 708 (2d Cir. 1964).

14. 388 F.2d. 11 (2d Cir. 1968).

15. J. WOODFORD HOWARD, JR., *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM* 240 n.p (1981) (citing Sheldon Goldman, *Conflict in the U.S. Courts of Appeals, 1965-1971: A Quantitative Analysis*, 42 *U. CIN. L. REV.* 635, 647-50 (1973)); JUAN WILLIAMS, *THURGOOD MARSHALL* 304-05 (1998). Friendly’s reputation as a conservative stems largely from articles he wrote on the criminal law, including: *The Bill of Rights as a Code of Criminal Procedure*, 53 *CALIF. L. REV.* 929 (1965); *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 *U. CIN. L. REV.* 671 (1968); and *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 *U. CHI. L. REV.* 142 (1970).

Before Henry J. Friendly was a lawyer and a judge, he was an aspiring historian. At Harvard College he studied old European history under the prominent Harvard historian Charles McIlwain, received his Bachelor of Arts degree summa cum laude, and almost joined the Harvard History Department.<sup>16</sup> At Harvard Law School he became president of the *Harvard Law Review* and again graduated summa cum laude with the highest numerical grade-point average at the school since Justice Brandeis, class of 1879. Fittingly, he then clerked for Justice Brandeis himself.<sup>17</sup> He was appointed fifty years ago—after thirty-one years in private practice—to the United States Court of Appeals for the Second Circuit, where he earned the title of outstanding federal appeals judge of his generation, coupled with Learned Hand as one of the best federal judges never to have made it to the Supreme Court.<sup>18</sup>

## I.

Judge Friendly's opinion in *Kinsman* involved an incident on the night of January 21, 1959, when two ice jams on the

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16. McIlwain wrote to Friendly: "I have no hesitation in saying to you that of all the students I have come in contact with in my whole teaching experience of some twenty years, you are the best fitted for this work." Letter from Charles McIlwain, to Henry J. Friendly (Sept. 7, 1923) (on file with Joan Friendly Goodman, daughter of Judge Friendly).

17. *In re Howard*, 210 F. Supp. 301, 302 (W.D. Pa. 1962). Justice Brandeis had the highest average under a superseded grading system while Friendly had the highest average under the new system. Audio Tape: Friendly Oral History, held by the Center for Oral History (July 4, 1974) (on file with author).

18. For example, Chief Justice Warren Burger said of Judge Friendly: "I can't possibly identify any judicial colleague more highly qualified to have come to the Supreme Court of the United States than Henry Friendly." Chief Justice Warren Burger, U.S. Supreme Ct., In Memoriam: Hon. Henry J. Friendly, Address Before the Extraordinary Session of the Court of Appeals for the Second Circuit (June 9, 1986) in 805 F.2d LXXXVI. Justice Lewis Powell said: "His intellect can be ranked with that of Paul Freund—the most brilliant members of our profession I have ever known personally." Letter from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Ct., to Judge Louis H. Pollak, Senior Dist. Judge, E. Dist. of Pa. (May 21, 1986) (on file with author). Harvard Law School Dean Erwin N. Griswold stated: "In my opinion, he was the ablest lawyer of my generation." Erwin N. Griswold, *In Memoriam: Henry J. Friendly*, 99 HARV. L. REV. 1720, 1720 (1986).

Buffalo River broke loose after a “rain and thaw followed a period of freezing weather.”<sup>19</sup> Propelled by the current, large chunks of ice and other debris lodged in the space between the MacGilvray Shiras, a ship owned by Kinsman Transit and Continental Grain Company, and the dock of the Concrete Elevator, owned by Continental. The buildup exerted pressure on the ship until the Shiras’ “stern lines parted, and [she] drifted into the current” at about 10:40 P.M.<sup>20</sup> “Careening stern first down the S-shaped river,” Judge Friendly explained, “the Shiras, at about 11 P.M., struck the bow of the Michael K. Tewksbury”—owned by another company—which had been well-moored in a protected area.<sup>21</sup> The collision pushed the Tewksbury into the river and “she too drifted [downstream, closely] followed by the Shiras.”<sup>22</sup>

Observers “called the Coast Guard, [who] called the city fire station on the river, [who] in turn warned the crew on the Michigan Avenue” drawbridge, located three miles downstream from the Concrete Elevator.<sup>23</sup> Although approximately twenty minutes had passed since the accident and although it took just two minutes and ten seconds to raise the drawbridge to full height, “the bridge was just being raised when, at 11:17 P.M., the Tewksbury crashed into its center.”<sup>24</sup> A shift change was scheduled for 11 P.M.; the operator on the earlier shift was in a tavern when the fire station call reached the bridge, and the second shift did not arrive until shortly before a second call to the bridge—and the crash.<sup>25</sup> Grounded, the Tewksbury stopped in the wreckage of the bridge against the stern of another ship that was moored next to the bridge, and the Shiras plowed into the Tewksbury.<sup>26</sup> The ships and debris “substantially dammed the flow [of the river], causing [it] to back up and flood installations on the banks” as far upstream as the Concrete

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19. *Kinsman*, 338 F.2d at 712.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 712-13.

25. *Id.* at 713.

