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I. INTRODUCTION

According to a well-known story, Cardozo's *Palsgraf* opinion[1] was born in his attendance at the discussion of the *Restatement (First) of Torts*.[2] If the formulations now proposed for the *Restatement (Third) of Torts* (proposed "*Restatement*") stand, the *Palsgraf* case—indeed the whole notion of duty as a viable element of negligence analysis—will effectively be dead. The proposed *Restatement* suggests that "duty is a non-issue" confined to unusual cases where "special problems of principle or policy . . . justify the withholding of liability."[3] Duty has then merely a negative significance. It refers not to an element necessary to establish the defendant's liability, but to a reason for exempting the defendant from a liability that would otherwise obtain. This proposal radically transforms the function of duty, which Cardozo's judgement brilliantly articulated. In this sense, the process of restating tort law will turn out to have both created and killed the *Palsgraf* analysis.

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1. Palsgraf v. Long Island R.R., Co., 162 N.E. 99 (N.Y. 1928)

2. William F. Prosser, Palsgraf *Revisited*, 53 MICH. L. REV. 1, 4 (1953).

3. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 6 (Discussion Draft Apr. 5, 1999) [hereinafter Discussion Draft].

The thoughtful paper by Professors Goldberg and Zipursky gives good reason to lament the prospect of *Palsgraf*'s passing.[4] Confronting the confusion in the judicial treatment of duty (the "mess," as they candidly call it), their paper helpfully surveys the cases and classifies the various kinds of considerations that figure in the discussion of duty. In their view, the proposed recasting of duty as an exemption is the legacy of the Legal Realists' skepticism concerning the conceptual structure of tort law. Consequently, they argue, the proposed *Restatement* succeeds neither in accurately restating the law of negligence nor in presenting it as a body of legal principle. They accordingly suggest that the Augean stables should be cleaned up rather than demolished, offering their analysis as an effort toward that end.

Although I admire the general elegance and erudition of Professor Schwartz's proposed *Restatement*, I want in this Essay to reinforce the Goldberg-Zipursky criticisms of its treatment of duty. I start with the general conception of liability that is implicit within tort law as a normative practice. This general conception brings out the notions of fairness and coherence that underlie tort law as a whole. Central to this conception, as I explain in Part II, is the correlativity of the plaintiff's right and the defendant's duty. I then ask in Part III what issues one would expect the law to address if negligence doctrine is to be consistent with that general conception. These issues are, first, the identification of the plaintiff's right and, second, the nexus between that right and the defendant's duty. The modern law of negligence has indeed dealt with these issues under the rubric of duty, thus imbuing duty with the positive significance that the proposed *Restatement* ignores. In this respect, as I contend in Part IV, the proposed *Restatement* is less adequate than its predecessor.

Throughout this Essay, my concern is not with specific duty doctrines but with the conceptual structure of the duty inquiry. A general section on duty in a new *Restatement* ought, at a minimum, to provide lawyers and judges with suitable categories for organizing their thoughts about negligence liability. How particular cases should be decided is another matter. One can, however, be confident that without a conceptual structure that raises the pertinent issues, the treatment of particular cases can hardly be satisfactory.

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4. John C. P. Goldberg & Benjamin C. Zipursky, *The Third Restatement and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 677 (2001).

II. THE CORRELATIVE CONCEPTION OF LIABLITY

The general conception of liability to which I refer is the following:[5] Liability treats the parties as correlatively situated. This correlativity highlights the obvious fact that the liability of the defendant is always a liability to the plaintiff. Liability consists in a legal relationship between two parties, each of whose position is intelligible only in the light of the other's. In holding the defendant liable to the plaintiff, the court is making not two separate judgments (one that awards something to the plaintiff and the other that coincidentally takes the same from the defendant), but a single judgment that embraces both parties in their interrelationship. The defendant cannot be thought of as liable without reference to a plaintiff in whose favor such liability runs. Similarly, the plaintiff's entitlement exists only in and through the defendant's correlative obligation.

The connection between the two parties that liability affirms is the procedural manifestation of the injustice that liability corrects. That injustice, like liability itself, is correlatively structured: In bringing an action against the defendant, the plaintiff is asserting that they are connected as doer and sufferer of the same injustice. As is evidenced by the judgment's simultaneous correction of both sides of the injustice, the injustice done by the defendant and the injustice suffered by the plaintiff are not independent items. Rather, they are the active and passive poles of the same injustice, so that what the defendant has done is the basis of liability only because of what the plaintiff has suffered, and vice versa. Each party's position is normatively significant only through the position of the other, which is the mirror image of it.

