THE IDENTITY CRITERION: RESUSCITATING A CARDOZIAN, RELATIONAL APPROACH TO DUTY OF CARE IN NEGLIGENCE

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I. INTRODUCTION

A. The Legacy of Palsgraf

Everyone agrees that the canonical case in American negligence law is *Palsgraf v. Long Island Railroad Co.*[1] In his famous majority opinion in the New York Court of Appeals, Chief Judge Benjamin Cardozo held that the outcome of the case turned on whether the plaintiff, Mrs. Palsgraf, had been owed a duty of care by the Long Island Railroad.[2] He declared that the answer to this question depended on whether the parties had a relevant relationship at the time of the conduct under consideration.[3] "Negligence, like risk," he said, is "a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all."[4]

Over ninety years have passed since then. One thing that everyone agrees upon (including Judge Charles Andrews, who wrote the almost equally famous dissent in *Palsgraf*) is that not everyone who sustains an injury as the result of someone else's negligence is entitled to compensation in a court of law.[5] In Andrews's words, "because of convenience, of public policy, of a rough sense of justice, the law

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1. *See* 162 N.E. 99, 101 (N.Y. 1928).
2. *Id.* at 99-100.
3. *Id.*
4. *Id.* at 101.
5. *See id.* at 102-04 (Andrews, J., dissenting).

arbitrarily declines to trace a series of events beyond a certain point."[6] Yet, torts lawyers continue to search in vain for a full articulation of a relational approach to duty of care that tells us where that point is.

Corrective justice and civil recourse theorists have claimed to offer a relational approach, but their focus has been on explaining *how* and *why*—rather than *whether*—the plaintiff can seek a remedy.[7] They have tended to take it for granted that the relevant relationship is between the immediate victim and the direct tortfeasor; and so, have failed to provide meaningful guidance about just who qualifies as either plaintiff or defendant.[8] Indeed, they seem incapable of dealing with situations where there are many victims with different types of injury (whether physical, economic, or emotional). Nor can they explain why (as in *Palsgraf* itself) a plaintiff may often sue not just the direct tortfeasor, but also a secondary party whom the law considers to be vicariously liable.[9]

These glaring shortcomings have led other scholars to either (a) confuse the issue and treat Cardozo's opinion as one that (despite his express statement to the contrary)[10] was really about proximate cause; or (b) reject a relational approach altogether. And, irrespective of whether they claim to favor or reject a relational approach, many scholars—but not, interestingly enough, the New York Court of Appeals itself[11]—have further muddied the waters by insisting that, in the end, the test of whether or not a duty of care exists is a matter of foreseeability.[12]

B. Why Does This Matter?

There is always a tendency for those who do not engage in legal theory to ask why such things should matter. The answer in this instance is as follows. While all areas of the law have their controversial features and issues, these tend—at least, in long-standing areas of the law like contracts and property—to occur at the margins of the field. In negligence law, however, the very core is controversial. The question of whether a duty is owed—and, if so, to whom—often remains very much open to debate. In other words, unlike in contracts and property—and despite Cardozo's efforts in *Palsgraf*—negligence law seems to have no clear foundational concept. As a result, the law is quite simply a mess.

6. *Id.* at 103.

7. *See, e.g.*, ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 187 (1995).

8. *See id.* at 186-87.

9. *See infra* Part IV.C.

10. *Palsgraf*, 162 N.E. at 101 ("The law of causation, remote or proximate, is thus foreign to the case before us.").

11. Pulka v. Edelman, 358 N.E.2d 1019, 1022 (N.Y. 1976) ("Foreseeability should not be confused with duty.").

12. *See infra* Part IV.B.

As Dean Leon Green—one of the doyens of twentieth-century American tort law—once said, "the lack of adequate legal theory [has] doubtless blurred the problems presented for judgment."[13] And that was back in 1934!

This mess is exemplified by the treatment of duty in the most recent Restatement on the law of torts.[14] Section 7(a), for example, completely rejects Cardozo's approach and instead adopts Judge Andrews's minority opinion that presupposes that everyone owes a duty of care to others,[15] except when Section 7(b) says that they do not—a qualification that is nowhere to be found in Judge Andrews's opinion.[16] As if this were not vague enough, the exception is said to exist "when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases."[17] Yet the Restatement finds itself completely unable to say, as a general matter, what such countervailing principles or policies might be. This is, to say the least, a bizarre way to treat such a foundational doctrine as duty of care.

But even that is not all. Recognizing that the law has never imposed a general duty on everyone to take action to ameliorate risks initiated by someone (or something) else, Section 37 of the Restatement then takes a position that is the very mirror-image of the approach in Section 7. This time we are told that no one owes a duty in such circumstances "unless a court determines that one of the affirmative duties provided" in the following seven sections applies.[18] Again, the Restatement provides no overarching concept to link these seven exceptions together—albeit that two are said to depend on the existence of some kind of relationship[19]—so it seems that this is all completely *ad hoc*. Little wonder, then, that Professor Jonathan Cardi has commented: "Perhaps the most persistent impression left after having reviewed hundreds of duty cases is just how frustratingly inconsistent, unfocused, and often nonsensical is the present

13. Leon Green, *Relational Interests*, 29 ILL. L. REV. 460, 473 (1934).

14. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 (2010).

15. *See Palsgraf*, 162 N.E. at 102 ("Due care is a duty imposed on each one of us to protect society from unnecessary danger."); *see also id.* at 103 ("Everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.").

16. RESTATEMENT OF TORTS (THIRD): LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 (2010) ("Duty (a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm. (b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.").

17. *Id.* § 7(b).

18. *Id.* § 37.

19. *Id.* §§ 40, 4.

state of duty law."[20] What is urgently required is a theory that can provide a universal criterion against which courts may judge whether a duty of care exists. Without it we are left with judges having to engage in embarrassing verbal contortions as they attempt to do their best with a list of phrases with little substantive meaning. A clearly articulated and understood criterion that is capable of being applied to real-life cases would bring much-needed clarity and predictability to the law and save it from falling entirely into disrepute. It would also avoid a lot of entirely unnecessary litigation, which wastes the courts' time and the parties' money. And instead of claims of "overreach," "unwarranted expansion," or "formalistic refusal to recognize a duty" being little more than empty slogans, we would have a means of identifying whether such claims are well-founded or entirely spurious.

C. Roadmap

This Article seeks to provide such a criterion, so that it should no longer be possible to say that "the judges have sought in vain for some substantial legal theory."[21] It proceeds as follows. Part II focuses on fundamentals and analyzes the very role of the doctrine of duty of care.[22] In other words, it considers why the doctrine exists at all. This is a question that seems too often to have been lost in the shuffle. Yet, without the appropriate context, it is all too easy to misunderstand the doctrine and, in turn, to fail to appreciate Cardozo's arguments about how the doctrine should be applied.

Part III then moves on to what Cardozo said in *Palsgraf*.[23] It shows how his arguments were consistent not just with the role that the doctrine is intended to play, but also with opinions he issued on the doctrine in other cases across a fifteen-year period between 1916 and 1931.[24] Paying much closer attention to Cardozo's own words has, unfortunately, been all too common. This Part explains not only that he considered relationality to be the key to the doctrine of duty of care, but also that he considered the victim's identity to be the key to relationality.[25]

Part IV considers three common misinterpretations of Cardozo's *Palsgraf* opinion and shows how each of these approaches fails to do his

20. W. Jonathan Cardi, *The Hidden Legacy of Palsgraf: Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873, 1875 (2011).

21. Green, *supra* note 13, at 490.

22. *See infra* Part II.

23. *See infra* Part III.

24. *See infra* Part III.

25. *See infra* Part III.

words justice.[26] It thus rejects the notion that Cardozo was dealing not with duty, but with proximate cause. It also rejects the rather fanciful notion that relationality implies a test of foreseeability. The existence (or otherwise) of a relationship is not a matter of foreseeability at all. In fact, the most that can be said of foreseeability in this context is that it provides an underlying moral justification for the use of relationality to determine duty. But it is certainly not a method of determining relationality.

Part IV also considers the two schools of thought with which a relational approach to duty has hitherto been most closely associated and finds that they are not truly relational at all.[27] Instead of being interested in "three-party situations,"[28] both corrective justice theory and civil recourse theory have focused exclusively on the bipolar relationship between "sufferer and doer"[29]: victim and direct tortfeasor. This contrasts sharply with relational theory in the world of contracts, whose whole point has been to direct attention to the complex set of relations in which "*every transaction is embedded*."[30] As a result, these self-proclaimed relational theories of torts are unable to account for the fundamental doctrine of tort law known as vicarious liability; and they also have nothing to say about how to identify whom the law should actually recognize as a victim.

Part V then goes on to explain how a Cardozo-inspired, identity-based relational theory of duty of care in negligence revolves around proof of a relevant relationship.[31] In this context, a relationship is relevant if it involves the type of interest that was ultimately harmed.[32] Such interests may relate to personal safety, the integrity of property, financial prosperity, or emotional equilibrium. A relationship is not relevant if it relates to an interest different from that ultimately harmed.[33] Thus a relationship concerned with financial matters cannot, for

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26. *See infra* Part IV.

27. *See infra* Part IV.C.

28. LEON GREEN ET AL., CASES ON INJURIES TO RELATIONS 3 (1940).

29. WEINRIB, *supra* note 7, at 186.

30. Ian R. Macneil, *Reflections on Relational Contract Theory After a Neo-Classical Seminar*, *in* IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL AND NETWORK CONTRACTS 207-08 (David Campbell et al. eds., 2003) (emphasis in original).

31. *See infra* Part V.

32. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99 (N.Y. 1928) ("Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right.").

33. "In this case . . . the interests said to have been invaded, are not even of the same order. The man was not injured in his person nor even put in danger. . . . If there was a wrong to him at all, which may very well be doubted, it was a wrong to a property interest only, the safety of his package."

Id. at 100.

example, sustain a duty of care in respect of psychological injury, but it will sustain a duty in respect of financial loss.

For primary victims—those who suffer injury not predicated on an injury to someone else—such a relationship may be found between the plaintiff and the defendant, or between the defendant and a third party, or between the plaintiff and an organization that owes a duty to the general public. But establishing such a relevant relationship is still not quite enough. In addition, the relationship must be both (a) qualitatively different from any relationship that the defendant might have with the public at large; and (b) formed in circumstances that enable the defendant to know the victim's identity.

Capacity to know the victim's identity may be established in one of two ways. In cases of physical harm, identity may be established if either (a) the victim (or the victim's property) was present at the scene at the time of the tort; or (b) the defendant was in a position to know the victim's name at the time of the tort.[34] In cases of economic loss or emotional distress, however, identity may be established only if the defendant was in a position to know the victim's name at the time of the tort.[35] But while the defendant must have been able to identify the plaintiff at the time of the tort, the converse need not be true. The plaintiff does not need to have been able to identify the defendant.

Where either the plaintiff or defendant is at one remove from the immediate nexus between primary victim and direct tortfeasor, additional relationships are required. For vicarious liability, this requires the addition of a relevant relationship between the direct tortfeasor and vicarious defendant.[36] Secondary *victims*, on the other hand, need to establish a relevant relationship between themselves and the primary victim.[37]

As Part V will demonstrate, this identity-based, relational approach makes the outcome of litigation significantly easier to predict.[38] For it can explain the outcomes of many past cases in much simpler and more easily understood terms than the judges themselves could provide at the time without the benefit of the theory to hand. This does not mean that I am alleging some sort of judicial conspiracy to hide the truth. On the contrary, my argument is essentially that many judges have already subconsciously come to adopt the rationale of identity-based relational theory. While their attempts to articulate the reasons for their decisions

34. *See, e.g.*, Macpherson v. Buick Motor Co., 111 N.E. 1050, 1052-53 (N.Y. 1916).
35. *See, e.g.*, Glanzer v. Shepard, 135 N.E. 275, 275 (N.Y. 1922).
36. *See, e.g.*, Ochoa v. Superior Court, 703 P.2d 1, 5 (Cal. 1985).
37. *See infra* note 469 and accompanying text.
38. *See infra* Part V.

have often been somewhat confused and confusing, the outcomes themselves—at least at the highest appellate level—have often been quite consistent.[39] Adopting identity-based relational theory as the means of resolving questions of duty in negligence will make those outcomes predictable in advance, and so render much current litigation unnecessary and infeasible, because both the parties and trial judge will be in a position to know the answer to the duty question at a very early stage.

Part VI concludes the Article by considering some of the emerging or more controversial areas of the law of negligence today and shows how an identity-based relational approach can tackle those issues predictably and with relative ease.[40]

II. ROLE OF DUTY OF CARE

A. Risk-Taking

At its most fundamental level, a capitalist society is one based on private ownership of the means of production, operated by entrepreneurs—a category that ranges from one-person operations and mom-and-pop businesses all the way up to multinational corporations—in pursuit of profit.[41] Profit is, of course, the reward for the successful taking of risks, while those who take bad risks are sanctioned with losses.[42] Such outcomes should not be based on pure luck; capitalism requires that entrepreneurs deserve what they receive. This, in turn, means that there has to be some way for them to make a meaningful assessment of each risk in advance.

Without the ability to calculate a risk, there is no way to know whether that risk is worth taking. And, without that ability, it will be impossible to distinguish good decisions (worthy of the reward of profits) from bad decisions (worthy of sanction through losses).