26. *Id.*

Elevator.<sup>27</sup> In addition to property damage, which included damage to property adjacent to the bridge from its falling towers, “[t]wo [members] of the bridge crew suffered injuries.”<sup>28</sup>

Claims, cross-claims, and third-party claims inundated the U.S. district court in Buffalo.<sup>29</sup> Sitting without a jury, District Judge Harold P. Burke applied the federal law of admiralty to decide who was liable and just how far a negligent party’s liability should reach down the chain of events.<sup>30</sup> He also had to decide claims between parties that were at least partially at fault, like Continental, which docked the Shiras but also suffered damage to the Concrete Elevator, and the City of Buffalo, which was responsible for maintaining the river and manning the drawbridge but found its drawbridge damaged when two ships collided with it.<sup>31</sup> In admiralty, unlike negligence under the laws of most states, when a plaintiff as well as a defendant is negligent, a court can reduce the award to the victorious plaintiff because he was partially at fault; when several parties are at fault, the judge can order them share the damages in proportion to their culpability.<sup>32</sup> Judge Burke made a variety of awards, which the Second Circuit proceeded to review.<sup>33</sup>

Before taking up what he regarded as “the most serious issues,” Judge Friendly made several preliminary findings.<sup>34</sup> First, the City was not negligent for failure to take action to prevent the buildup of ice on the river.<sup>35</sup> Second, the manner of

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27. *Id.*

28. *Id.* Judge Friendly had a passion for facts, and paid special attention to them in his opinions. He would read the appendices to the parties’ briefs as well as the briefs themselves and, on occasion, he would ask for and examine the entire trial-court record. Lawrence B. Pedowitz, *Judge Friendly: A Clerk’s Perspective*, 1978 ANN. SURV. AM. L. xviii, xix (1979).

29. *Id.* at 711-14.

30. *Id.*

31. *Id.*

32. 2 C.J.S. *Admiralty* § 115 (2003). The law of admiralty does not utilize the terms “plaintiff” and “defendant.” However, they are used here for simplicity.

33. *Kinsman*, 338 F.2d at 713.

34. *Id.* at 717.

35. *Id.* at 713-14.

the mooring of the Shiras was negligent.<sup>36</sup> Third, under the arcane provisions of the admiralty law there were limitations on the extent of Kinsman's liability because the owners of the family corporation were insufficiently involved in the events to impose full liability on the corporation.<sup>37</sup> Fourth, the Tewksbury and its owner Midland were not negligent in the manner in which that ship was moored.<sup>38</sup>

That left three major issues, the first of which was the City's failure to raise the bridge in time. Judge Friendly began: "If this were a run of the mine negligence case, the City's argument against liability for not promptly raising the Michigan Avenue Bridge would be impressive."<sup>39</sup> No vessels were expected—the tugs quit at 4 P.M.—"it would have been consistent with prudence for the city to relieve the bridge crews of their duties."<sup>40</sup> The City would not be liable "because out of abundance of caution, it had ordered them to be present when prudence did not so require."<sup>41</sup> However, this was no "run of the mine negligence case." The difference resided in section 4 of the Federal Bridge Act of 1906,<sup>42</sup> which required that when a drawbridge is constructed over a navigable stream, "then the draw shall be opened promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft."<sup>43</sup> A federal regulation related to the statute read: "The draws of these bridges shall be opened promptly on signal for the passage of any vessel at all times during the day or night except as otherwise provided by this section."<sup>44</sup> No exception applied.<sup>45</sup>

The second major issue was the allocation of damages between Kinsman and Continental, on the one hand, and the City, on the other hand. "We speedily overrule the objections of

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36. *Id.* at 714.

37. *Id.* at 714-16.

38. *Id.* at 716-17.

39. *Id.* at 717.

40. *Id.*

41. *Id.*

42. 33 U.S.C. § 494 (2006).

43. *Id.*

44. *Kinsman*, 338 F.2d at 718 (citing 33 C.F.R. § 203.707(e) (1961)).

45. *Id.*



Kinsman and Continental . . . [A]n actor whose negligence has set a dangerous force in motion is not saved from liability for harm it has caused to innocent persons solely because another has negligently failed to take action that would have avoided this.”<sup>46</sup> The argument that someone down the line negligently failed to stop the force and therefore should be the sole person liable “grows out of the discredited notion that only the last wrongful act can be a cause—a notion as faulty in logic as it is wanting in fairness. The established principle [of sharing the payment of damages] is especially appealing in admiralty, which will divide the damages among the negligent actors or non-actors.”<sup>47</sup> The award of damages proportionate to a party’s fault eliminates the search for the sole blameworthy actor. Thus, although some common law precedent supported Kinsman and Continental, Judge Friendly concluded that admiralty law precedent, although not absolutely clear, favored the City.<sup>48</sup>

The third major issue was the relevancy of the fact that “[t]he allegedly unexpectable character of the events [led] to much of the damage.”<sup>49</sup> Judge Friendly wrote: “The very statement of the case suggests the need for considering *Palsgraf v. Long Island R.R.* . . . and the closely related problem of liability for unforeseeable consequences.”<sup>50</sup> In *Palsgraf*, an injury to Helen Palsgraf took place when a late-arriving passenger, fighting his way onto a crowded moving train assisted by a push by a railroad guard, dropped a newspaper-covered package onto the tracks.<sup>51</sup> Nothing indicated the package contained fireworks, which exploded when they hit the ground.<sup>52</sup> The force of the detonation overturned a penny weighing machine twenty-five or thirty feet

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46. *Id.* at 719.

47. *Id.*

48. *Id.* at 718-21.

49. *Id.* at 721.

50. *Id.* at 721. The *Palsgraf* case, Judge Friendly noted, was incorporated into the law of admiralty by an opinion written by Judge Learned Hand. *Id.* (citing *Sinram v. Pa. R.R.*, 61 F.2d 767, 770 (2d Cir. 1932).

51. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 99 (N.Y. 1928).

52. *Id.*

away, perhaps less, and it fell on Mrs. Palsgraf.<sup>53</sup> She sued the Long Island Railroad for her injuries and won a jury verdict, which the New York Appellate Division affirmed.<sup>54</sup> New York's highest court, however, reversed and dismissed the case in a four-to-three opinion, with Judge Cardozo writing for the majority.<sup>55</sup>

Judge Cardozo's opinion explained that, "the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty . . . . The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."<sup>56</sup> Judge Friendly observed that Judge Cardozo

53. *Id.* at 105 (Andrews, J., dissenting).

54. *Palsgraf v. Long Island R.R.*, 225 N.Y.S. 412 (App. Div. 1927).