This correlativity figures in the way that tort doctrine constructs the tort relationship. Because liability treats the parties as doer and sufferer of the same injustice, tort law elaborates legal categories that reflect the identical nature of the injustice on both sides. Since the defendant, if liable, has committed the same injustice that the plaintiff has suffered, the reason the plaintiff wins ought to be the same as the reason the defendant loses. Therefore, in specifying the nature of the injustice, the only normative considerations that are significant are those that apply correlatively to both parties. Normative considerations that reflect the correlative situation of the two parties set terms for their interaction that take

5. *See generally* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995).

account of their mutual relationship and therefore are fair to both of them. Such considerations also reflect the mutual dependence of plaintiff and defendant for purposes of liability, thus allowing tort law to function as a coherent enterprise in justification rather than as a hodgepodge of factors separately relevant only to one or the other of the parties.[6]

For tort law (as well as for the law of obligations more generally), the overarching justificatory categories expressive of correlativity are those of the plaintiff's right and the defendant's corresponding duty not to interfere with that right. The injustice of tortious conduct consists in the defendant's doing something that is incompatible with a right of the plaintiff. Right and duty are correlated when the plaintiff's right is the basis of the defendant's duty and, conversely, when the scope of the duty includes the kind of right-infringement that the plaintiff suffered. Under those circumstances, the reasons that justify the protection of the plaintiff's right are the same as the reasons that justify the existence of the defendant's duty.

III. CORRELATIVITY AND DUTY

When negligence law is conceived in terms of the correlativity of right and duty, one would expect it to attend to the following two issues. First, what is the content of the plaintiff's right, i.e., what interests of the plaintiff are legally protected against the defendant's conduct? Second, how does negligence law embody the correlativity of the defendant's duty to that right? The concept of duty in negligence law provides the rubric under which these two issues can be considered.

The first of these issues reflects the need to determine whether the plaintiff's loss constitutes an infringement of something to which the plaintiff has a right. Being harmed at the defendant's hand is merely a fact about the plaintiff's history that in itself has no correlative normative significance; only when the harm signifies the defendant's violation of the plaintiff's right do the parties occupy correlative normative positions. Conversely, if the loss of which the plaintiff is complaining is not the subject matter of a

6. For an account of the role of correlativity in contemporary tort theory, see Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES LAW 249 (2000).

right, then the defendant has no duty with respect to it. In the old language of the law, the case is then one of *damnum sine iniuria.*

The supposed absence of a right accounts for some of the situations where the common law does not recognize (or has been reluctant to recognize) the existence of a duty. In circumstances of non-feasance, for example, the entitlement claimed is not merely to one's own physical integrity—which *ex hypothesi* the defendant has not endangered—but to the defendant's positive assistance. Under the common law, however, one has no general right to be benefited by another. Similarly, cases of economic loss are problematic where the harm flows not from the violation of the plaintiff's proprietary right but from the defendant's interference with a resource or facility belonging to a third party.[7] The perceived absence of a right in the plaintiff may also explain, at least in part, the law's slowness to recognize negligence liability for emotional distress and for prenatal injury. In the former case, freedom from emotional trauma was perhaps regarded as too speculative or insubstantial to count as a right. Similarly, in the latter case the common law position that legal personality begins at birth allowed prenatal injuries not to be viewed as violations of the child's rights. Of course, whether the law has correctly dealt with these various claims is a matter for legal argument, informed by evolving notions about the significance of particular interests and about the adequacy of the evidence needed to support a claim. The point here is merely that the law's treatment of duty in these contexts can be understood as attempts to determine whether what the plaintiff has suffered at the defendant's hand is the infringement of a right.

The second issue is that, given the existence of a right in the plaintiff, the defendant's duty has to be correlative to it. This means that the content of the plaintiff's right has to be the object of the defendant's duty. In order to be liable, the defendant must have been negligent with respect to the plaintiff's right. Otherwise, the parties are not the doer and sufferer of the same injustice, and the reason for the plaintiff's winning would not be the same as the reason for the defendant's losing.

Cardozo's treatment of duty in the *Palsgraf* case gives paradigmatic legal expression to the notion that the defendant's duty is to be construed as correlative to the plaintiff's right. Because in that case the defendant's conduct was not wrongful toward the plaintiff (although it was arguably wrongful toward someone else),

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7. Peter Benson, *The Basis for Excluding Liability for Economic Loss in Tort, in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 427 (David Owen ed., 1995).

the defendant was held not to be under a duty with respect to the plaintiff's loss. Only if the wrongfulness of the defendant's risk-creation was relative to the plaintiff's right could the parties be regarded as doer and sufferer of the same injustice. Cardozo's achievement was to align the relational significance of risk, as a foreseeable effect on another, with the relational nature of tortious wrongdoing as the violation of the plaintiff's right. Consequently, the plaintiff had to be within the class of persons whose rights were foreseeably affected by the defendant's unreasonable creation of risk.