Capitalism does not, therefore, promote the taking of any and all risks; instead, it seeks to encourage worthwhile risks. But the only way to assess a risk is to compare the potential benefits with the potential

39. *See infra* Part V.C.

40. *See infra* Part VI.

41. *See Capitalism*, CAMBRIDGE ENG. DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/capitalism (last visited Aug. 1, 2021) ("[A]n economic, political, and social system in which property, business, and industry are privately owned, directed toward making the greatest possible profits for successful organizations and people[.]").

42. *See* Tim Kaye, *Law and Risk: An Introduction*, *in* RISK AND THE LAW 10 (Gordon R. Woodman & Diethelm Klippel eds., 2008).

hazards. If the potential hazards are indeterminate, then there is no way to judge whether a risk is worth taking; if the risk is infinite, then no benefit on earth can make it worth taking.

One relevant risk is, of course, legal risk.[43] More specifically, it is the risk of being held liable to pay for harm caused by one's actions.[44] The common law developed two new fields to address this issue. One was the law of contracts;[45] the other was the law of torts.[46] While both had existed before the development of capitalism, they were both significantly re-organized and re-conceived in order to meet the demands of the new economic order.[47] Both deal with the question of risk by breaking it down into the following three questions:

> 1. Is there a legal risk at all (does the law recognize the circumstances as a basis for potential legal liability)?
> 2. If there is such a risk, how much harm could the risk cost if it occurs?
> 3. How many potential victims might there be (because this number will act as a multiplier to the answer to question 2)?

While it is not typically possible to answer these questions with 100% certainty—after all, risks involve predicting the future, which is rarely entirely certain—it is undoubtedly possible in many cases for them to be answered with a high degree of confidence.[48] It should be noted, however, that each of these questions raises an issue of a significantly different order.

The first two questions address kinds of risk that are easy to classify. Whether a legal risk exists at all must, by definition, be a matter of law that demands an answer of either yes or no. If the answer to this first question is "no," there is no need to proceed to the other two questions because they cannot come into play; the activity involves no issues of interest to the laws of contracts and torts.

The question of the amount of harm that might be caused to each victim, by contrast, involves a highly fact-intensive investigation of the

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43. *See id.* at 4-5.

44. *See id.*

45. *See id.* at 4.

46. *See id.*

47. On the transformation of the law of contracts, see Joseph M. Perillo, *Robert J. Pothier's Influence on the Common Law of Contract*, 11 TEX. WESLEYAN L. REV. 267, 267 (2005). On the transformation of the law of torts, see Oliver Wendell Holmes, *The Theory of Torts*, 7 AM. L. REV. 652, 652-54 (1873).

48. *See, e.g.*, MAX WEBER, GENERAL ECONOMIC HISTORY 227-28 (Frank H. Knight trans., 1927) (1950).

context and circumstances, with a resultant answer that can then be expressed in financial terms.[49]

But the third question—which asks how many victims there might be—is neither self-evidently legal nor obviously factual. The law clearly cannot predict the number of victims; but neither can fact-intensive investigation. Instead, the number of victims is likely, in the end, to be the product of a simple matter of (bad) luck.

Yet, we have already noted that unpredictable risks are precisely what capitalism seeks to avoid. And this particular form of unpredictability is exacerbated by that fact that the answer to this question is, arguably, the most important of all. This is because it acts as a multiplier: the dollar amount calculated as the likely cost of harm must necessarily be multiplied by the number of victims in order to produce a meaningful assessment of the total risk involved.[50]

Even small differences in the answer to the question about the number of victims can produce qualitatively different totals. Even if the hazards can be accurately assessed per person, the total risk to be taken still has to be multiplied by the number of potential victims. Yet, if the class of potential plaintiffs is indeterminate in number, there is no way to gauge the potential risk in advance, so the more indeterminate that number becomes, the more difficult it then becomes to make a meaningful risk assessment. Businesses and entrepreneurs will have no idea what risk they are taking on, and potential liability insurers will have no idea what level of premiums to charge. Which means that many worthwhile risks will simply never be taken.

The only way to transform such unpredictability into something "calculable"[51] is to ensure that the determination of the number of victims is as much a matter of law as the question of whether there is any risk at all. This means not only that it must then be decided by a judge rather than by a jury, but also that it will always be subject to appeal and the doctrine of precedent.[52] In other words, this approach enables appellate courts to lay down clear, systemic guidance to trial judges about how to recognize who qualifies as a legally recognizable victim.[53]

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49. *See* Luke Meier, *Using Tort Law to Understand the Causation Prong of Standing*, 80 FORDHAM L. REV. 1241, 1269 (2011).

50. Paras Sharma, *Economic Analysis of Tort Liability*, INT'L J. LAW, 2020, at 1, 3-4.

51. WEBER, *supra* note 48, at 228.

52. *See* Sandra A. Hoffmann & Michael Hanemann, *Torts and the Protection of "Legally Recognized" Interests*, RES. FOR FUTURE, Aug. 2005, at 2.

53. *See id.*

B. Privity in Contracts

The law of contracts was the first branch of civil law to wrestle with this problem.[54] It deals with the issue through the doctrines of offer and acceptance, which together establish privity of contract.[55] Only those who make or accept an offer can be said to be privy to the contract; and only those who enjoy such privity can acquire the rights and obligations that the contract creates: "[T]he law . . . creates the duty, establishes the privity, and implies the promise and obligation."[56]

It should be noted, however, that privity of contract does absolutely nothing to address question (2) above. Only by looking at the consideration and terms of the contract is it possible to estimate the harm likely to be done if a specific party fails to adhere to the terms of the contract.

What privity does achieve is play a significant role in determining the answers to both questions (1) and (3). Together with the doctrine of consideration (or, in some cases, that of promissory estoppel),[57] it determines whether any contractual relationship has been created at all. By itself, it also determines who is a party to the contract (and is therefore capable of being a legally recognized victim of its breach).[58] It is, in essence, a doctrine of standing.

The doctrine of privity thus enables every party to a contract to know the identity of the other parties.[59] Which means, in turn, that the total number of parties with rights under the contract must also be known. While these specifications for the creation of a contractual relationship have been somewhat relaxed by the idea that third-party beneficiaries may also acquire contractual rights,[60] the courts have still required that any such beneficiary must be clearly identified.[61] Even with a more relaxed approach to the formation of a contract, therefore, it remains the case that the parties to a contract always know both the

54. Vernon V. Palmer, *The History of Privity—The Formative Period (1500-1680)*, 33 AM. J. LEGAL HIST. 3, 6 (1989).

55. Joseph M. Perillo, *Robert J. Pothier's Influence on the Common Law of Contract*, 11 TEX. WESLEYAN L. REV. 267, 277 (2005).

56. Brewer v. Dyer, 61 Mass. 337, 340 (1851).

57. *See, e.g.*, Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 346 (1969).

58. *See Privity of Contract*, WESTLAW PRACTICAL LAW GLOSSARY (last accessed June 13, 2021).

59. *Id.*

60. Lawrence v. Fox, 20 N.Y. 268, 271-72 (1859).

61. Ultramares Corp. v. Touche, 174 N.E. 441, 445 (N.Y. 1931) ("[T]oday the beneficiary of a promise, clearly designated as such, is seldom left without a remedy.").

identity of those with rights over them and the total number of such parties.[62]

C. Duty of Care in Negligence

In order to address the same questions, every tort also needs a doctrine to enable it to identify not only whether anything of legal significance has occurred, but also, if so, how many potential victims might be entitled to seek compensation. The doctrine of duty of care fulfills that role for the law of negligence.[63] It is thus also a doctrine of standing.[64]

Like privity in contracts, duty does not specify the substantive content of any obligation and so does not address question (2) above. That role is actually performed by the doctrine of *standard* of care, which can come into play only once it has first been determined that the defendant in question did in fact owe a duty to the victim.[65] Duty of care is precisely the doctrine to make that prior determination. In other words, the role of duty of care in negligence is—again like privity in contracts—to ascertain the answers to questions (1) and (3). It thus determines whether any duties are owed at all and, if so, it identifies to whom they are owed.[66] Just as only those who are in privity can seek remedies when those terms are breached, only those owed a duty of care can seek a remedy in negligence.[67]

More than any other element of the tort, it is duty which can provide the basis for dismissal of a case, or summary judgment, or a directed verdict, without the unpredictability of having to consider the substantive merits.[68] Duty, in other words, is the foundation on top of which the whole edifice of the law of negligence is built. It is fundamental to providing the predictability essential for meaningful assessment of legal risk.[69] But there are two respects in which the

62. *See id.*

63. *See id.*; *see also* Benjamin C. Zipursky, *Substantive Standing, Civil Recourse, and Corrective Justice*, 39 FLA. STATE U. L. REV. 299, 304 (2011).

64. Zipursky, *supra* note 63, at 304. Professor Ben Zipursky has referred to duty of care as a doctrine of "substantive standing," but his use of the adjective "substantive" in this context seems unnecessary and confusing. *Id.*

65. Peter F. Lake, *Common Law Duty in Negligence Law: The Recent Consolidation of a Consensus on the Expansion of the Analysis of Duty and the New Conservative Liability Limiting Use of Policy Considerations*, 34 SAN DIEGO L. REV. 1503, 1514 (1997).

66. *See id.*; *see also infra* Part II.A.

67. Lake, *supra* note 65, at 1508.

68. *See id.* at 1503-09; *see also* Holmes, *supra* note 47, at 652-54, 660-62.

69. Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 3, 8-9 (1998).

challenge facing the doctrine of duty in negligence is significantly different from that facing privity in contracts.

First, the absence of a doctrine of privity (or equivalent) from the law of contracts would effectively mean that the law could not recognize any contracts at all.[70] No contract could be created without some sort of meaningful interaction (whether termed offer and acceptance, or reasonable reliance) between two or more parties.[71] Without the doctrine of privity (and the doctrines of offer, acceptance, and promissory estoppel of which it is comprised), there could simply be no law of contracts.

In negligence law, by contrast, the absence of a doctrine of duty of care would not have the effect of eliminating the tort of negligence at all. Quite the contrary. Probably the easiest way to demonstrate this is to imagine what the law would look like without a doctrine of duty. That would leave us with three elements: breach (i.e., negligent conduct), causation, and harm.[72] So *everyone* who suffered harm caused by someone else's negligence would have a legitimate claim for compensation against that other person.

For example, an auditor, who negligently certifies that a corporation is financially sound when it is not, may thereby cause losses to anyone who relies on the audit report. But those victims could include those who bought stock in the corporation, those who lent it money, those who sold it goods or services on credit, and those who gave up employment elsewhere to work for it. Without a doctrine of duty in place, every single member of one or more of these groups would have a cognizable legal claim, and that would make for an indeterminable class of potential plaintiffs.[73] As we have already noted, that is anathema to capitalism's requirement for predictable risk.[74]

Second, the doctrine of privity in contracts is seldom applied to situations involving more than a very small number of potential parties.[75] The questions it typically resolves are whether there was a contract between A and B, or between A, B, and C. As a result, there is relatively little risk involved in leaving questions of offer and acceptance to a jury.[76] The range of possible outcomes is already so heavily

70. Lawrence v. Fox, 20 N.Y. 268, 272 (1859).

71. *Id.* at 272, 275.

72. *See* David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1672 (2007) (denoting the four elements of negligence).

73. Ultramares Corp. v. Touche, 174 N.E. 441, 443-47 (N.Y. 1931); Zipursky, *supra* note 69, at 32-34.

74. Zipursky, *supra* note 69, at 34-35.

75. *See Ultramares Corp.*, 174 N.E. at 445.

76. *See id.* at 444.

circumscribed that the risks associated with unpredictability have already been significantly mitigated.

As the auditor example illustrates, however, when it comes to duty of care in negligence, the stakes are often much higher, because the potential parties could number in the thousands or even millions.[77] This is clearly the indeterminacy problem writ large. Decisions about whether a duty of care exists cannot, therefore, be left to a jury. On the contrary, duty must be decided by the judge as a matter of law.

III. THE CARDOZO CASES

A. Palsgraf v. Long Island Railroad Co.

Now that we have established the purpose and role of the doctrine of duty of care in negligence, we can move on to consider how Chief Judge Benjamin Cardozo of the New York Court of Appeals sought to implement it. We shall start, naturally enough, with *Palsgraf v. Long Island Railroad Co.*[78] While it is the one torts case that every American lawyer claims to remember, the memory often plays tricks, especially when it comes to recalling what the judges did and did not say. So it is worth spending a little time initially to go over what should be familiar ground.