55. *Palsgraf*, 162 N.E. at 99. Posner states that Cardozo's statement of facts "is both elliptical and slanted" in favor of the railroad. POSNER, *supra* note 3, at 38. For example, the book points out that Cardozo called the bundle small even though witnesses had described it as large and that Cardozo said nothing about the distance of the scale from the fall of the fireworks. *Id.* at 39. It was Judge Andrews' dissent that provided the information about the location of the scale. *Palsgraf*, 162 N.E. at 105 (Andrews, J., dissenting). Posner also described Judge Cardozo's opinion as an "audacious denial that the railroad had been culpably negligent." POSNER, *supra* note 3, at 40. Friendly did not challenge Judge Cardozo's statement of the facts. *In re Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964). While the details of the facts in *Palsgraf* were of limited relevance to his opinion in *Kinsman*, Judge Friendly certainly recognized that the stronger the facts were for the railroad, the easier it was to find in favor of plaintiffs in *Kinsman*. *Id.*

56. *Palsgraf*, 162 N.E. at 100. Cardozo's use of the term "duty" was standard at the time; Judge Andrews used the term. *Id.* at 102 (Andrews, J., dissenting). The dissent in *Palsgraf* took a broader and more practical view of liability:

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 . . . . But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former.

*Id.* at 103. The law stated in the dissent is the law in most states. POSNER, *supra* note 3, at 41. Judge Posner was far too harsh on Judge Andrews when he wrote, "Judge Andrews's dissent, which although much praised is inept." *Id.* at 45. Judge Andrews supplied important facts omitted by Judge Cardozo. *Palsgraf*, 162 N.E. at 105 (Andrews, J., dissenting).

had found “the Long Island Railroad owed no ‘duty’ to Mrs. Palsgraf under the circumstances,” although it might owe a duty in other circumstances, such as “if Mrs. Palsgraf had been injured by the fall of improperly loaded objects from a passing train.”<sup>57</sup> It had no duty because there was no “notice that the package contained a substance demanding the exercise of any care toward anyone so far away; Mrs. Palsgraf was not considered to be within the area of apparent hazard created by whatever lack of care the guard had displayed to the anonymous carrier of the unknown fireworks.”<sup>58</sup>

Friendly compared *Kinsman* with *Palsgraf*: “We see little similarity between the *Palsgraf* case and the situation before us . . . . [A] ship insecurely moored in a fast flowing river is a known danger not only to herself but to owners of all other ships and structures down-river, and to the persons upon them.”<sup>59</sup> Foreseeable consequences included damage to the bridge and “partial damming that would flood property upstream,” particularly, as Judge Friendly noted, the length of one of the two loose ships was two-and-one-half times and the other was three times the width of the channel at the bridge.<sup>60</sup> Also foreseeable was that the drawbridge would not be raised “since, apart from other reasons, there was no assurance of timely warning.”<sup>61</sup> It may have been less foreseeable that the *Shiras* would have made it so far down the river, but the current was swift and, on learning of the *Shiras*’ breaking loose, Continental’s employees and others “foresaw precisely that.”<sup>62</sup> Thus, “all the claimants here met the *Palsgraf* requirement of being persons to whom the actors owed a ‘duty of care’ . . . .”<sup>63</sup> “Although the obvious risks from not raising the

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57. *In re Kinsman Transit Co.*, 338 F.2d 708, 721 (2d Cir. 1964).

58. *Id.* Friendly employed a footnote to observe that “[t]here was exceedingly little evidence of negligence of any sort. . . . How much ink would have been saved over the years if the Court of Appeals had reversed Mrs. Palsgraf’s judgment on the basis that there was no evidence of negligence at all.” *Id.* at n.5.

59. *Id.* at 721-22 (emphasis added).

60. *Id.* at 722.

61. *Id.* at 723.

62. *Id.*

63. *Id.* at 722 (emphasis added).

bridge were damage to itself and to the vessels, the danger of a fall of the bridge and of flooding would not have been unforeseeable under the circumstances to anyone who gave them thought.”<sup>64</sup> Judge Friendly cautioned that “such post hoc step by step analysis would render ‘foreseeable’ almost anything that has in fact occurred; if the argument relied upon has legal validity, it ought not be circumvented by characterizing as foreseeable what almost no one would in fact have foreseen . . . .”<sup>65</sup>

Judge Friendly still had to respond to the argument. He stated:

that *the manner* in which several of the claimants were harmed, particularly by the flood damage, was unforeseeable and that recovery for this may not be had—whether the argument is put in the forthright form that unforeseeable damages are not recoverable or is concealed under a formula of lack of “proximate cause.”<sup>66</sup>

About this issue Judge Friendly later wrote to a Harvard Professor: “I must confess there is no phase of law that seems more baffling and unsusceptible of clear statement than the causation problem.”<sup>67</sup> This was not an issue that *Palsgraf* could answer. “Chief Judge Cardozo did not reach the issue of ‘proximate cause’ for which the case is often cited.”<sup>68</sup>

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64. *Id.* at 723.

65. *Id.*

66. *Id.* at 722-23 (emphasis added). This sentence was quintessential Friendly. In a few words he described concepts that many might think were identical while others would not see as even similar, and at the same time expressed his preference for one of the formulations.

67. Letter from Henry J. Friendly, to Robert Keeton (Nov. 10, 1964) (on file with the Harvard Law School Library (Henry J. Friendly Collection, Box 211, Folder 13)).

68. *Kinsman*, 338 F.2d at 722-23 & n.8. Cardozo had written:

The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability. If there is no tort to be redressed,

Judge Friendly's analysis favored plaintiffs: "The weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are 'direct,' and the damage, although other and greater than expectable, is of the same general sort that was risked."<sup>69</sup> His discussion of foreseeability was uncommonly clear and expansive, although, as he conceded, his opinion provided little in the way of guidance and left much to the intuition of the judge:

We see no reason why an actor engaging in conduct which entails a large risk of small damage and a small risk of other and greater damage, of the same general sort, from the same forces, and to the same class of persons, should be relieved of responsibility for the latter simply because the chance of its occurrence, if viewed alone, may not have been large enough to require the exercise of care. . . . This does not mean that the careless actor will always be held for all

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there is no occasion to consider what damage might be recovered if there were a finding of a tort.