Although he focused on this second issue, Cardozo alluded to the first one as well. "Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right."[8] Because "the commission of a wrong imports the violation of a right,"[9] the plaintiff is precluded from recovering unless the defendant's conduct is a wrong in relation to that right. Hence, "[w]hat the plaintiff must show is 'a wrong' to herself, i.e., a violation of her own right."[10] That the plaintiff had a right to her bodily security was not disputed in the case, but the defendant's action was not wrongful relative to that right. Thus Cardozo affirmed that the existence of a right in the plaintiff is presupposed in the requirement that the duty breached by the defendant be a wrong toward her.

Cardozo's opinion thus presents the two interrelated functions of the inquiry into the defendant's duty. The first issue is whether the plaintiff's damaged interest has the status of a right, because it is only to a right that the defendant's duty can be correlative. The second issue is whether that correlativity obtains in the case at hand, i.e., whether the defendant breached a duty correlative to that right by creating an unreasonable risk to persons such as the plaintiff. When these two issues are brought together, the question of duty produces a structure of inquiry geared to ascertaining whether the parties can plausibly be regarded as the doer and sufferer of the same injustice.

8. Palsgraf v. Long Island R.R., Co., 162 N.E. 99, 99 (N.Y. 1928).
9. *Id.* at 101.
10. *Id.* at 100.

IV. DUTY IN THE *THIRD RESTATEMENT*

The proposed *Restatement* submerges these issues (and others)[11] under a general section declaring that, in unusual cases where special problems of principle or policy justify it, a court may determine that the defendant owes no duty to the plaintiff. In its comment to this section, the proposed *Restatement* notes that courts often refer to duty as a prerequisite of liability. However, because the duty is couched in terms of reasonable care or compliance with the legal standard of reasonable conduct, "[t]hese formulations merely give expression to the point that negligence is the standard of liability."[12] The proposed *Restatement* contends that drawing attention to this obvious point is redundant. Therefore, it concludes, duty is usually a non-issue that surfaces only in the unusual cases where the special problems justify denying its existence.

My comments in the previous Section indicate that more is at stake in the duty inquiry than a redundant reference to the standard of care. The duty inquiry has a definite structure that reflects the normative connection between what the defendant has done and what the plaintiff has suffered. This structure takes a recognizable legal form through the requirement that a court determine, first, whether the plaintiff's loss is in principle worthy of legal protection as a right, and second, whether the plaintiff is within the unreasonable risk created by the defendant's conduct. If the function of a *Restatement* of the general principles of negligence law is to orient lawyers and judges to the issues that they ought to consider, the proposed *Restatement*'s section on duty is a lost opportunity.[13]

This criticism of the proposed *Restatement* can be confirmed by the case that the *Restatement* itself singles out as resembling its

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11. Goldberg and Zipursky usefully outline four senses of duty that can be discerned in the cases: (i) whether the defendant was under an obligation to act with vigilance of the plaintiff's interests, (ii) whether there is an appropriate nexus between the defendant's breach and the duty owed to the plaintiff, (iii) whether the defendant's act was a breach as a matter of law and therefore is not to be left to the jury, and (iv) whether a policy based exemption is applicable. Goldberg & Zipursky, *supra* note 4, at Part V. My comments here cover roughly the same ground as the first two of these senses.

12. Discussion Draft, *supra* note 3, § 6 cmt. a.

13. The duty section of the proposed *Restatement* may ultimately prove to be self-defeating. One can judge the unusual only by reference to the usual. In order to coherently elaborate "the special problems of principle or policy that justify the withholding of liability," one needs a clear sense of the principles or policies that are constitutive of liability. Only then can one work out their justifiable limits. By omitting mention of the issues that are essential to the duty inquiry and of the principles that they represent, the proposed *Restatement* directs its users to potentially unstable exceptions.

position. In *Fazzolari v. Portland School District No. 1J*,[14] the Supreme Court of Oregon, after an illuminating survey of the academic literature on duty, concluded that, if one leaves aside situations where the plaintiff is pointing to an obligation arising from the defendant's particular status or relationship, duty figures only negatively to limit the reach of the common law's generalized standards. "Duty remains a formal element in the plaintiff's claim only in the sense that the plaintiff loses if the defendant persuades a court to phrase such a limit in terms of 'no-duty.' "[15] The closeness of this formulation to the proposed Restatement's is evident.