After buying a ticket to Rockaway Beach, Mrs. Palsgraf was standing on a platform of the Long Island Railroad.[79] A train stopped at the station, bound for a different destination. As it began to pull away, a man carrying a package tried to jump aboard.[80] He succeeded after a fashion but appeared unsteady as if about to fall. "A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind."[81] This caused the package, wrapped in newspaper, to fall. It turned out that it contained fireworks, which then exploded.[82] The shock of the explosion caused some scales to fall at the other end of the platform, where they struck Mrs. Palsgraf.[83]

She sued the railroad to recover compensation for her injuries. Writing on behalf of a majority of the New York Court of Appeals, Cardozo began—as should be expected after the discussion in Part II—

77. *See id.*
78. 162 N.E. 99 (N.Y. 1928).
79. *See id.*
80. *See id.*
81. *Id.*
82. *See id.*
83. *See id.*

by quoting Chief Judge McSherry of the Court of Appeals of Maryland: "In every instance, before negligence can be predicated of a given act, . . . must be sought and found a duty to the individual complaining."[84]

He then proceeded to consider whether Mrs. Palsgraf had been owed such a duty, but held that: "The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all."[85]

Quoting Sir Frederick Pollock, he added: "Proof of negligence in the air, so to speak, will not do."[86] Nor could it be claimed that a duty is owed to one person simply because it is owed to another.[87] Since Mrs. Palsgraf sued "in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another,"[88] and since "no hazard was apparent . . . with reference to her, [the act] did not take to itself the quality of a tort because it happened to be a wrong . . . with reference to some one else."[89] "What the plaintiff must show is 'a wrong' to herself, *i.e.*, a violation of her own right, and not merely a wrong to some one else."[90] That she had failed to do. As a consequence, she was held to have been owed no duty of care by the Railroad, and her claim was dismissed.[91]

So how could Mrs. Palsgraf have established that the Railroad owed a duty to her "in her own right[?]"[92] Cardozo's answer was that: "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."[93] And again: "Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all."[94] As Professor Cardi has noted, such terminology has meant that "*Palsgraf* is most commonly cited for the idea that duty is 'relational.'"[95]

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84. *Id.* at 99-100 (citing W. Va. Cent. & Pittsburgh Ry. Co. v. State, 54 A. 669, 671-72 (Md. 1903)).

85. *Id.* at 99.

86. *Id.* (quoting SIR FREDERICK POLLOCK, THE LAW OF TORTS 455 (11th ed., 1920)).

87. *See id.* at 99-101.

88. *Id.* at 99-100.

89. *Id.*

90. *Id.*

91. *See id.* at 99-101.

92. *Id.* at 100.

93. *Id.* at 100-101.

94. *Id.* at 99-101.

95. *See* Cardi, *supra* note 20, at 1875-86 (quoting John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of* MacPherson, 146 U. PA. L. REV. 1733, 1819 (1998)).

After the discussion in Part II, this should come as no surprise. We saw there that, within the law of negligence, duty of care has twin roles to play: the determination of whether or not any duty exists at all and, if so, to whom.[96] And we also saw that these roles have been successfully filled in the law of contracts by the doctrine of privity.[97] So it is surely to be expected that Cardozo sought to develop duty in negligence law in a manner analogous to privity in contracts. He therefore focused on the existence or otherwise of a relevant relationship.[98]

In this context, "relevance" means that the relationship is concerned with the type of interest that was ultimately harmed by the defendant's negligence, whether that be bodily security, or some property or financial asset.[99] But while Cardi is certainly right to say that *Palsgraf* has been treated as the "centerpiece of academic tort theory,"[100] it was not the first case in which Cardozo argued that duty is relational. In fact, he had made the same point in both *Glanzer v. Shepard*[101] (decided six years earlier) and in *H.R. Moch Co. v. Rensselaer Water Co.*,[102] where he pronounced judgment just over a month before the *Palsgraf* appeal was heard.

B. H.R. Moch Co. v. Rensselaer Water Co.

In *Moch*, the relevant facts were as follows. Rensselaer Water contracted to supply water to a city and its inhabitants.[103] While this contract was in force, a building caught fire, and the fire spread to Moch's warehouse.[104] The warehouse and its contents were destroyed, so Moch sued Rensselaer for negligently failing to supply a sufficient amount of water to save them.[105] Cardozo explained the issue thus: "What we need to know is not so much the conduct to be avoided when the relation and its attendant duty are established as existing . . . [w]hat we need to know is the conduct that engenders the relation."[106] In other words, the issue at stake was whether a relevant relationship had been established between Rensselaer and Moch.

96. *See supra* Part II.A.
97. *See supra* Part II.A–B.
98. *See, e.g.*, *Palsgraf*, 162 N.E. at 99-101.
99. *See id.*
100. *See* Cardi, *supra* note 20, at 1875.
101. 135 N.E. 275 (N.Y. 1922).
102. 159 N.E. 896 (N.Y. 1928).
103. *Id.* at 896.
104. *Id.*
105. *Id.*
106. *Id.* at 898.

Cardozo rejected Moch's argument that Rensselaer was brought into such a relation with everyone who might potentially benefit from the supply of water at the moment that the contract with the city was created.[107] That would mean that everyone who makes a promise in a contract would be under a duty not merely to the promisee but also to an "indefinite number" of potential beneficiaries.[108] "The assumption of one relation will mean the involuntary assumption of a series of new relations, inescapably hooked together."[109] That would be to go too far.[110] As in *Palsgraf*, therefore, Cardozo held that the plaintiff had been owed no duty of care.[111]

Once again, this decision should come as no surprise. As we saw in Part II, the law cannot recognize an indefinite number of potential plaintiffs because that would mean the running of an indeterminate risk.[112] In the absence of a relationship between Moch and Rensselaer that was qualitatively different from any that the latter had with the public at large, there could be no question of the law recognizing a duty of care.

C. Glanzer v. Shepard

In *Glanzer v. Shepard*, however, the outcome was rather different.[113] Glanzer agreed to buy 905 bags of beans from Bech, Van Siclen & Co. for a price to be determined by the total weight of the beans.[114] The weight was to be certified by public weighers.[115] Bech retained Shepard, who were such weighers, to carry out the weighing of its commodities.[116] Bech then sent a letter informing Shepard that the bags of beans were on the dock, ready to be weighed, and that the beans had been sold to Glanzer.[117] Shepard accordingly weighed the beans and sent a certified copy of the weight sheets to Glanzer.[118]

After paying for, and taking possession of, the beans, on the basis of the certified weight, Glanzer then sought to resell them. But it was discovered that the beans actually weighed 11,854 pounds less than the

107. *Id.*
108. *Id.* at 899.
109. *Id.*
110. *Id.*
111. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99-101 (N.Y. 1928).
112. *See supra* Part II.A.
113. 135 N.E. 275, 275 (N.Y. 1922).
114. *Id.*
115. *Id.*
116. *Id.* at 275-76.
117. *Id.* at 275.
118. *Id.*

amount that was certified in the sheets.[119] Glanzer sued Shepard for negligence in carrying out the weighing.[120] The trial judge ordered judgment for Glanzer for the amount overpaid.[121] After two appeals, the matter came before the New York Court of Appeals.[122]

Giving judgment on behalf of a near-unanimous court, Judge Cardozo (as he then was) held that the law imposed on Shepard not merely a duty in contracts towards Bech, but also a duty in torts towards Glanzer.[123] On the face of it, this result might seem inconsistent with *Palsgraf* and *Moch*. Indeed, precisely that criticism has been leveled by Professor Keith Hylton, who has suggested that Cardozo sometimes took what he calls a "broad" approach and ruled for the plaintiff, yet sometimes took a "narrow" approach and ruled for the defendant.[124] But closer analysis reveals that there was one highly significant difference in the facts that led to *Glanzer* being decided differently from *Palsgraf* and *Moch*. So let us proceed step-by-step through Cardozo's reasoning process.

First, he noted that the plaintiffs' use of the certificates was "not an indirect or collateral consequence of the action of the weighers,"[125] but "the end and aim of the transaction."[126] In addition, Shepard "sent a copy [of the weight sheets] to the plaintiffs for the very purpose of inducing action."[127] In other words, Shepard not only knew the identity of the party (Glanzer), who would be purchasing the beans in reliance on the weight sheets, but they had actually dealt directly with Glanzer in sending them those very sheets. As Cardozo put it: "In such circumstances, assumption of the task of weighing was the assumption of a duty to weigh carefully for the benefit of all whose conduct was to be governed."[128] Naturally, that included the buyer, whose payment was based on the weight certified. And finally, tying this back to the concept of relationship, Cardozo explained: "We do not need to state the duty in

119. *Id.*
120. *See id.*
121. *Id.*
122. *Id.*
123. *Id.* at 275-77.
124. Keith N. Hylton, *New Private Law Theory and Tort Law: A Comment*, 125 HARV. L. REV. F. 173, 175 nn.8-10 (2011–12). One of the cases he cites to support his claim is *Pokora v. Wabash Ry. Co.*, 292 U.S. 98 (1934). But that is a case about *standard* of care—not *duty* of care—and so need not be addressed here. *See* Pokora v. Wabash Ry. Co., 292 U.S. 98, 104 (1934). For further discussion regarding the broad versus narrow scope of Cardozo's opinions, see RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 113 (1990).
125. *Glanzer*, 135 N.E. at 275.
126. *Id.*
127. *Id.* at 276.
128. *Id.*

terms of contract or of privity. Growing out of a contract, it has none the less an origin not exclusively contractual. Given the contract *and the relation*, the duty is imposed by law."[129]

There was a fundamental difference in the facts of *Glanzer* as compared to those of *Palsgraf* and *Moch*. In *Moch*, Cardozo was concerned that the defendant might be liable to an "indefinite number" of potential beneficiaries.[130] In *Palsgraf*, he was concerned that the defendant could be liable to a whole crowd as a result of jostling just one of its number.[131] But those problems did not exist in *Glanzer*. There could only ever be one buyer who relied upon the certified weight sheets, and the weighers themselves had been in direct contact with that very party.[132] Thus, there was every reason for Shepard to owe Glanzer a duty of care.

Indeed, Shepard knew Glanzer's identity, just as much as if there had been a contract between the parties.[133] In the subsequent case of *Ultramares v. Touche*, Cardozo made this point expressly, as he explained the outcome in *Glanzer* on the basis that there was an "intimacy [in] the resulting nexus"[134] that was "so close as to approach that of privity, if not completely one with it."[135]

D. Ultramares Corp. v. Touche

Which brings us to the case of *Ultramares v. Touche* itself: a case that, for some reason, is too often overlooked. Yet, *Ultramares* is a case of great significance for several reasons. Coming more than three years after *Palsgraf*, it is the last of five cases in the New York Court of Appeals in which Cardozo addressed the question of duty of care.[136] By that time, Cardozo had had plenty of time to ponder upon *Palsgraf* and its reception, and so he was in pole position to modify, correct, or refine what he had said.

As it happens, he took the opportunity to expand upon his reasons for insisting that the criterion for deciding whether or not a duty of care is established depends on the existence (or lack thereof) of a relevant

129. *Id.* (citing MacPherson v. Buick Motor Co., 217 N.Y. 382, 390 (1916)) (emphasis added).

130. H.R. Moch Co. v. Rensselaer Water Co. 159 N.E. 896, 899 (N.Y. 1928).

131. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 100 (N.Y. 1928) ("One who jostles one's neighbor in a crowd does not invade the rights of others standing at the outer fringe.").

132. *Glanzer*, 35 N.E. at 275.

133. *Id.*

134. 174 N.E. 441, 445 (N.Y. 1931).

135. *Id.* at 446.

136. *See supra* Part II. The others are *Moch*, *Glanzer*, and *Palsgraf* (all of which have already been discussed).

relationship.[137] He also re-emphasized points he had made earlier, in both *Glanzer* and *Moch*, in a manner that provides us with a definitive means of determining whether a relevant relationship exists.[138] And he also made more explicit a wrinkle that he had previously only hinted at in *Palsgraf*: that such relationships are irrelevant when the tort at stake is not negligence, but fraud.[139]

So let us now acquaint ourselves with the facts of *Ultramares*. In January 1924, accountants Touche were employed by Fred Stern & Co. to audit and certify Stern's balance sheet.[140] After completing the audit, Touche supplied Stern with thirty-two certified copies as counterpart originals. "Nothing was said as to the persons to whom these counterparts would be shown or the extent or number of the transactions in which they would be used."[141] But Touche knew that they would be used by Stern as the basis for negotiating loans and terms of credit from third parties,[142] and Ultramares subsequently made Stern a substantial loan in reliance on one of the certified copies.[143]

Stern was, in fact, insolvent, but the books had been falsified by the inclusion of accounts receivable and other assets that did not actually exist.[144] Ultramares inevitably lost its money. Realizing (because of Stern's lack of funds) that any action for breach of contract against Stern would be pointless, Ultramares chose instead to sue Touche on the grounds that the latter had either committed negligence in failing to uncover the fraud or else had colluded in the fraud itself.[145]

The trial judge allowed the negligence allegation to go to the jury, who found for Ultramares.[146] On appeal to the New York Court of Appeals, and on behalf of a unanimous court, Chief Judge Cardozo held: "We think the evidence supports a finding that the audit was negligently made."[147] But he followed that declaration immediately with the ominous qualification that "we put aside for the moment the question whether negligence, even if it existed, was a wrong to the plaintiff."[148] As with Mrs. Palsgraf, whether Ultramares could ultimately succeed in

137. *Ultramares Corp.*, 174 N.E. at 444-46.
138. *Id.* at 446.
139. *Id.* at 446-47.
140. *Id.* at 442.
141. *Id.*
142. *Id.*
143. *Id.* at 443.
144. *Id.* at 442.
145. *Id.* at 442-43.
146. *Id.* at 443.
147. *Id.* at 443, 450.
148. *Id.* at 443.

its claim was dependent on whether it could show that the defendant had owed it a duty of care.