*Palsgraf v. Long Island R.R.*, 162 N.E. 99, 101 (N.Y. 1928). Analysis of the issue of proximate cause arguably should precede considerations of foreseeability. If the tort did not cause the injury, there is no reason to consider whether the injury was foreseeable.

69. *Kinsman*, 338 F.2d at 724. Judge Friendly noted that English law imposed liability when the injury was caused somewhat differently than could be expected, providing the damages were "direct." *Id.* at 723. He was skeptical:

[W]e would find it difficult to understand why one who had failed to use the care required to protect others in the light of expectable forces should be exonerated when the very risks that rendered his conduct negligent produced other and more serious consequences to such persons than were fairly foreseeable when he fell short of what the law demanded.

*Id.* at 723-24. The parties' briefs in *Kinsman* had not mentioned English law.

damages for which the forces that he risked were a cause in fact. Somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity. Thus, if the destruction of the Michigan Avenue Bridge had delayed the arrival of a doctor, with consequent loss of a patient’s life, few judges would impose liability on any of the parties here . . . . It would be pleasant if greater certainty were possible, but the many efforts that have been made at defining the locus of the “uncertain and wavering line” are not very promising; what courts do in such cases makes better sense than what they, or others, say.<sup>70</sup>

At this point Judge Friendly turned from a restatement of the repeatedly explored law of foreseeability to an analysis that included language perhaps reflecting the budding law and economics movement, whose leaders included then professors and now judges, Guido Calabresi<sup>71</sup> and Richard A. Posner.<sup>72</sup>

Where the line will be drawn will vary from age to age; as society has come to rely increasingly on insurance and other methods of loss-sharing, the point may lie further off than a century ago. Here it is surely more equitable that the losses from the operators’ negligent failure to raise the Michigan Avenue Bridge should be ratably borne by Buffalo’s taxpayers than left with the innocent victims of the flooding . . . .<sup>73</sup>

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70. *Kinsman*, 338 F.2d at 725 (internal citations omitted).

71. See, e.g., Guido Calabresi, *The Decision for Accidents: An Approach to Non-Fault Allocation of Costs*, 78 HARV. L. REV. 713, 725-34 (1965).

72. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* (2007).

73. *Kinsman*, 338 F.2d at 725-26. Judge Andrews’ dissent in *Palsgraf*, which focused on the issue of proximate cause, raised a hypothetical similar to Friendly’s delayed doctor, and said: “[I]t is all a question of expediency. There are no fixed rules to govern our judgment. . . . There is in truth little to guide us other than common sense.” *Palsgraf*, 162 N.E. at 104 (Andrews, J.,

In fact, a memorandum that Friendly wrote to his fellow judges on the panel was more forward-looking than his statement in his opinion:

If there were any way in which the doctrine could be manipulated so as to correspond with probable insurance that would be fine, and in our case one may guess there to be more likelihood that the property owners were insured against flood damages than that Continental's liability insurance would be equal to the strain. But suppose Joe Doak, who was standing by the river bank, had been drowned? On the whole, it seems best not to bring into negligence law the 'foreseeability' doctrine of *Hadley v. Baxendale* so far as concerns damages rather than the determination of negligence. . . . I submit that importing foreseeability into determining the scope of damages for negligence is unsound in theory and unworkable in practice.<sup>74</sup>

The decree entered by the Second Circuit apportioned the losses among the various responsible parties: Buffalo recovered two-thirds of the damages to its property from Continental and Kinsman; Continental recovered two-thirds of its damages from the City and Kinsman; and Kinsman, which made no claim against Continental, recovered half of the damages suffered by the Shiras at the bridge from the City and Continental.<sup>75</sup> More than four decades after *Kinsman*, Judge Calabresi commented on Judge Friendly's opinion: "I think Friendly was definitely

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dissenting). At some point the two approaches converge. See Case Comment, *Proximate Cause—Last Clear Chance—Admiralty: Foreseeability Requirement and the "Freak Accident,"* 49 MINN. L. REV. 1052, 1058-59 (1965).

74. Memorandum from Henry J. Friendly, to Judges Leonard P. Moore & Sterry R. Waterman (Apr. 13, 1964) (on file with the Harvard Law School Library (Henry J. Friendly Collection, Box 29, Folder 19)).

75. *Kinsman*, 338 F.2d at 726-27.

foreseeing law and economics type analysis. He was doing it more through intuition than systematically. But . . . his judicial intuition more often got it correct than the analysis of many a law and economics scholar.”<sup>76</sup>

Judge Leonard P. Moore dissented only from the portion of Judge Friendly’s opinion that sustained the award of damages caused by the flooding of the upstream properties. Judge Moore took a different view of the foreseeability of the harm, concluding that “the fortuitous circumstance of the vessels so arranging themselves as to create a dam is much ‘too tenuous,’” and compared the events to “the humorous and almost-beyond-all-imagination sequences depicted by the cartoonist . . . Rube Goldberg,” hugely famous a half-century ago.<sup>77</sup> Judge Moore’s principal concern was that “[j]udgment would be entered against the defendant which court or jury decided was best able to pay.”<sup>78</sup> Thus, his analysis favored defendants and was less forward-looking than Judge Friendly’s, voting for the defendants on this claim despite the fact that the injured upriver property owners were far less able than the defendants to protect against and distribute the costs of the accident among a broader swath of people.

The parties provided Judge Friendly with precious little help. When he saw that the briefs cited no rules or regulations relating to the Bridge Act, his experience and intuition led him to tell his law clerk, Pierre N. Leval, now a judge on the Second Circuit, to go to the law library to see if there were any applicable rules or regulations.<sup>79</sup> Leval found the regulation cited above that required drawbridges to be opened “promptly on signal for the passage of any vessel at all times during the day or night except as otherwise provided in this section.”<sup>80</sup> The uncovered regulation played an important role in the decision.

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76. E-mail from Guido Calabresi, Senior Cir. Judge, 2d Cir., to author (Sept. 18, 2008) (on file with author).