The question then arises, however, of how to characterize the generalized standards to which the Oregon Supreme Court refers. The Court's language is instructive:

> In short, unless the parties invoke a status, a relationship, or a particular standard of conduct that creates, defines, or limits the defendant's duty, the issue of liability for harm actually resulting from the defendant's conduct properly depends on whether that conduct unreasonably created *a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff.*[16]

Although eschewing the language of duty, the Court in the italicized words has nonetheless included reference to the sorts of issues germane to the correlative conception of duty. To be sure, the significance of this reference is equivocal. On the one hand, the Court acknowledges that, to be successful, the plaintiff requires both a protected interest and harm within the scope of the unreasonable risk to that interest. On the other hand, however, the Court's treatment of duty means that the location of these issues remains unmarked within the conceptual structure of negligence law. Why, one might wonder, does the Court empty duty of its usual content if it nonetheless views that content as a condition of liability? Be that as it may, the proposed *Restatement* that draws on this case is more radical: It makes no reference to these issues anywhere, leaving the mistaken impression that they do not exist.[17]

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14. Fazzolari v. Portland Sch. Dist., 734 P.2d 1326 (Or. 1987) (en banc) (Linde, J.).

15. *Id.* at 1331.

16. *Id.* at 1336 (emphasis added).

17. This may be the result of two suspect organizational considerations. First, the proposed *Restatement* takes physical injury as the core of negligence (apparently because of the preponderant number of such cases), with the general principles being concerned with the core so understood. The fact that the proposed *Restatement* is dealing with physical injury then serves to mask the significance of the omission of reference to protected interests, since bodily integrity is usually a protected interest. *See* Discussion Draft, *supra* note 3, § 6 Reporter's Note. However, principles are general not because they deal with a significant number of cases but because they elucidate the conceptual structure of the phenomenon as a whole. Moreover, even in connection with physical injury, the question of whether the plaintiff's interest is protected against the

In this respect the proposed *Restatement* is less felicitous than its predecessor. The *Restatement (Second) of Torts*, Section 281 begins its statement of the elements of a negligence action as follows:

> The actor is liable for an invasion of an interest of another, if:
>
> (a) the interest is protected against unintentional invasion, and
>
> (b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included . . .

The two conditions listed are exactly those required by the correlative conception of liability. The *Restatement (Second)* does not, of course, incorporate them into a general conception of negligence, as I did above. Moreover, the *Restatement (Second)* proceeds to flesh out this reference to protected interests by a more particular treatment. But the important point is that the *Restatement (Second)*, unlike the proposed *Restatement*, recognizes the necessity for considering these issues, and consequently includes them in its presentation of the structure of negligence liability.

The professed aim of the proposed *Restatement* is to clarify the meaning of the basic concepts of tort law.[18] Unfortunately, the section on duty does not succeed in this aim. The section reduces duty to a non-issue that lies dormant except when jolted into life by special problems that justify the withholding of liability. By thus draining duty of positive significance, the proposed *Restatement*

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defendant's conduct may nonetheless arise; otherwise, the proposed *Restatement*'s negative formulation would itself be otiose. (For an interesting recent Canadian example, see *Dobson v. Dobson* (1999), 174 Dom. L. Rep. (4th) 1 (S.C.C.), dealing with the liability of a mother for negligently causing damage to her own child while in the womb.) Furthermore, a possible consequence of hiving off physical injury is that there may be a different principle of duty when one comes to other kinds of harms, like economic loss, even though the conception of duty in modern negligence law is supposed to be general. As Lord Atkin put it in his classic judgment in *Donoghue v. Stevenson*, (1932) App. Cas. 562, at 580: "[T]here must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances."

Second, the proposed Restatement has not yet dealt with proximate cause. The issue of the correlativity of the defendant's wrongful behavior to the plaintiff's right can be dealt with as a matter of proximate cause as well as of duty. For the conceptual relationship between the two, see WEINRIB, *supra* note 5, at 158. As Leon Green observed in his article *Duty, Risks, Causation Doctrines*, 41 TEX. L. REV. 42 (1962), they are "spongy terms, each capable of absorbing the meaning of the other . . . ." Indeed, the Oregon Supreme Court's formulation in terms of kind of harm sounds like proximate cause rather than duty. But the court's opinion was as inhospitable to what proximate cause as to duty, *Fazzolari*, 734 P.2d at 1330, so that, if this judgment is the inspiration of the proposed *Restatement*'s approach, there is no reason to suppose that correlativity will be handled by proximate cause either.

18. Discussion Draft, *supra* note 3, foreword.

effaces duty's role—certified and confirmed by *Palsgraf*—to be a marker of the correlativity that obtains between the plaintiff's right and the defendant's wrong. This role in turn is crucial to the capacity of negligence law to be fair to both parties within a framework of coherent justification. In modern negligence law, the duty inquiry has a structure that can be stated positively, consisting in the elucidation of the plaintiff's right and of the nexus between that right and the defendant's conduct. If there is to be a new *Restatement (Third) of Torts: General Principles*, a recapitulation of that structure should be included. The new *Restatement* will then be truer to the cases, more useful to those who consult it, more explicit about the function of the duty inquiry, and more consonant with the correlative nature of tort liability.