Cardozo's reasoning in *Ultramares* started from an uncontroversial summary of well-established contract law: "The defendants owed to their employer . . . a duty growing out of contract to make it with the care and caution proper to their calling."[149] The question for him—as the discussion in Part II of this Article would lead us to expect—was how to translate such a duty into negligence law.[150]

Cardozo was no King Canute.[151] He was not one for resisting change to the law when there was (in his view) good reason for it.[152] He was well aware that the "assault upon the citadel of privity is proceeding in these days apace"[153] so that "today the beneficiary of a promise, clearly designated as such, is seldom left without a remedy."[154] Cardozo's point, nevertheless, was that such a beneficiary still had to be "clearly designated as such,"[155] so that they would still be identifiable by the parties to the contract. There had to be a way to tie a contractual promise "directly to the individual members of the public."[156]

Indeed, he emphasized that "[s]omething more" is always required beyond establishing that a promise is for the benefit of the public as a whole or for that of "a class of indefinite extension."[157] In order to be owed a duty of care in negligence law, therefore, Ultramares had to be identifiable by Touche at the time when the audit report was finalized.[158]

Cardozo had, after all, applied precisely that approach in *Glanzer* where, finding that the plaintiff was indeed identifiable by the defendant, he had held that the plaintiff was owed a duty of care.[159] Ultramares, on the other hand, was not identifiable: "Nothing was said as to the persons to whom [the] counterparts would be shown . . . . In particular there was no mention of the plaintiff, . . . which till then had never made advances to the Stern Company . . . ."[160]

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149. *Id.* at 444.

150. *See id.*; *see also supra* Part II.

151. King Canute is generally remembered as a king who believed that he was so powerful that he could successfully order the tide to recede. Ironically, the story on which this is based actually records him as demonstrating his humility by showing that he could *not* turn back the tide. But it is likely that the story is apocryphal in any event.

152. *Ultramares Corp.*, 174 N.E. at 444.

153. *Id.* at 445.

154. *Id.*

155. *Id.*

156. *Id.* at 445 (quoting H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 897 (N.Y. 1928)).

157. *Id.*

158. *Id.* at 442.

159. Glanzer v. Shepard, 135 N.E. 275, 276-77 (N.Y. 1922).

160. *Ultramares Corp.*, 174 N.E. at 442.

Recognizing a duty of care owed to Ultramares in such circumstances would thus mean that *anyone* who had relied on Touche's audit report would be able to bring a claim.[161] As we know from Part II, the law simply cannot countenance such a prospect if the defendant was not in a position to identify those victims in advance: "If liability for negligence exists, a thoughtless slip or blunder . . . may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms [would be] so extreme . . . ."[162]

Accordingly, Ultramares was held to have been owed no duty of care in negligence.[163] It should be noted, however, that Cardozo did not deny outright the possibility of the law of negligence recognizing the duty of an auditor in favor of a third party. What he did deny was that there could be such a duty if the auditor had no way of knowing the identity of that third party in advance.[164]

E. MacPherson v. Buick Motor Co.

MacPherson v. Buick Motor Co.[165] was a very different case. It was actually decided before any of the other four cases already discussed in this Part, and it was also the only one to revolve around a defective product.[166] It seems clear that lawyers of the time (including Cardozo himself) implicitly believed that products involved different considerations from statements.[167] Thus, in both *Glanzer* and *Moch*—cases about statements—Cardozo cited only cases about statements;[168] while, in *Macpherson*, he cited only cases about products.[169]

The facts of *MacPherson* were as follows. Buick sold a car to a dealer, who then sold it on to Macpherson. While it was being driven, one of the wheels collapsed, causing Macpherson to be ejected and injured.[170] The wheel had not been made by Buick, but had been

161. *Id.* at 444.

162. *Id.*; *see supra* Part II.

163. *Ultramares Corp.*, 174 N.E. at 450.

164. *See* White v. Guarente, 372 N.E.2d. 315, 317 (N.Y. 1977).

165. 111 N.E. 1050 (N.Y. 1916).

166. *See id.* at 1051.

167. *Compare* Glanzer v. Shepard, 135 N.E. 275 (N.Y. 1922); H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896 (N.Y. 1928), *with id.*

168. It might be tempting to think that cases like *Glanzer* and *Ultramares Corp.* were really about services rather than statements. But Cardozo rejected that contention, stating: "The service may have been rendered as carefully as you please, and its quality will count for nothing if there was negligence thereafter in distributing the summary." *Ultramares Corp.*, 174 N.E. at 446.

169. *See generally MacPherson*, 111 N.E. at 1051-54 (citing only to cases about products).

170. *Id.* at 1054.

purchased from a wheel manufacturer.[171] The evidence suggested, however, that the defect would have been discovered if Buick had carried out a reasonable inspection before selling the vehicle.[172] So Macpherson sued Buick for negligence.

As in *Moch*, *Glanzer*, and *Ultramares*, *Macpherson* involved the question of whether the defendant owed "a duty of care and vigilance"[173] to anyone other than the party with whom the defendant had a contract.[174] Again giving judgment on behalf of a near-unanimous court, Judge Cardozo (as he then was) held that it did.[175] He stressed that a defective car is dangerous,[176] that Buick had sold the car to a buyer whom it knew "was a dealer in cars, who bought to resell,"[177] and that it also knew that "the car would be used by persons other than the buyer. This was apparent from its size; there were seats for three persons."[178] So Buick did indeed owe a duty to Macpherson.

Of course, the discussions above of *Moch*, *Glanzer*, and *Ultramares* suggest that Cardozo subsequently realized that knowledge that one's work would be relied on by others should not be enough to establish that the defendant owes a duty of care to those "others" unless the defendant could also have identified who they were. Yet there was no way for Buick to know of Macpherson's identity in advance.[179] At first blush, Cardozo's judgment in *Macpherson* might appear to be anomalous, or at least an initial stab at tackling the issues posed by duty of care while Cardozo's thoughts were still at an embryonic stage.

Yet, whether embryonic or not, Cardozo's judgment in *Macpherson* highlighted issues that he subsequently addressed again in *Ultramares*. In the latter case, Cardozo was concerned to avoid the possibility of an "indeterminate class" of potential plaintiffs.[180] But that hardly presented much of a problem in *Macpherson* because the car involved only had "seats for three persons."[181]

It is, of course, true that there was no way for Buick to know in advance whether the car would be carrying one, two, or three individuals, and so the number of potential plaintiffs was, if taken literally, still indeterminate. But we also recognized in Part II that the

171. *Id.* at 1051.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 1053.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931).
181. *MacPherson*, 111 N.E. at 1053.

law can seldom develop a doctrine where the outcome will always be known with 100% certainty. Instead, it strives to transform the wholly indeterminable into something that can be predicted with a high degree of confidence.[182] Part II also explained that duty attempts to play a role in negligence law that privity already plays in the law of contracts; and we have noted how, in *Ultramares*, Cardozo used privity as a model for duty of care.[183] It is surely understandable that he should have had no qualms about finding the existence of a duty in *Macpherson*, where the largest possible number of parties involved—four: Buick, plus three potential riders in the car—could never have been greater than the number of parties typically found in many commercial contracts.[184]

The real issue that *Macpherson* raises is not one of inconsistency of approach. It is much more about whether Cardozo's method of *applying* his approach was correct. More specifically, it raises the question of whether he was correct that a situation that could never involve more than three plaintiffs (*Macpherson*) was sufficient to establish a duty of care, while a scenario that could never involve more than 32 plaintiffs (*Ultramares*) was not. We shall return to this question in Part V.[185]

F. Summary

At this stage, it is perhaps worth taking a little time to summarize what we have now managed to establish about Benjamin Cardozo's approach to duty of care in negligence. Perhaps a list of bullet-points will make this clearer:

- The law of contracts has the doctrine of privity (supplemented by the notion of being an identified third-party beneficiary) to identify and delimit the number of parties who may sue or be sued.
- The law of negligence needs to develop a doctrine to perform a similar task for, without it, there is the risk of liability to an "indeterminate class" of potential plaintiffs.
- The doctrine of duty of care is best suited to this task because it raises a question of law for the judge rather than a question of fact for the jury.
- A duty will be owed by the defendant to the plaintiff if those parties had a relevant relationship with each other at the time of the defendant's conduct, and that relationship was significantly closer than any relationship that the defendant might have had with the general public.

182. *See supra* Part II.A.
183. *See supra* Part II.C; *Ultramares*, 174 N.E. at 445, 448.
184. *MacPherson*, 111 N.E. at 1051.
185. *See infra* Part V.

- Such a relationship exists whenever the defendant is in a position to identify the plaintiff as a potential victim at the time when the tort occurred (because this is analogous to there being either contractual privity between the parties or a relationship between the defendant and a third-party beneficiary).
- Such a relationship will also exist whenever there is a clearly identified class of potential victims, if that class is no larger than the number of parties typically to be found in a contract.

G. What Cardozo Did Not *Say*

It is, however, just as important to emphasize what Cardozo did *not* say. For some reason, both scholars and practitioners have been all too ready to put words into his mouth—and have then confused themselves.[186] So let us point out the three largest red herrings: the things that Cardozo is supposed to have said but actually did not.

- None of this analysis has anything to do with proximate cause or scope of liability. On the contrary, it is all a matter of duty designed precisely to enable judges to rule on the issue as a matter of law.
- Nothing in Cardozo's analysis uses foreseeability as a test of duty.
- There is nothing in any of Cardozo's analysis to suggest that the search for a relevant relationship should be confined to potential connections between the plaintiff and the direct tortfeasor.

Before we go on to develop a Cardozo-inspired relational framework for duty of care within the law of negligence, it is worth examining these red herrings in more detail in order to ensure that they do not erroneously contaminate our approach. So it is to them that we now turn.[187]

IV. THREE RED HERRINGS

A. Proximate Cause/Scope of Liability

Probably the most baffling red herring is that, as Professor Benjamin Zipursky has pointed out, "*Palsgraf* is predominantly treated—at least by scholars—as a 'proximate cause' case."[188] It is

186. *See infra* Part IV.

187. *See infra* Part IV.

188. Zipursky, *supra* note 69, at 11 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 43, at 284-90 (5th ed. 1984)); DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 210 (3d ed. 1997); RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 513 (6th ed. 1995); MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 376-

baffling because not only did Cardozo quote with evident approval Chief Judge McSherry's assertion that "in every instance, before negligence can be predicated of a given act, . . . must be sought and found a duty to the individual complaining";[189] but he also declared expressly: "The law of causation, remote or proximate, is thus foreign to the case before us."[190]

Professor Keith Hylton has, nevertheless, attempted to argue that Cardozo was being disingenuous because: "The first thing to say is that *Palsgraf* is obviously a case about proximate cause."[191] But that's an utterly hopeless argument. Professor Hylton would surely never accept such unsupported assertions from his own students. Indeed, how on earth is it "obviously" about proximate cause when Cardozo himself—a man known for choosing his words very carefully—said expressly that it was about duty?[192] Hylton's answer is that "the way to understand *Palsgraf* is to see that it was a power play. Chief Judge Cardozo took a question away from the jury, weakening the jury and enhancing the power of the judge. The reason for doing so was to create greater certainty in the law."[193]

Of course Cardozo wanted to create greater certainty! He was, after all, one of the founders of the American Law Institute, whose very purpose was to promote greater consistency and predictability in the law.[194] But a high degree of predictability is essential for the development of negligence law.[195] In historical terms, therefore, Cardozo had little choice. If he had not emphasized the role of duty in *Palsgraf*, a judge in a subsequent case would undoubtedly have done so instead. Indeed, the history of the treatment of duty in the *Restatement (Second) of Torts* suggests that that is precisely what happened.[196] As my colleague, Peter Lake, pointed out some years ago: "[U]nder the *Restatement (Second) of Torts*' approach to negligence, unlike for . . . Cardozo, duty is not an element of the cause of action for

81 (6th ed. 1996); JOHN W. WADE ET AL., PROSSER, WADE & SCHWARTZ'S CASES AND MATERIALS ON TORTS 304 (9th ed. 1994).

189. W. Va. Central R. Co. v. State, 96 Md. 652, 671-72 (Md. 1903).

190. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 101 (N.Y. 1928).

191. *See* Hylton, *supra* note 124, at 176.

192. Otto Stockmeyer, *Beloved Storytellers (Part Two): Cardozo's Opinion Style*, COOLEY L. SCH., https://info.cooley.edu/blog/beloved-storytellers-part-two-cardozos-opinion-style (last visited Aug. 1, 2021).

193. Hylton, *supra* note 124, at 177.

194. *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute*, 1 A.L.I. PROC. 1 (1923).

195. *See infra* Part V.A.

196. *See* Lake, *supra* note 65, at 1515.

negligence,"[197] yet this "featherlight treatment of duty . . . has been superseded and eclipsed by modern decisional law."[198]

B. Foreseeability

Hylton tries to extricate himself from the confusion of his own making by adding: "Proximate cause typically involves an inquiry into foreseeability, as a necessary condition for liability. Chief Judge Cardozo's *Palsgraf* opinion is an analysis of foreseeability."[199] But that just confuses matters even more. In fact, while proximate cause does "typically involve[] an inquiry into foreseeability," Cardozo's judgment in *Palsgraf* does not analyze foreseeability at all.[200] Indeed, the word "foreseeability" does not appear anywhere in his judgment (and nor does any other verbal form with the same stem).