77. *Kinsman*, 338 F.2d at 727-28 (Moore, J., concurring and dissenting).

78. *Id.* at 727.

79. Interview with Pierre N. Leval, Senior Cir. Judge, 2d Cir., in N.Y., N.Y. (Oct. 17, 2006).

80. 33 C.F.R. § 203.707(e) (1961); Interview with Judge Pierre N. Leval, *supra* note 79; *see also supra* text accompanying notes 34-44.



The briefs of the four parties were deficient in other respects. Incredibly, only one of the briefs filed so much as cited *Palsgraf*; without any discussion or analysis the City's brief simply quoted two short passages from Judge Cardozo's majority opinion.<sup>81</sup> The consideration of foreseeability in the City's brief—again the only brief that even mentioned the issue—was limited to the question of whether the City had any expectation that ships would be on the Buffalo River that night.<sup>82</sup> Judge Friendly generously expanded the City's meager and off-center argument on foreseeability.<sup>83</sup>

What is even more startling is that none of the briefs filed in *Kinsman* were as good on the principal issue as the brief of the Long Island Railroad in *Palsgraf*, argued thirty-six years earlier and obviously without the benefit of Judge Cardozo's opinion. Mrs. Palsgraf's brief limited itself to mundane statements like: "The defendant having set in motion a chain of events was liable for the result thereof."<sup>84</sup> The railroad's brief, however, was surprisingly sophisticated for one written in the late 1920s. Judge Richard Posner did not do it justice when he wrote: "The opinion owes, by the way, nothing to the briefs, which are competent and well written, but nothing more; alongside Cardozo's opinion they are pedestrian"; "[t]he railroad's brief is not markedly superior to the plaintiff's."<sup>85</sup>

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81. Brief for the City of Buffalo, *In re Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964) (No. 238-243, 28387-28392).

82. *Id.*

83. Friendly explained a legal rationale in a memorandum to the other members of the panel: "Although the *Palsgraf* point was not specifically argued, Continental's (and *Kinsman*'s) claims that the City should be held solely liable for everything and they for nothing, surely include the lesser claim that they should not be held liable for damage from the damming and flooding." Memorandum from Henry J. Friendly, to Judges Leonard P. Moore and Sterry R. Waterman (Mar. 4, 1964) (on file with the Harvard Law School Library (Henry J. Friendly Collection, Box 211, Folder 13)).

84. Plaintiff-Respondent's Brief from *Palsgraf v. Long Island R.R.* reprinted in 2 RECORDS AND BRIEFS OF LANDMARK BENJAMIN CARDOZO OPINIONS 10 (Doc. 20) (William H. Manz, ed. 2001). Judge Posner accurately called Palsgraf's argument "standard analysis." POSNER, *supra* note 3, at 37.

85. POSNER, *supra* note 3, at 45, 48. Judge Posner was correct to the extent that his comment referred to considerations of style—an important part of his discussion of Cardozo's legacy—but not necessarily considerations applicable to a party trying to win a case.

After arguing that its employees were not negligent, the railroad's brief turned to the issue of causality.<sup>86</sup> The railroad first claimed an absence of proximate cause and then continued with language that undoubtedly assisted Judge Cardozo to write his landmark opinion and, indeed, gave him the opportunity to jettison the arguably superfluous concept of "duty"<sup>87</sup> on which he nevertheless chose to rely:

Defendant's employees not knowing the contents of the package carried by the passenger could not reasonably foresee or anticipate that it might explode. Such an occurrence is not a natural and probable consequence of assisting a passenger to board a train. . . . "In other words negligence is not a matter to be judged after the occurrence; it is always a question of what reasonably prudent men under the same circumstances would or should in the exercise of reasonable care have anticipated."

"We think that ordinary caution did not involve forethought of this extraordinary peril."

"[The defendant] became answerable in other words for those consequences that ought to have been foreseen by a reasonably prudent man."<sup>88</sup>

Despite his seeming endorsement in *Kinsman* of Judge Cardozo's product, it is far from clear that Judge Friendly was enamored of *Palsgraf's* usefulness in the contemporary world.

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86. Points for Appellant from *Palsgraf v. Long Island R.R.* reprinted in 2 RECORDS AND BRIEFS OF LANDMARK BENJAMIN CARDOZO OPINIONS, *supra* note 84, at Doc. 19, 5-12.

87. The railroad may have seen that it adds little, if anything, to the analysis to say that the railroad owed Mrs. Palsgraf a duty not to cause a boarding passenger to drop a package on her foot but not a duty to cause the passenger to drop a package that explodes. Duty seems to describe the result rather than lead to it.

88. Points for Appellant from *Palsgraf v. Long Island R.R.*, *supra* note 86, at 6-8 (citations omitted).

His *Kinsman* opinion noted: “Since all the claimants here met the *Palsgraf* requirement . . . we are not obliged to reconsider whether that case furnishes as useful a standard for determining the boundaries [of liability] in admiralty for negligent conduct as was thought . . . when *Palsgraf* was still in its infancy.”<sup>89</sup> Judge Friendly did not explain what he meant by his statement, which certainly suggested a measure of reservation, until four years after *Kinsman* in *Ira S. Bushey & Sons, Inc. v. United States*,<sup>90</sup> his only other opinion that discussed *Palsgraf*. *Bushey* involved an inebriated seaman who opened valves that flooded a drydock, causing serious damage.<sup>91</sup> Judge Friendly concluded: “The risk that seamen going and coming from [their ship] might cause damage to the drydock is enough to make it fair that the enterprise bear the loss.”<sup>92</sup> Significantly, he turned for support not to Judge Cardozo, but to Judge Andrews, the author of the *dissenting* opinion in *Palsgraf*, who seemed to take the more pragmatic approach. Judge Friendly wrote:

It is not a fatal objection that the rule we lay down lacks sharp contours; in the end, as Judge Andrews said in a related context, “it is all a question [of expediency] of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind.”<sup>93</sup>

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89. 338 F.2d at 722.

90. 398 F.2d 167 (2d Cir. 1968).

91. *Id.* at 167.

92. *Id.* at 172. This conclusion contains strains of Professor Goodhart’s letter to Judge Friendly that while a railroad might foresee that the package in *Palsgraf* contained an explosive, “it would be unreasonable to require the railway in every instance to act as if the contents of the package were of this dangerous nature.” See Letter from Arthur L. Goodhart, *supra* note 3. Friendly, like Goodhart, was stepping away from an analysis based solely on foreseeability.

93. *Bushey*, 398 F.2d at 172 (alteration in original) (quoting *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 104 (N.Y. 1928) (Andrews, J., dissenting)). Friendly saw merit in Judge Andrews’ analysis.

Judge Friendly seemed willing to discard Judge Cardozo's concepts of duty and foreseeability in favor of a focus on basic fairness and practicality and the growing concerns of law and economics.

## II.

The second case in which Judge Friendly confronted a precedent written by Judge Cardozo—where the later judge had even more serious reservations—involved the extent to which a steamship company could hold a passenger to notification and filing requirements printed on his ticket that are more demanding than those imposed by the law. *Silvestri v. Italia Societa per Azioni di Navigazione*<sup>94</sup> grew out of an injury to *Ciro Silvestri* while a transatlantic passenger from the United States to Italy aboard the Italian Line's S.S. *Leonardo da Vinci*. The district court granted summary judgment against *Silvestri* because of his failure to begin the action within one year, as required by Article 30 of the Terms and Conditions printed on his ticket.<sup>95</sup> A “box” in the upper right hand corner of *Silvestri's* ticket was in Italian and English and bore the words “PASSAGE CONTRACT.”<sup>96</sup>

Almost all of the captions in the “box” were in capital or bold face letters, the major exception being the following statements, which appeared in the upper left hand corner of the ticket in

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94. 388 F.2d 11 (2d Cir. 1968).

95. *Id.* at 12-13. The first sentence of Article 30 read:

No action or proceeding against the Company for death or injury of any kind to the passenger shall be instituted, unless written notice is given to the Company or its duly authorized Agent within six months from the day when the death or injury occurred and the action or suit arising therefrom is commenced within one year from the date when the death or injury occurred.

*Id.* at 13 n.1.

96. *Id.* at 14.

ordinary lower-case one-eighteenth inch type:

“Il presente biglietto di passaggio è soggetto alle condizioni stampate sulla copertina e sui fogli n° 1 e 2.

Subject to the conditions printed on the cover of this ticket which form part of this contract.”

The inconspicuousness of these statements was increased by the fact that they were squeezed immediately below a caption in bold face and to the left of one in capital letters. The two “leaves” which are an integral part of the coupon retained by the passengers were headed “TERMS AND CONDITIONS” in bold face. Then followed 35 numbered paragraphs in very small print. At the end were spaces for signature by or for the passenger, but neither Silvestri nor any representative signed.<sup>97</sup>

In his lawsuit Silvestri made the following important concessions:

that he had the ticket in his possession for at least three days before boarding the ship in New York and [then while in transit to] Italy, that he had looked at it prior to embarking, that he had consulted a lawyer in Italy, who had [contacted] the Italian Line without obtaining a satisfactory offer of settlement, and that he had given no written notice until the filing of the [suit more

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97. *Id.* Friendly’s opinion pointed out that the English version was different from the Italian because the latter indicated “cover” and “leaves” while the English referred just to “cover.” *Id.* at 17. Friendly mentioned this discrepancy to reject any argument that Silvestri was misled; Silvestri’s deposition showed he understood both Italian and English. *Id.* at 18 n.6. So did Friendly.

than one year after his injury].<sup>98</sup>

The parties' briefs were cursory. The *total* number of pages in the briefs of the parties, including statements of facts and descriptions of the proceeding in the trial court, was eighteen and they demonstrated no particular familiarity with the law and little with the facts. Not only did the parties fail to provide significant assistance to Judge Friendly, other possible sources of aid likewise failed him. While Judge Friendly relied on some treatises, such as Harvard Professor Louis Loss' treatise on federal securities law, he received no help from treatises in *Silvestri*.<sup>99</sup>

At first blush the case seemed straightforward to the Second Circuit panel. After argument, they voted unanimously to affirm summary judgment entered in favor of defendant.<sup>100</sup> When Judge Friendly's opinion surfaced seven weeks after oral argument, however, it was written the other way—a unanimous vote to reverse and remand for a trial. He began his legal discussion with a caustic comment: “Silvestri's alternative arguments for reversal rest on the applicability of two Supreme Court decisions, *The Majestic*, 166 U.S. 375 (1897), and *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959), neither of which has been cited by counsel.”<sup>101</sup> Having chastised Silvestri's lawyer, Judge Friendly got down to work. Silvestri

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98. *Id.* at 12-13.

99. One famous treatise at the time said, “to be valid, a limitation [on a passenger ticket] must be fair and reasonable and not contrary to the dictates of public policy,” followed by a listing of some of the types of limitations. 10 SAMUEL WILLISTON & WALTER H. E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 1098 at 186-87 (3d ed. 1967). Footnotes cited representative cases without indicating their facts or outcome. *Id.* at nn. 7-9 (discussing *Murray v. Cunard S.S. Co.*, 139 N.E. 226 (N.Y. 1923)). Another leading treatise discussed passengers who accepted a transportation ticket without reading it: “He [a passenger] can not hold the insurer or carrier to a promise other than that contained in the document because the latter has made no other promise; and he can not have the contract set aside for mistake, because he has made no mistake.” 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 607 at 661-62 (1960). Corbin, cited, *inter alia*, *Murray*, but provided no discussion of the case. *Id.* at n.17.

100. Friendly Collection (on file with the Harvard Law School Library (Henry J. Friendly Collection, Box 18, Folder 3)).

101. *Silvestri*, 388 F.2d at 13.

could prevail “only if the judge erred in ruling that the conditions were incorporated [into the passenger’s contract], decision of which requires us to go back to *The Majestic*,”<sup>102</sup> a case which he proceeded to discuss in prose rivaling Judge Cardozo’s in elegance.