It is very clear why not—Cardozo was not talking about proximate cause at all, but about duty. Instead, it was Judge Andrews in his dissent who discussed the role of foreseeability.[201] But that was because his argument was precisely that *Palsgraf* should be decided as a matter of proximate cause![202]

It might be objected that, while Cardozo did not explicitly use the language of foreseeability, he was nevertheless focused on analyzing the *concept*. But that is a strange argument to make about a noted stylist like Cardozo. If he had truly "analyzed" the concept in *Palsgraf*, he would have explored the concept in some depth, and would surely have employed a variety of synonyms (including "foreseeability") to avoid monotonous repetition, especially as Judge Andrews did indeed use that word.[203] But Cardozo did nothing of the sort. Moreover, there is also

197. *Id.*

198. *Id.* at 1504.

199. *See* Hylton, *supra* note 124, at 176. Of course, Hylton is not alone in this error. As he points out, most textbook writers consider Cardozo's *Palsgraf* opinion to be an analysis of foreseeability. *Id.* (first citing W. Jonathan Cardi, *The Hidden Legacy of Palsgraf: Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873, 1874 (2011)); and then citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 254-60 (4th eds. 1971)) ("[T]orts textbooks cover the case in the chapter on proximate cause. Prosser's torts hornbook discusses *Palsgraf* in the chapter on proximate cause.").

200. *See* Hylton, *supra* note 124, at 176.

201. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 104 (N.Y. 1928) (Andrews, J. dissenting) ("[T]he results which a prudent man would or should foresee – do have a bearing upon the decision as to proximate cause.").

202. Andrews argued that duty was not an issue because everyone is automatically owed such a duty as a corollary of being a member of civil society. *Id.* at 102 ("Due care is a duty imposed on each one of us to protect society from unnecessary danger."). *Id.* at 103 ("Everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.").

203. *Compare id.* at 100-01, *with id.* at 102-04.

absolutely nothing in his judgment in *Glanzer* that hints remotely at foreseeability, while the only time he mentioned it in either *Moch* or *Ultramares* was in relation to *intentional* torts.[204]

1. Relationships vs. Foreseeability

In fact, the closest Cardozo came in *Palsgraf* to arguing for any role for foreseeability is to be found in the following passage: "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."[205] Yet this passage does not support any interpretation that foreseeability is about duty. On the contrary, the "risk reasonably to be perceived"[206] (that is, reasonable foreseeability) is *not* there being treated as the means of *establishing* a duty but as the way to "*define*[] the duty to be obeyed."[207] Definition is not a matter of existence, but of meaning. Someone who provides the definition of "beer" does not thereby establish that there is a glass full of it on the countertop. But, *if* there is a glass of liquid, the definition will help establish whether the liquid in question is beer or not.

In other words, Cardozo was talking there not about duty, but about the *scope* of a duty (known in his day as proximate cause), *if* such a duty exists.[208] That this was Cardozo's point is made all the clearer by a later sentence in the same paragraph: "The range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury."[209] This could not possibly be true if the question being decided were that of duty. For duty is *always* a matter of law decided by the court.[210] What Cardozo was, in fact, explaining was simply that scope/proximate cause is a question of fact for a jury to determine, except when only one inference may be drawn, in which case the court will decide the issue as a matter of law.[211]

The truth is simply that, as we have already seen, Cardozo's analysis—not just in *Palsgraf*, but in several other leading cases—was focused on identifying a *relationship* between the plaintiff and the defendant that could justify a court holding that the defendant owed to

204. H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 899 (N.Y. 1928); Ultramares Corp. v. Touche, 174 N.E. 441, 446 (N.Y. 1931) ("Foresight of these possibilities may charge with liability for fraud. The conclusion does not follow that it will charge with liability for negligence.").

205. *Palsgraf*, 162 N.E. at 100.

206. *Id.*

207. *Id.* (emphasis added).

208. *See id.*

209. *Id.* at 101.

210. *See* Lake, *supra* note 65, at 1512.

211. *See Palsgraf*, 162 N.E. at 100-01.

the plaintiff a duty of care.[212] Relationships do not imply foreseeability.[213] A couple's marriage, for example, is not a matter of foreseeability. Nor is a relationship of parenthood, or that of child, sibling, or grandparent. Whether a person cohabits in the same household—typically required for the household test of duty in emotional distress cases[214]—has nothing to do with foreseeability either. Nor is the existence of a contractual relationship or fiduciary duty a matter of foreseeability.

Indeed, the New York courts have made it abundantly clear that foreseeability is not the criterion for establishing a duty.[215] By 1983, for example, the Appellate Division of the Supreme Court was able to quote numerous declarations to this effect[216]: "Foreseeability should not be confused with duty."[217] "[T]he foreseeability factor is not determinative of the issue."[218] Were foreseeability the sole factor in determining the duty owed, "[i]t would extend endlessly, like the rippling of the waters . . . to all who suffered injury or economic loss caused by the absence of electrical power."[219] "Mere foreseeability without relation cannot suffice."[220]

2. Last Train to Rockaway Beach

Palsgraf itself provides an excellent illustration of this point. For, in fact, the Long Island Railroad *could* have foreseen that its negligence—or that of its employees—might harm Mrs. Palsgraf. After all, she had just bought a ticket from them and was standing on their station platform at the time of the accident. If foreseeability were really the touchstone of duty, then the Railroad would have owed her a duty. Then the guards' behavior in pushing and pulling the passenger onto the moving train might have amounted to a breach of that duty that caused her harm, and she could have won her case.

But she did not win because foreseeability was *not* the criterion employed to establish duty. That criterion was relationship.[221] Mrs.

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212. *See, e.g.*, *id.*

213. Thing v. La Chusa, 771 P.2d 814, 820, 826-27 (Cal. 1989).

214. *See, e.g.*, *id.* at 829-30.

215. *See, e.g.*, Strauss v. Belle Realty Co., 469 N.Y.S.2d 948, 951 (App. Div. 1983); Pulka v. Edelman, 358 N.E.2d 1019, 1022-23 (N.Y. 1976); Beck v. FMC Corp., 385 N.Y.S.2d 956, 958 (App. Div. 1976); Cullen v. BMW of North America, 531 F. Supp. 555, 563 (E.D.N.Y. 1982).

216. *Strauss*, 469 N.Y.S.2d at 951.

217. *Pulka*, 358 N.E.2d at 1022-23.

218. *Beck*, 385 N.Y.S.2d at 958.

219. *Id.*

220. *Cullen*, 531 F. Supp. at 563.

221. Palsgraf v. Long Island R.R. Co., 182 N.E. 99, 99-101 (N.Y. 1928).

Palsgraf had bought a ticket to Rockaway Beach, so the relevant relationship with the Railroad revolved around her journey to that destination. If she had suffered an injury while taking *that* journey, then the Railroad could potentially have been liable because it would then have owed her a duty. But the passenger carrying the fireworks had been attempting to board a train for a different destination, and Mrs. Palsgraf had no relationship with the Railroad in that regard. So any wrongful conduct by the Railroad's guards could not amount to a breach of the Railroad's duty to her because it owed her no such duty in the first place.[222]

The simple fact is that relationship and foreseeability are two distinct concepts. They are not interrelated in the way that has so often been assumed. The most that can be said of foreseeability in this context is that it provides an underlying moral justification for the use of relationality to determine duty.[223] But if there is one single reason why "duty cases [are] frustratingly inconsistent, unfocused, and often nonsensical,"[224] it is surely this thoroughly misplaced emphasis on foreseeability.

C. Discrete Relationships

The third mistaken interpretation of Cardozo's judgment in *Palsgraf* is of a rather different order. Those who have pursued this particular red herring understand perfectly well that Cardozo applied a relationality requirement to determine whether a duty of care had been established. They also appreciate that this essentially involves an inquiry into whether a relationship somewhat akin to contractual privity existed between plaintiff and defendant at the time the tort took place. The problem is that they have focused almost entirely on the singular relationship between two parties: the plaintiff and the direct tortfeasor.[225] Yet, as Dean Leon Green pointed out over half a century ago: "Cases involving injures to relations are *three*-party situations."[226]

222. *Id.* at 99.

223. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 94-95, 110, 130-31 (1881).

224. *See* Cardi, *supra* note 20, at 1875.

225. *See, e.g.*, Ernest J. Weinrib, *Does Tort Law Have a Future?*, 34 VAL. U. L. REV. 561, 561-63 (2000). "The significance of these cases is that they articulate the bipolarity of the relationship between the doer and the sufferer of negligent injury." *Id.*

226. LEON GREEN ET AL., CASES ON INJURIES TO RELATIONS ix (1968) (emphasis added).

1. Corrective Justice Theory

Corrective justice theorists are the main offenders in this regard.[227] Borrowing heavily on the philosophy of Aristotle, they argue that the main function of tort law is to restore the "moral equilibrium"[228] that existed before the tort was committed by having the tortfeasor pay appropriate compensation to the victim.[229]

The notion of "restoring the moral equilibrium" is highly problematic because it presupposes that (a) there was a moral equilibrium before the tort occurred; and (b) that it is capable of being restored.[230] For current purposes, however, we can pass over such metaphysics and focus on a more practical—and, indeed, fundamental—problem. For it is hardly ever the case that the actual tortfeasor meets the cost of any compensation awarded to the victim.[231] Instead, it is typically either the tortfeasor's employer or—in the vast majority of cases—a liability insurer who pays the compensation. The direct tortfeasor very seldom does anything at all to restore any "moral equilibrium."[232]

Corrective justice simply cannot account for the doctrine of vicarious liability, according to which one person—typically an employer—is made liable for a tort committed by another.[233] This flaw in application exposes something fundamentally wrong with the theory: it focuses exclusively on the relationship between "sufferer and doer"[234]: victim and direct tortfeasor. As a result, as Professor Ernest Weinrib, one of its leading proponents, has admitted, corrective justice can account for vicarious liability "only if the employer can, in some sense, be regarded as a doer of the harm."[235] Weinrib has argued that this is precisely how we should conceive of a tort when committed by an employee within the course of their employment because, in his view, "the law constructs a more inclusive legal persona, the-employer-acting-through-the-employee, to whom responsibility can be ascribed."[236]

227. *See, e.g.*, ERNEST J. WEINRIB, CORRECTIVE JUSTICE 37, 44 (2012).

228. ARISTOTLE, NICOMACHEAN ETHICS, BOOK V 121 (M. Ostwald trans., 1962).

229. William H. Pedrick, *Does Tort Law Have a Future?*, 39 OHIO STATE L.J. 782, 786 (1978).

230. ARISTOTLE, *supra* note 228, at 121.

231. Pedrick, *supra* note 229, at 786.

232. ARISTOTLE, *supra* note 228, at 121.

233. ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 186 (1995).

234. *Id.*

235. *Id.*

236. *Id.* at 187.

But this is just fanciful fiction. A corporate employer cannot in any sense inspect vehicles,[237] weigh beans,[238] write reports[239]—or, indeed, push and pull passengers onto departing trains.[240] So this argument falls at the first hurdle. As Professor Catharine Wells once said:

> Ultimately, the problem with a formal account of corrective justice is that it does not conform to the practical realities of legal arrangements. The law must be reflexive and responsible to the needs of human life, and thus its substance cannot be reduced to the inflexible requirements of an a priori moral system.[241]

As Wells also said, it is clearly better to locate analysis of the law "in a non-fictional world and address[] it in terms that are both practical and real."[242] After all, "we do not believe in fairy tales anymore."[243] Once we address reality, it is apparent that corrective justice fails for another reason too. For if it really were the employer performing the act, then the plaintiff should be able to sue *only* the employer. But that is not how tort law works at all. In fact, the plaintiff can sue *both* the employer (as vicariously liable) *and* the employee (as directly liable).[244] Once again, therefore, corrective justice simply fails to capture the real world of the law of torts. As Weinrib has put it, corrective justice is "bipolar"[245]—focused on just the two parties of "doer and sufferer"[246]—when what is needed is a multi-relational approach.

2. Civil Recourse Theory

Recognizing some of the deficiencies in corrective justice theory, Zipursky developed a modified form of it that he calls "civil recourse theory."[247] Whereas corrective justice theory holds that a tort immediately puts the tortfeasor under an obligation to make up for such wrongdoing, civil recourse theory sees a tort as generating a right for the

237. *See* MacPherson v. Buick Motor Co., 111 N.E. 1050, 1055 (N.Y. 1916).
238. *See* Glanzer v. Shepard, 135 N.E. 275, 275 (N.Y. 1922).
239. *See* Ultramares Corp. v. Touche, 174 N.E. 441, 450 (N.Y. 1931).
240. *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99 (N.Y. 1928).
241. Catharine P. Wells, *Corrective Justice and Corporate Tort Liability*, 69 S. CAL. L. REV. 1769, 1776 (1996).
242. *Id.* at 1780.
243. Lord Reid, *The Judge as Lawmaker*, 12 J. SOC. PUB. TCHRS. L. 22, 22 (1972).
244. While suing the employee as well as the employer is not particularly common, it certainly does happen. *See, e.g.*, National Union Fire Ins. v. Crocker, 246 S.W.3d 603, 604 (Tex. 2008).
245. Weinrib, *supra* note 225, at 561.
246. *Id.* at 562.
247. Benjamin Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 734-37 (2003).

victim to seek redress through the courts.[248] This improves upon corrective justice theory in that it explains not only that a plaintiff is able to seek several remedies, and not just compensation to restore the *status quo ante*, but that they will be unable to obtain any remedy if they are unsuccessful in a civil suit (or simply fail to bring such an action at all).[249]

But there is no reason to adopt civil recourse theory to be able to account for those features. Indeed, it may be said that the theory raises more questions than it answers, for it provides no criteria for deciding which remedies may be pursued by a plaintiff (nor in what circumstances). It just paints a picture in which a successful plaintiff is able to inflict pain and suffering on a defendant, as if the law is prepared to endorse almost any such conduct. That is, of course, very far from the truth.[250]

The problem is that civil recourse theory remains just as trapped within the confines of the bipolar relationship between "sufferer and doer" as corrective justice theory. Indeed, it seems to take for granted that it is that relationship—and *only* that relationship—that matters. So it focuses on the legal process on which a plaintiff might embark, but has nothing to offer in terms of explaining who either the plaintiff(s) or defendant(s) might be. A truly relational approach is not so blinkered.

3. Relational Torts and Relational Contracts

At around the same time that *Ultramares* was decided, Leon Green had the germ of an idea of what was required.[251] He was keen for torts scholars to focus on—note the plurals throughout—"interests in relations with other persons."[252] By 1968, he had so much material that he and his associates could even compile a book of cases on torts whose contents were devoted solely to relational interests.[253] In terms somewhat reminiscent of the concept of organic solidarity coined by the founder of sociology, Emile Durkheim,[254] Green was adamant that: "[A]s the social order becomes more and more dependent on the *group* as the core of its existence, the importance of relations will increase and courts . . . will

248. *Id.* at 733-34.

249. *Id.* at 748-51.

250. I have previously outlined a sound taxonomy of remedies that explains precisely when every remedy known to the civil law—and not just to the law of torts—is, or is not, available. *See* Tim Kaye, *A Sound Taxonomy of Remedies*, 36 QUINNIPIAC L. REV. 79, 112-13 (2018).

251. LEON GREEN, THE JUDICIAL PROCESS IN TORTS CASES (1931).

252. Green, *supra* note 13, at 462.

253. GREEN ET AL., *supra* note 28.

254. EMILE DURKHEIM, THE DIVISION OF LABOUR IN SOCIETY 111-13 (W. D. Halls trans. 1997).

find their efforts more and more devoted to the adjustment of relational conflicts."[255]

By "relational conflicts," Green was certainly not taking the narrow, bipolar approach of the relationship between "sufferer and doer."[256] On the contrary, he remarked that, "in hurts to relational interests, three parties must always be involved."[257] In other words, relational conflicts involve someone else in addition to the primary victim and direct tortfeasor, whether that third party be a vicariously liable defendant or a secondary victim.[258] Indeed, it is perfectly possible for more than three parties to be involved.

While Green's calls seem thus far to have gone unheeded within the field of torts, Professor Stewart Macaulay later began to explore similar themes within the field of contracts. He pointed out that there are many "non-contractual" elements to a business relationship that fall outside of the traditional purview of a contract.[259] As I have said before, these relations may be divided into three types[260]:

- relations between the parties that go beyond the scope of the instant, discrete contract;
- relations between contracting parties and third parties who will be affected by the formation and performance (or lack thereof) of the instant contract; and
- relations between the parties and an institution of the state.[261]

The clear theme underlying each of these types of relationality is that, whether they include additional terms or additional parties, they go beyond the terms of the contract at hand between the named parties because "*every transaction is embedded in complex relations*."[262] Relational contract theory is thus at pains to include many relationships outside the immediate, discrete contract, for even an apparently discrete transaction has some relational aspects[263]:

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255. GREEN ET AL., *supra* note 28.

256. *Id.*

257. Green, *supra* note 13, at 462.

258. *See id*.

259. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55, 58-60 (1963).

260. Tim Kaye, *Torts as Relational Contracts*, *in* SHAKING THE WORLD GENTLY: A WEBFESTSCHRIFT IN HONOR OF PROFESSOR ROBERT DALE BICKEL 273-74 (Tim Kaye ed., 2013).

261. *See* Juliet P. Kostritsky, *Judicial Incorporation of Trade Usages: A Functional Solution to the Opportunism Problem*, 39 CONN. L. REV. 451, 485-86 (2006).

262. Ian R. Macneil, *Reflections on Relational Contract Theory after a Neo-classical Seminar*, *in* IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL AND NETWORK CONTRACTS 207, 208 (David Campbell et al. eds., 2003) (emphasis in original).

263. Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 856-57 (1978).

> Many if not most contracts are heavily relational and intertwined, and not discrete at all. People often deal with each other over long periods of time, and when they do their present dealings are intertwined with their previous actions, and their current understanding has many open-ended terms and tag ends.[264]

Yet what Green had said of the law of torts in 1934 continued to be true decades later: "The value of the relational interest in dealing with tort cases has not been generally recognized. It has been in large measure ignored . . . ."[265] But worse was to come. When, at last, some scholars purported to take up the relational baton in the field of torts, they were advocates of corrective justice theory.[266] So what claimed to be "relational" tort theory was anything but. Instead, it focused on the discrete relationship between "sufferer and doer" and excluded all others.[267] In this, ironically, it mirrored the traditional scholarship on contract law from which relational contract law scholars had been so keen to move away. So when self-proclaimed relational torts theory did appear, it was the very antithesis of what Green had advocated for decades earlier. It is past time to get relational tort law theory on the same—multi-relational—track that relational contract theory has been on for decades.

Such a theory must not only explain past cases, but also provide practical guidance for the future. The objective is to provide judges, litigants, entrepreneurs, corporations, and attorneys with a tool that replaces the current "inconsistent, unfocused, and often nonsensical"[268] state of duty law with something clear that is easily applied. This also means that the theory should provide clear criteria against which it is possible to ascertain whether a case has been correctly decided, and so give appellate judges a meaningful basis on which to supervise the trial courts within their jurisdiction.

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264. Peter Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1 ANN. SURV. AM. L. 139, 156 (1988) (discussing Ian R. Macneil, *Restatement (Second) of Contracts and Presentiation*, 60 VA. L. REV. 589 (1974)).

265. Green, *supra* note 13, at 460.

266. *See, e.g.*, Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV., 403, 403-21 (1992); Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 FORDHAM L. REV. 1811, 1820-21 (2004).

267. WEINRIB, *supra* note 7, at 186.

268. *See* Cardi, *supra* note 20, at 1875.

V. THE IDENTITY CRITERION

A. Formation Phase

As we have already established, the role of duty of care in negligence is analogous to that of privity in contracts.[269] Its purpose is to identify and delimit the number of parties who may sue or be sued.[270] Because of the high stakes involved if the answer to this question is too unpredictable, Part II also established that duty must be a question of law for the court.[271]

But duty of care in negligence is not just analogous to privity in contracts; Cardozo actually modeled duty on privity.[272] Thus we saw in Part III that Cardozo's method of determining whether a duty exists turns on (a) whether the parties had a relevant relationship with each other at the time of the defendant's conduct;[273] and (b) whether that relationship was qualitatively different from any relationship that the defendant might have had with the general public.[274]

As to the first point, Cardozo took the view that the essential quality of privity of contract that should be adopted by duty of care in negligence is the ability of each party to be able to identify the other parties to the relationship.[275] In each of *Moch*, *Glanzer*, *Palsgraf*, and *Ultramares*, the plaintiff would clearly have been able to identify the defendant. So Cardozo held in each case that the existence (or lack thereof) of a relevant relationship centered on the question of whether the defendant was in a position to be able to identify the plaintiff at the time of the alleged tort. In one respect, however, these holdings tend to obscure a fundamental aspect of identity-based relational theory. Whether the plaintiff could have identified the defendant is actually irrelevant.

Because they address different aspects of human behavior, the laws of contracts and torts were not designed with precisely matching characteristics. In particular, as I have explained elsewhere, the law of contracts has two phases, whereas the law of torts only has one.[276] Each

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269. *See supra* Part II.

270. *See supra* Part III.

271. *See supra* Part II.

272. *See* Glanzer v. Shepard, 135 N.E. 275, 276 (N.Y. 1922); Ultramares Corp. v. Touche, 174 N.E. 441, 444-46 (N.Y. 1931).

273. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 101 (N.Y. 1928).

274. *Glanzer*, 135 N.E. at 276; H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 897 (N.Y. 1928).

275. *Ultramares Corp.*, 174 N.E. at 446.

276. Kaye, *supra* note 260, at 293-94.

has a performance phase, during which the tort or breach of contract occurs. But it is only contract law that boasts a preceding "formation phase," during which the terms of the contract are established (whether by means of offer, acceptance, and consideration, or promissory estoppel).[277] It is during the formation phase that privity of contract is, therefore, established.

The law of torts, by contrast, has no equivalent to the contractual formation phase. This makes torts inherently asymmetrical. Except in cases of comparative fault (where, in all but five United States jurisdictions,[278] fault is apportioned among the actors in proportion to their respective degrees of culpability),[279] only the defendant has the information necessary for full decision-making autonomy about the relationship.[280] Only tortfeasors—whether direct or vicarious—have the opportunity to consider the risks that their conduct might bring about. Potential victims typically have no idea of their perilous position at the hands of the defendant, and so do not have the same capacity to evaluate their options.

Two consequences follow from this asymmetry. First, in the absence of a formation phase, the determination of whether or not a duty exists for the purposes of the tort of negligence can be made only at the moment of performance (that is, the commission of the tort). Second, because such performance refers to the conduct of the defendant, the defendant must have been able to identify the plaintiff at the time of the tort. But the converse need not be true. Because plaintiffs do not have full decision-making autonomy about the commission of the tort, they do not need to have been able to identify the defendant in order to be owed a duty of care for the purposes of the law of negligence.

B. Third Party Contracts

In the absence of a formation phase within the law of negligence, Cardozo effectively co-opted the formation phase of the law of contracts as a sort of formation phase for the law of negligence, too.[281] *Glanzer v. Shepard* is a clear example of this approach in action. The contract between Bech, the seller of beans, and Shepard, a public weigher of

277. *Id.*

278. Alabama, Maryland, North Carolina, Virginia, and the District of Columbia.

279. Li v. Yellow Cab Co., 532 P.2d 1226, 1235 (Cal. 1975).

280. It might be argued that assumption of risk is another instance where the plaintiff retains autonomy of decision-making. But assumption of risk is not a true affirmative defense; it would be irrational to assume a risk of someone else's negligence. Indeed, it is really just a synonym for a claim of "no duty" or "no breach" and, in practice, is typically pled as such.

281. Kaye, *supra* note 260, at 296-99.

beans, required that Shepard send to the buyer, Glanzer, certified copies of the weight sheets for the beans weighed.[282] Glanzer was not privy to the contract between Shepard and Bech.[283] Nor was it a true third-party beneficiary of the contract, because it received neither money nor free beans or services from the contract; the weight sheets were simply proof of the basis on which payment was calculated. So it could not seek a remedy within the law of contracts. However, the contractual formation phase involving Bech and Shepard also generated a relationship between Shepard and Glanzer because it informed Shepard of the buyer's identity.[284] Although this was not a relationship that the law would typically consider to be contractual (because Glanzer proffered no consideration), it meant that Shepard was aware of who (in addition to Bech) would be relying on its expertise in weighing beans.

In *H.R. Moch Co. v. Rensselaer Water Co.*, by contrast, the city's contract with Rensselaer Water did not specify the identity of those to whom Rensselaer was expected to supply water.[285] Instead, it simply imposed an obligation to supply the public generally.[286] It might still be said that there was some sort of relationship between Rensselaer and Moch, but it was no different from the relationship that Rensselaer had with any other city inhabitant.[287] There was nothing in the formation phase of the contract between Rensselaer and the city that could be said to have generated a relationship between Rensselaer and Moch that might have marked it out as "special": that is, qualitatively different from any relationship with the general public.[288] That would have required that the contract between Rensselaer and the city identify Moch expressly as an entity that would be reliant on Rensselaer. Without such identification, there could be no special relationship between Rensselaer and Moch. And, without such a relationship, it could not be said that Rensselaer owed Moch a duty of care for the purposes of the law of negligence.

Moch demonstrates that the options available to a court as a matter of first impression in such a case would appear to be either (a) to recognize a duty owed to every city inhabitant, or (b) to deny that a duty is owed to anyone without such a special relationship. But the law cannot choose option (a) because that would risk the defendant's being

282. *See* Glanzer v. Shepard, 135 N.E. 275, 275 (N.Y. 1922).
283. *See id.* at 275-76.
284. *See id.*
285. 159 N.E. 896, 897 (N.Y. 1928).
286. *See id.* at 898.
287. *See id.* at 896-97.
288. *See id.* at 896-98.

held liable to an indeterminate class of potential plaintiffs. In reality, therefore, there is no choice. The law has to choose option (b).