That case stemmed from a misadventure of the Misses Potter who, with their maid, had sailed from Liverpool to New York in 1892. Despite the improvements in transatlantic navigation since the memorable voyage exactly four centuries earlier, the estimable young ladies found on disembarking that the contents of their trunks had been badly damaged by sea water. When they libeled the *Majestic*, they were met, among other defenses, with a ticket provision limiting liability “for loss of or injury to or delay in delivery of luggage” to 10 pounds. The ticket contained a “box” bearing the names of the passengers, alongside which was an agreement of carriage signed by the Oceanic Steam Navigation Company. Underneath this was a “Notice to Cabin Passengers” with provisions not relevant to the issue save for a reference “See Back”; on the back, under the rubric “Notice to Passengers,” like that on the front in bold face type, was a statement “This contract is made subject to the following conditions,” including, in fine type, the limitation of liability for luggage to which we have referred. The attention of the Misses Potter had not been called to this, nor had either of them read it. In a unanimous opinion . . . the Court allowed [the sisters] to recover . . . [holding] that the limitations “were not included in the contract proper, in terms or by reference.”<sup>103</sup>

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102. *Id.*

103. *Id.* at 13-14 (quoting *The Majestic*, 166 U.S. 375, 385 (1897)). Friendly extravagantly praised Judge Cardozo’s writing style in Friendly,

It was time for Judge Friendly to discuss more recent precedents. He explained that, “[j]udicial efforts to determine what suffices to meet the rule of *The Majestic* have produced distinctions of considerable nicety.”<sup>104</sup> Two lines of authority developed in the Second Circuit.<sup>105</sup> Its early decisions ruled against “incorporation” of the conditions into the agreement between the passenger and the line, which meant the passenger was not bound by them.<sup>106</sup> A later and contrary line of authority was based on Judge Cardozo’s opinion in *Murray v. Cunard S.S. Co.*<sup>107</sup> Judge Cardozo recited:

The plaintiff’s ticket . . . is described in large type as a “cabin passage contract ticket.” It provides, again in large type, that “this contract ticket is issued by the company and accepted by the passenger on the following terms and conditions.” . . . At the top of the ticket is printed a notice: “The attention of passengers is specially directed to the terms and conditions of this contract.”<sup>108</sup>

Despite the fact the passenger had apparently been required to surrender the ticket on board the ship, Judge Cardozo “enforced a 40 day notification requirement.”<sup>109</sup> Reversing the lower courts that had favored the plaintiff, Cardozo explained:

This is not a case of a mere notice on the back of a ticket, separate either in substance or in form from the body of the contract. *The Majestic*, 166 U.S. 375. Here the condition is wrought into the

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*supra* note 4, at 11-13.

104. *Silvestri*, 388 F.2d at 14.

105. *Id.* at 15.

106. *Id.*

107. *Id.*

108. *Id.* (alteration in original) (quoting *Murray v. Cunard S.S. Co.*, 139 N.E. 226, 227 (N.Y. 1923)).

109. *Id.*



tissue, the two inseparably integrated. This ticket, to the most casual observer, is as plainly a contract, burdened with all kinds of conditions, as if it were a bill of lading or a policy of insurance. No one who could read could glance at it without seeing that it undertook . . . to prescribe the particulars which should govern the conduct of the parties until the passengers reached the port of destination. In such circumstances, the act of acceptance gives rise to an implication of assent.<sup>110</sup>

“Despite the eminence of its authorship the *Murray* opinion did not at first have an enthusiastic reception in this court,” Judge Friendly remarked.<sup>111</sup> Several opinions found *Murray* distinguishable and held for the passengers.<sup>112</sup> But as the steamship companies created more forceful notices, the Second Circuit began to enforce the conditions. Discussing the decisions that favored defendants, Judge Friendly made statements like, “Examination of the record in *Baron* shows that both these legends were in solid capitals.”<sup>113</sup> He learned these facts, not from the parties in his case, but by calling for and personally examining the records in other cases.<sup>114</sup> If he could not distinguish cases from what appeared in the published opinions, he was prepared to rely on information that the courts did not include in their opinions.<sup>115</sup> Judge

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110. *Id.* (ellipsis in original) (quoting *Murray*, 139 N.E. at 228 (citation and internal quotation omitted)).

111. *Id.* at 15.

112. For a discussion of the opinions, see *id.*

113. *Id.* at 15-16 & n.4 (citing *Baron v. Compagnie Generale Transatlantique*, 108 F.2d 21 (2d Cir. 1939)).

114. *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 203 (2d Cir. 1967); *United States ex rel. La Near v. La Vallee*, 306 F.2d 417, 421-22 (2d Cir. 1962); Interview with Paul Mogin, former clerk for Judge Friendly, in Wash., D.C. (Nov. 28, 2006).

115. Judge Friendly evidently exhumed the court record in at least two other cases discussed in his opinion. While the nature of Friendly’s research is hardly central to this article, it is worth noting that his creativity and diligence threatened to create problems, namely, that readers of opinions could not be certain that another judge would not rely on matters not

Friendly attributed the shift in outcomes favoring steamship companies, in part, to:

the disparity in the results with respect to steamship lines produced by the doctrine of *The Majestic* as against those attained by other carriers [railroads and Western Union] under the rule that valid limitations in tariffs filed with regulatory agencies of the United States are binding, whether embodied in the transportation documents . . . or not.<sup>116</sup>

It was still necessary to decide Silvestri's claim, and Judge Friendly suggested a highly pragmatic standard that he gleaned from his thorough review of the decisions:

[T]he thread that runs implicitly through the cases sustaining incorporation is that the steamship line had done all it reasonably could to warn the passenger that the terms and conditions were important matters of contract affecting his legal rights . . . .