The later case of *Strauss v. Belle Realty Co.*[289] provides an even clearer illustration of this point.[290] On the evening of July 13, 1977, millions of customers receiving electricity from Consolidated Edison Company of New York, Inc. ("Con Edison") suffered a power outage.[291] The next day, Julius Strauss, a tenant in an apartment building, found himself without running water because the building's pumps had no electricity.[292] He decided to descend the stairs in the dark in order to obtain some water but fell and sustained serious injuries.[293] He sought compensation from Con Edison on the grounds that the contract between the building's owners and Con Edison meant that Con Edison owed him a duty of care as a resident in the building.[294] The New York Court of Appeals did not agree.[295] As in *Moch*, there was no way for the defendant to be able to identify the plaintiff as a potential victim. It was Strauss's landlord who had the contract with Con Edison; from the latter's point of view, he was (like an indeterminate number of other people) just an unidentifiable tenant who happened to reside in New York. Con Edison therefore owed him no duty of care.[296]

The case of *J'Aire Corp. v. Gregory*,[297] however, involved an identifiable tenant, and so—as Cardozian, identity-based relational theory would predict—the outcome was inevitably different.[298] J'Aire operated a restaurant at an airport on premises leased from the County of Sonoma.[299] The County subsequently contracted with Gregory to renovate the HVAC system and install insulation on the premises, but the work was not completed within a reasonable period of time.[300] J'Aire claimed compensation for lost profits from Gregory on the grounds of the latter's negligence.[301] While J'Aire could not be said to have been a third-party beneficiary of the contract between Gregory and the County, it was obvious that J'Aire would be affected by any delay in its completion because Gregory's employees were actually working on the

289. 469 N.Y.S.2d 948 (App. Div. 1983).
290. *Id.* at 949-51.
291. *Id.* at 949.
292. *See id.*
293. *Id.*
294. *Id.* at 951.
295. *Id.*
296. *Id.* at 950.
297. 598 P.2d 60 (Cal. 1979).
298. *See id.* at 62-63.
299. *Id.* at 62.
300. *Id.*
301. *Id.*

very premises that J'Aire operated.[302] J'Aire was, accordingly, identifiable and thus owed a duty of care.[303]

C. Occam's Razor

J'Aire is an especially interesting case for our purposes because it highlights two other features that this Article has not yet addressed. First, it should be noted that the Supreme Court of California, which decided *J'Aire*, did not use the relational theory promoted here to do so. Instead, it listed six factors, including foreseeability, that had to be taken into account in order to decide the duty question.[304] That, of course, makes unpredictability endemic: the more factors to be considered in a decision, the more likely it is that judges will disagree, and the harder it becomes for attorneys to advise their clients on the likely outcome of prospective litigation. This makes assessing legal risk before the event exceptionally difficult.

What is being argued here, therefore, is that Cardozo-inspired, identity-based relational theory—which, as we saw in Part IV, has no room for foreseeability as part of the test for duty of care in negligence—provides a much clearer, simpler, and more predictable method of explaining the outcomes of such cases.[305] This, in turn, has the potential to significantly reduce the amount of litigation in cases of alleged negligence. If identity-based relational theory had been employed in the *J'Aire* litigation itself, the case would probably never have reached the courts at all; it certainly would not have made it all the way to the California Supreme Court.

In other words, Cardozo-inspired relational theory takes Occam's Razor to the analysis of duty of care in negligence. It cuts out all the unnecessary, confusing, and unpredictable elements. Yet, while finding the reasons given in many past cases to be inaccurate or somewhat off-point, it often confirms that the outcomes in those cases—at least at appellate level—have been correct.

D. Truncated Formation Phase

The second feature that *J'Aire* illustrates is what might be called the truncated formation phase of some contracts, and how that comes to be of significance for duty of care in negligence. While complex *executory* contracts (or *executory* contracts of high value) typically involve a

302. *Id.* at 65.
303. *Id.* at 62-63.
304. *Id.* at 63 (citing Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958)).
305. *See supra* Part IV.

protracted period of negotiation, many everyday immediately-*executed* contracts of lesser value involve virtually no negotiation at all. Buying a coffee at a coffee shop is a classic example: the store advertises what it has (or can make), and the customer simply orders and pays.

Such simple, discrete contracts do still have a formation phase (where the beverage is selected and paid for) which occurs before the performance phase, in which the coffee is made and handed over. But, unless payment is made by credit card, few details about the customer are ever known to the coffee shop.

Yet we would hardly say that the identity of the customer who pays by cash is unknown to the barista. The latter can normally still, for example, identify the customer when the coffee is ready. It is just that identity is determined in a different way from the type of situations envisioned in *Glanzer*, *Moch*, *Strauss*, or *Ultramares*. Acting on behalf of their employers, baristas obviously sell coffee to *someone*. So far as the law is concerned, therefore, they form a contract with the person in front of them. In such cases, identity is determined by the customer's physical attributes rather than by the customer's name. Indeed, while baristas often write a name on a cup of coffee to indicate for whom it has been prepared, this is so often misspelled that some customers resort to providing a simple "Starbucks name" instead—an alias that is easy for a barista to spell.[306]

All of that is trite contract law. One of the interesting features about *J'Aire* is that it effectively adopted an analogous approach to identity for the purposes of duty of care in negligence law. J'Aire was identifiable by Gregory not because the latter was expressly told that J'Aire operated the restaurant where Gregory was supposed to be working, but because Gregory knew that the restaurant would inevitably be affected if the renovations were not completed expeditiously—and that the restaurant was clearly being operated by *someone*.[307] So, despite the apparent lack of knowledge of certain attributes of identity of the restaurant operator (such as name), the restaurant's physical presence was enough to establish a duty.

Moreover, the relationship between contractor and concession-holder in *J'Aire* was "special"—just like that between barista and customer—in that it was qualitatively different from any relationship that the contractor might have had with the general public

306. *See* Svati Kirsten Narula, *What's Your Starbucks Name?*, THE ATLANTIC (Jan. 22, 2014), https://www.theatlantic.com/business/archive/2014/01/whats-your-starbucks-name/283163.

307. *J'Aire Corp.*, 598 P.2d at 62-63, 66 (stating that "liability for negligent conduct may only be imposed where there is a duty of care owed by the defendant to the plaintiff or to a class of which the plaintiff is a member").

(such as travelers using the airport). The contractor was making specific improvements to the premises of a specific person, just as a barista prepares a specific beverage for a specific person rather than the same infusion for everyone.

It should also be noted that this approach is entirely consistent with the role of duty outlined in Part II.[308] As we saw there, and as Cardozo memorably explained in *Ultramares*, the purpose of duty is to avoid the prospect of potential liability to an "indeterminate class" of victims.[309] If physical presence is used as the basis for determining identity within a special relationship, such a prospect is unlikely to pose much of a problem. Just as there is an intrinsic limit to the number of individuals who buy each cup of coffee, there is an intrinsic limit to the number who own a single airport restaurant concession.

The plaintiff Strauss in *Strauss* was not, of course, in such a situation. In fact, his position was different in two ways. First, Con Edison was not supplying electricity only to Strauss's landlord; on the contrary, it had millions of customers throughout New York.[310] While there might be an intrinsic limit to the number of tenants in an apartment building, there is no intrinsic limit to the number of people in a state. Second, Strauss did not have a "special" relationship with Con Edison: there was nothing qualitatively different about it to distinguish it from relationships that Con Edison had with anyone else who consumed its electricity.[311]

On the other hand, the physical presence method of determining identity does explain why Cardozo was prepared to find the existence of a duty in *Macpherson*, even though the names of those who could be sitting in the defective car were unknowable to Buick. Macpherson's very presence in a designated seat was enough.[312] It also explains the outcome in *Palsgraf*. While the guards pushed and pulled the package-carrying passenger onto the moving train, they (and their employer, the Railroad) would have owed a duty to those by the platform edge in the direction of travel.[313] The fact that the guards would not have known the names of those individuals would have been irrelevant; their very presence would have sufficed to make them

308. *See supra* Part II.

309. *See supra* Part II; *J'Aire Corp.*, 598 P.2d at 63-64, 66; Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931).

310. *See* Strauss v. Belle Realty Co., 469 N.Y.S.2d 948, 949 (App. Div. 1983).

311. *See id.* at 949-50.

312. MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916).

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

identifiable. But Mrs. Palsgraf was "at the other end of the platform."[314] She was, therefore, not present at the scene and was accordingly owed no duty of care.

As this shows, the physical presence approach yields much the same results as use of the familiar metaphor of the "zone of danger" often wrongly attributed to Cardozo—in fact, "the danger zone" was a phrase uttered by Judge Andrews.[315] Physical presence is essentially presence in that zone.

E. Physical Versus Economic Loss

As already noted, both *Macpherson* and *Ultramares* involved groups of plaintiffs who were delimited in number, but whose names were nevertheless unknown.[316] Cardozo was prepared to recognize a duty owed to a group of three such individuals in *Macpherson*, but he was not prepared to recognize a duty owed to thirty-two such individuals in *Ultramares*.

One explanation for the different treatment, already provided, is that duty of care is modeled on privity in contracts and that whereas four parties to a contract is quite typical, thirty-three is not. The trouble with that explanation, however, is that it is not particularly helpful as a criterion for future decisions. It suggests that there must be a cut-off point beyond which the number of potential plaintiffs is too high for the law to recognize them as being owed a duty of care, but it leaves open the precise number at which that point is reached. Whatever number is chosen, moreover, will necessarily be arbitrary.

The physical presence method of establishing a party's identity surely furnishes a much better explanation. While the plaintiff in *Macpherson* was clearly physically present in the vehicle at the time of the accident, there is nothing about an audit that requires the physical presence of anyone who relies on it. Transactions like audits are not carried out on the basis of a truncated formation period. They rely on a more thoughtful negotiation of details, such as price, timing, and the seniority and experience of those designated to carry out the work.

This should not, however, be taken as saying that identity-based relational theory means that auditors can never owe a duty of care to someone with whom they have no privity of contract. On the contrary, what it means is that the plaintiff's identity must have been established

314. *See Ultramares Corp.*, 174 N.E. at 445; *Strauss*, 469 N.Y.S.2d at 954; *MacPherson*, 111 N.E. at 1053 (N.Y. 1916); *Palsgraf*, 162 N.E. at 99, 1010.

315. *See Palsgraf*, 162 N.E. at 99; *see also id.* at 103 (Andrews, J., dissenting).

316. *See supra* Part III.D–E.

during a more protracted formation period during which the *name* of the potential victim(s) will have become known or knowable to the defendant.

The case of *White v. Guarente*[317] illustrates this point.[318] As the New York Court of Appeals decided, just over forty years after *Ultramares*, where an accountant is retained to "perform an audit and prepare the tax returns of Associates, known to be a limited partnership," the accountant also assumes a duty "for the benefit of those in th[at] fixed, definable and contemplated group."[319] The Court correctly distinguished *Ultramares* on the grounds that the latter case involved an "indeterminate class of persons who, presently or in the future, might deal . . . in reliance on the audit," so that its significance "is its holding that an accountant need not respond in negligence to those in the extensive and indeterminable investing public-at-large."[320] In *White* itself, by contrast:

> [T]he services of the accountant were not extended to a faceless or unresolved class of persons, but rather to a known group possessed of vested rights, marked by a definable limit . . . . The instant situation did not involve prospective limited partners, unknown at the time and who might be induced to join, but rather actual limited partners, fixed and determined.[321]

The Texas case of *McCamish v. F.E. Appling*[322] provides another example of how duty in the law of negligence may be established through a highly negotiated transaction.[323] Appling was the managing partner of Boca Chica, a joint venture formed to develop recreational property.[324] Boca Chica obtained a loan and line of credit from Victoria Savings Association ("VSA") in 1985 to finance a real estate project on the basis of an oral representation from VSA that it would later expand the line of credit, provided that Boca Chica's lot sales justified completing the development.[325] Despite the continued viability of the project, however, VSA subsequently decided not to extend the additional credit.[326] Boca Chica went bankrupt.[327] It sought to bring a lender

317. 372 N.E.2d 315 (N.Y. 1977).
318. *Id.* at 318-19; *see Ultramares Corp.*, 174 N.E. at 449-50; *MacPherson*, 111 N.E. at 1052.
319. *White*, 372 N.E.2d at 318-19.
320. *Id.* at 318.
321. *Id.*
322. 991 S.W.2d 787 (Tex. 1999).
323. *Id.* at 791.
324. *Id.* at 788.
325. *Id.*
326. *See id.*
327. *See id.*

liability claim against VSA but was concerned that if VSA were placed in receivership under the Federal Savings & Loan Insurance Corporation ("FSLIC"), then such a claim would be unenforceable because it was based on an oral representation.[328] Instead, it agreed to a settlement with VSA, but only after Appling insisted that VSA's lawyers sign the settlement to say that it met the terms of the relevant statute to make it enforceable against the FSLIC.[329] McCamish, Martin duly did so as VSA's attorneys. But the settlement did not meet the statutory requirements and so was not enforceable against the FSLIC.[330]

The identity-based relational theory that is being developed in this Article makes it clear that McCamish, Martin owed a duty to Appling, even though there was no attorney-client relationship between them. Appling's identity was not only well known to McCamish, Martin; the fact that one of the latter's attorneys signed the settlement agreement was due precisely to Appling's insistence upon it as a condition of agreeing to the settlement. The relationship between them had thus come about after a period of intense negotiation, whereas nothing equivalent had taken place in *Ultramares*.[331]

This highlights the fact that the truncated method of establishing identity by mere physical presence is available only in cases where the defendant's alleged negligence causes physical harm (whether to person or to property). It is not available as a method of establishing duty when the defendant's alleged negligence causes purely economic loss.[332] In such cases, a duty will be established only if the defendant was in a position, at the time of the act, to know the plaintiff's name. The reason for the distinction in treatment of physical harm compared to purely economic loss is simply that the sustaining of physical harm is typically limited to a much smaller group of victims than purely economic loss. The specter of potential liability to an indeterminate class is, therefore, much more likely to manifest itself in cases of purely economic loss, and so the law adopts a more restrictive test of duty in order to cope.