While we would not insist on any particular rubric, seventy years of experience under *The Majestic* doctrine should have enabled the draftsman of the ticket to produce a warning significantly more eye-catching than this. To be sure, it can be said that all this is legalism, since Silvestri should have known the Italian Line had not gone to the trouble of printing the Terms and

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contained in the opinion and thereby change its meaning. While engaging in a *tour de force*, Friendly was unilaterally changing the rules of the game in a potentially profound and disruptive way. Cf. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 751 (4th ed. 2007) ("Citizens ought to be able to open up the statute books and find out what the law requires of them.").

116. *Silvestri*, 388 F.2d at 16-17 (citations omitted).

Conditions for the fun of it and would not have read them no matter what was said; and we confess some doubt how far the intensity of ticket reading by steamship passengers correlates with the strength of the invitation to indulge in it. All this, however, could have been said with equal accuracy of the Misses Potter, yet *The Majestic* decided what it did.<sup>117</sup>

Judge Friendly did not offer much hope to Mr. Silvestri. After noting that Silvestri consulted a lawyer who should have been aware of the Italian Line's limitations on the time for bringing suit, and, moreover, that his lawyer may have obtained a duplicate of Silvestri's ticket, Judge Friendly abruptly ended the opinion: "If the company can establish that because of the lawyer's advice or otherwise Silvestri knew that the ticket required him to bring suit within a year, we might have a different case. We hold only it was error to grant summary judgment for respondent. Reversed."<sup>118</sup> Silvestri still faced a difficult task, but he had a chance.

Judge Cardozo's biographer, Professor Andrew L. Kaufman of Harvard Law School, recognized that Judge Cardozo was often more charitable and reasonable than he was to Mr. Murray.<sup>119</sup> Nevertheless, *Palsgraf*, along with another case to which Kaufman referred, suggest that Friendly was correct in saying that Judge Cardozo was more interested in general propositions than facts (or people):

For some unspecified reason, Cardozo simply was not moved by his knowledge of common behavior to apply the "method of sociology" in this case. The logic of the rules won out. Rightly or wrongly, and I think wrongly, Cardozo saw this case as he had seen the case of the woman who

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117. *Id.* at 17-18 (emphasis added).

118. *Id.* at 18.

119. KAUFMAN, *supra* note 3, at 356 (discussing *Murray v. Cunard S.S. Co.*, 139 N.E. 226 (N.Y. 1923)).

fell over the mechanic fixing the cash register. People had to take responsibility to look out for themselves sometimes, and Cardozo thought that this was one of these times.<sup>120</sup>

Indeed, Judge Cardozo had a ready reason for deciding the case for Mr. Murray—the company had collected his ticket after he boarded, and one party to a contract ordinarily does not collect the other party’s copy—but he nevertheless held the line for the company.<sup>121</sup>

Judge Friendly was willing to take a step that Judge Cardozo was unwilling to take, namely, to accept the reality that passengers do not read all the terms on a ticket because they do not expect to find anything relevant to the main purpose of buying a ticket. Judge Friendly seems to have been more flexible and understanding than Judge Cardozo. Nearly forty years after *Murray*, perhaps it was time to accept the fact of life that travelers do not read the fine print on contracts and, indeed, are not really expected to. What would happen if renters of cars said, “One second, I want to read the contract”? Judge Friendly was more willing than Judge Cardozo to accept human behavior as a fact of life. Although he did not say so, Friendly may have thought that this was a very good case for a jury of Silvestri’s peers to decide. What may have turned out to be an even more important difference between the two jurists, however, was that Judge Friendly and his wife took frequent cruises, while Judge Cardozo rarely traveled.<sup>122</sup> Summa cum laude at Harvard College and Law School and Judge of the United States Court of Appeals for the Second Circuit, Judge Friendly, and his wife, may not have read their passenger tickets either.

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120. *Id.* at 358. The reference was to *Greene v. Sibley, Lindsay & Curr Co.*, 177 N.E. 416 (N.Y. 1931), where Cardozo had denied relief to a woman who walked before she looked.

121. KAUFMAN, *supra* note 3, at 356.

122. *Id.* at 147-49, 472-73. Professor Kaufman did note that Judge Cardozo had been on an ocean liner, although he did not say how many times. *Id.* at 357-58. The implication was that it was a small number, perhaps only one. *See id.*

Happenstance may change the outcome of a case, and it may have with *Silvestri*. Clerking for Judge Friendly at the time of *Silvestri* was Bruce Ackerman, now a professor at Yale Law School.<sup>123</sup> Hiring brilliant law clerks, Judge Friendly preferred them to be outspoken, and Ackerman took him at his word.<sup>124</sup> As Professor Ackerman has explained, Judge Friendly's initial reaction was to affirm on the ground that the notice provision was in the contract.<sup>125</sup> Ackerman described what happened next: "I handed him the contract and asked him to read it. That was unfair; he couldn't read shit. But he changed his mind."<sup>126</sup> As Ackerman (and others) well knew, Judge Friendly's eyesight was poor and he had difficulty reading even ordinary-sized print.

### III.

While respectful, Judge Friendly was skeptical of Judge Cardozo's approaches in *Palsgraf* and *Murray*, and was inclined to be more generous to the plaintiffs and expand the responsibilities of the defendants. Judge Friendly's opinion implied that *Palsgraf* might be outdated because at least a modicum of law and economics orientation, including looking at who was in a better position to bear, share, or prevent the loss, was appropriate nearly four decades after Judge Cardozo wrote his opinion. In *Silvestri* Judge Friendly veered from formal concepts like "incorporation" and asked the more practical question whether the steamship company did all it reasonably could to bring the notice requirement to the attention of the passengers. He could have asked, but did not, which party was better able to prevent or insure against the loss, although it may have been in the back of his mind, as it was in the earlier *Kinsman*.

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123. Interview with Prof. Bruce Ackerman in New Haven, Conn. (Aug. 6, 2007).

124. *Id.*

125. *Id.*

126. *Id.* Ackerman wrote the initial draft of *Bushey*, see *id.*, an unabashedly law and economics approach. Friendly's published opinion was more traditional.