The West Virginia case of *Aikens v. Debow* provides an excellent example of this principle in action.[333] The plaintiff, Richard Aikens, operated a motel and restaurant known as the Martinsburg Econo-Lodge, which was most easily accessed via a bridge that passed over Interstate 81 ("I-81").[334] The defendant, Robert Debow, was driving a flatbed truck

328. *See id.* at 789.
329. *See id.*
330. *See id.* at 790.
331. *Compare id.* at 791, *with* Ultramares Corp. v. Touche, 174 N.E. 441, 442-43 (N.Y. 1931).
332. *See* Aikens v. Debow, 541 S.E. 2d 576, 589 (W. Va. 2000).
333. *Id.*
334. *See id.* at 579.

north on I-81, carrying a trackhoe that was too high to pass under the overpass, and so caused an accident which did substantial damage to the bridge.[335] It was closed for nineteen days to make the necessary repairs.

There can be no doubt that Debow owed a duty to the owner of the bridge.[336] Because the harm sustained was physical, and the cause of that harm was a negligent act, mere physical presence of the plaintiff (analogous to what is acceptable for the purposes of the truncated formation phase in contracts) is enough to establish duty.[337] The bridge could hardly have been more physically present, and it must obviously have been owned by someone, so that person was clearly owed a duty of care.

But Aikens suffered no physical harm.[338] In order to be able to establish a duty of care, therefore, he needed to show that, at the time of the accident, Debow was in a position to be able to identify Aikens as a potential victim of his own negligent driving. But that was clearly not the case. Aikens's claim—seeking compensation for the decreased revenues he experienced due to closure of the overpass—was therefore denied on the grounds that he was not owed a duty of care.[339]

The point is that it would be extremely unlikely for a motorist or truck driver to cause physical damage to more than one bridge in any given incident, and so the more relaxed method of establishing identity through physical presence is acceptable as a means of establishing duty. But the number of businesses, who might suffer a loss of profits as their businesses receive less passing trade as a result of damage to a bridge, is clearly indeterminate. Indeed, hotels are often grouped together in specific locations, so that it might well be said to be entirely foreseeable that other hotels would have suffered in similar fashion to Aikens's Econo-Lodge. And, where there are hotels, it is also foreseeable that there will be restaurants, who are likely also to have been affected. Maybe gas stations too, and places selling coffee, etc. Yet, despite such foreseeability, the law refuses to recognize a duty owed in such cases. That is because duty is, as has already been established, not a matter of foreseeability at all.[340] In cases of purely economic loss, proof of duty depends on the plaintiff managing to establish that their identity was known (or was capable of being known) by the defendant at the time of the latter's tort.[341]

335. *See id.*
336. *See id.* at 586.
337. *Id.* at 583-85, 589.
338. *See id.*
339. *Id.* at 580-82, 589-90.
340. *Id.* at 582.
341. *Id.* at 582-85, 589-90.

F. Third-Party Relationships

Cardozo could, of course, decide only those cases that came before him. While *Moch*, *Glanzer*, and *Ultramares* were all cases in which the defendant was in privity of contract with a third party, there seems little reason to believe that Cardozo would have insisted that any relevant relationship with a third party had to be contractual before it could be considered as the potential source of a duty of care in negligence. On the contrary, there is every reason to think that a status-based relationship with a third party could also be a potential source of a duty of care.[342]

Tarasoff v. Regents of University of California[343] is a good example.[344] Prosenjit Poddar was a voluntary outpatient of Dr. Lawrence Moore, a psychologist employed by the Cowell Memorial Hospital at the University of California at Berkeley.[345] During therapy, "Poddar informed Moore . . . that he was going to kill an unnamed girl, readily identifiable as Tatiana [Tarasoff], when she returned home from spending the summer in Brazil."[346] He subsequently carried out that murder. Tatiana's parents sued Moore and the University for negligently failing to warn Tatiana of the risk to her safety, and the Supreme Court of California held that both defendants had owed Tatiana a duty of care.[347]

As the Court found that Tatiana was "readily identifiable," Cardozian relational theory would dictate that the defendants would have owed her a duty of care if Poddar, Moore, and the University had been in a contractual relationship. It is difficult to believe, however, that Cardozo would have advocated for the contrary conclusion if there had been no such contract. The fact that Poddar was Moore's patient clearly established a relationship of significance. The substance of that relationship was not dependent on whether payment was made for Moore's services.[348]

The Ohio case of *Mussivand v. David*[349] takes the significance of status-based relationships one step further.[350] For these relationships need never be the sort that might sometimes have a commercial basis, and yet they may still provide the basis for establishing a duty of care in

342. *See* Manfred Rehbinder, *Status, Contract, and the Welfare State*, 23 STAN. L. REV. 941, 941-43, 945, 951-54 (1971).
343. 551 P.2d 334 (Cal. 1976).
344. *See id.* at 340, 342-33.
345. *Id.* at 339.
346. *Id.* at 339, 341.
347. *Id.* at 340-46, 348.
348. *Id.* at 342-44.
349. 544 N.E.2d 265 (Ohio 1989).
350. *See id.* at 269-73.

negligence.[351] In *Mussivand* the defendant had an affair with the plaintiff's wife, but failed to inform her that he had a sexually-transmitted infection ("STI"). She then passed the STI onto her husband, who sued the defendant.[352] The Supreme Court of Ohio confirmed the current, chaotic state of the doctrine of duty by opining that: "There is no formula for ascertaining whether a duty exists,"[353] and that "[a]ny number of considerations may justify the imposition of duty in particular circumstances."[354] Thus a case that should never have even made it to trial found its way to the state Supreme Court.

Identity-based relational theory makes the determination of whether or not a duty exists so much simpler. Because the defendant knew that his lover was married, and because the law permits a person to have only one spouse, the defendant knew the identity of his lover's husband. The husband was therefore clearly owed a duty of care. As the Court made clear, however, the defendant would not have owed such a duty to anyone else with whom his lover might have been sleeping.[355] This is because (unless his lover had expressly told him who they were) he would have had no way of identifying those other men. Nor, for that matter, would he have owed a duty to the husband if he had had no reason to believe that his lover was married.

It might be objected that this analysis fails to address a situation where the married couple do not share a last name. But that is highly analogous to the case of the Starbucks customer who either uses an alias "Starbucks name" or whose name is butchered by a barista writing it on a cup. So far as the doctrine of duty is concerned, the issue is not whether the name used is legally accurate. On the contrary, the relevant question is to whom the name refers.[356] Thus, whether they like it or not, some people are regularly known as "so-and-so's husband/wife/spouse." Since he married Senator Kamala Harris, for example, Douglas Emhoff has no doubt often been referred to as "Mr. Kamala Harris." Indeed, it seems likely that many people who know that Senator (now Vice President) Harris is married are unaware of her husband's official name. So far as the doctrine of duty of care in negligence is concerned, that lack of detail is immaterial: "Mr. Kamala Harris" is as much Douglas Emhoff's name as Douglas Emhoff.

351. *Id.*
352. *Id.* at 268, 272.
353. *Id.* at 270.
354. *Id.*
355. *Id.* at 272.
356. *Id.*

G. Relationships Between Plaintiff and Defendant

Relationships between the defendant and a third party are not the only kinds of relationships capable of generating a duty of care for the purposes of the law of negligence. On the contrary, relationships between defendant and plaintiff themselves are surely even better placed to create such duties, because what is then entailed is simply that the formation phase in a contractual relationship between the parties leads to a performance phase in the law of torts.[357]

A contract between a patient and a physician provides a classic example. For it is hard to see how the physician could ever be in breach of it. Failure to act with appropriate professional care and skill will not amount to a breach of contract, but to professional malpractice or negligence in torts. So while the relationship utilizes the formation formalities of a contract, any breach takes us into the realm of the tort of negligence. Much the same is true of the relationship between a client and an attorney. Indeed, if the client is seeking to bring an action for personal injury and the attorney is working on a contingency fee arrangement, then this truly is a contract which can never be breached. Any failure by the attorney to uphold the terms of the contract will again be classed not as a breach of contract, but as malpractice implicating the tort of negligence.[358]

In such circumstances, it would be bizarre to deny the existence of a duty for the purposes of the law of negligence. The relationship between the parties is clearly "special," in the sense that it is qualitatively different from any relationship the defendant has with the public at large, and there is no chance of the defendant being liable to an "indeterminate class." Moreover, any failure to recognize such a duty would leave the plaintiff entirely without a remedy because, as we have already noted, they would be unable to sustain a claim for breach of contract.

Identity-based relational theory recognizes a duty being owed by a professional person to a patient or client because it is self-evident that the identity of the latter is known to the former at the relevant time. And, as cases like *Beul v. ASSE Intern., Inc.*[359] demonstrate, such relationships need not amount to contracts to be the source of such duties.[360] In *Beul*, a 16-year-old German girl by the name of Kristin, who wanted to spend a year in the United States, was placed with the Bruce family of Fort

357. Kaye, *supra* note 260, at 293.
358. *Id.* at 296-97.
359. 233 F.3d 441 (7th Cir. 2000).
360. *Id.* at 445.

Atkinson, Wisconsin, by an agency that operated student exchange programs.[361] Under federal regulations, the agency was under an obligation to "monitor the progress and welfare of the exchange visit"[362] while, according to the rules of the trade association of which it was a member, the agency was required to "maintain thorough, accurate, and continual communication with host families and school authorities."[363] The Seventh Circuit held that this meant that "the agency . . . was standing in for [Kristin's] parents."[364] Effectively, it was *in loco parentis*, a status-based relationship if ever there was one, and certainly not a relationship that exists only when a commercial contract has been agreed.[365]

Over a period of more than six months, Mr. Bruce developed an unhealthy obsession with Kristin.[366] He repeatedly raped her.[367] During this period, the agency representative made little or no attempt to contact Kristin or the Bruce family, and the alarm was raised only when Mrs. Bruce discovered love letters.[368] After his abuse was discovered, Mr. Bruce killed himself.[369] Kristin was left severely traumatized. The Seventh Circuit was in no doubt that the agency owed Kristen a duty of care in negligence.[370] The relationship that it had with her *in loco parentis* was clearly enough to generate such a duty, and it obviously knew Kristin's name since it had placed her with the Bruce family in the first place.

H. Public Relationships

So far as the potential generation of a duty of care in negligence is concerned, identity-based rational theory holds that relationships between organs of government and members of the public work in much the same way as relationships of the types already considered.[371] So if there is nothing to mark the relationship out as "special"—different from the relationship between the government body and the public at large—then it will not be capable of generating a duty of care.[372] What makes a

361. *Id.* at 444.
362. *Id.* at 445.
363. *Id.*
364. *Id.* at 451.
365. *Id.*
366. *See id.* at 445-46.
367. *Id.* at 446.
368. *Id.*
369. *Id.*
370. *Id.* at 448.
371. *See infra* notes 373-91 and accompanying text.
372. *See infra* notes 373-91 and accompanying text.

relationship special is where the government had the ability, at the time of the accident, to know the victim's identity.

The case of *Solomon v. City of New York*[373] followed precisely this reasoning.[374] The city had numerous park and playground facilities, and had promulgated regulations which prohibited bicycle riding within designated areas.[375] Solomon was injured within one such area and sought compensation from the city for failing to enforce the regulations.[376] As a unanimous New York Court of Appeals found, however, there was no "special" relationship between the city and the plaintiff.[377] There was nothing specifically to identify Solomon as someone to whose care the city should pay particular attention.[378] Solomon was simply a member of the general public and thus in the same position as everyone else.[379] Accordingly, no duty of care had been established, and the lawsuit had been properly dismissed.[380]

The Florida case of *Kaisner v. Kolb*,[381] on the other hand, provides an example of how such a duty may arise.[382] Kaisner and his family were traveling in a pickup truck when they were stopped for an expired inspection sticker.[383] Mr. Kaisner left the pickup truck and walked towards the police cruiser.[384] One of the officers approached Kaisner and told him not to come any closer.[385] Then the officer returned to the cruiser.[386] Some minutes passed when the police cruiser was hit from behind by another vehicle, and was propelled forward, striking Kaisner.[387] The Supreme Court of Florida held that the police had owed him a duty of care.[388]

Clearly, the officers' relationship with Kaisner at the time of the accident was very different from any relationship that they had with other members of the public.[389] It was also a relevant relationship for the

373. 489 N.E.2d 1294 (N.Y. 1985).
374. *Id.* at 1295.
375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.*
381. 543 So. 2d 732, 734 (Fla. 1989).
382. *Id.* at 734.
383. *Id.* at 733.
384. *Id.*
385. *Id.*
386. *Id.*
387. *Id.*
388. *Id.* at 734.
389. *Id.* at 733-34.

purposes of duty because it limited his freedom of movement.[390] He was also right there in the officers' presence.[391] As we saw earlier, that is sufficient to establish identity when the victim has suffered physical injury.[392]

An Iowa case further underlines the identity-based approach, but also perhaps suggests that Cardozo's own application of it in *Palsgraf* might not have been entirely accurate. In *Raas v. State*,[393] the court held that the state owed a duty to an individual who was attacked in the parking lot by two inmates escaping from a correctional facility.[394] However, the state did not owe a duty to another individual who was attacked while fishing on a river.[395] The former was clearly in the defendants' presence because he was on their premises; the latter was not.

This approach makes it simple to tell when a plaintiff is in the defendant's presence, and thus eliminates the need for a highly fact-specific inquiry, so it is particularly appropriate as the basis for deciding a question of law, like duty. It is also consistent with traditional notions of premises liability; the physical boundaries of the premises become the boundaries for the purposes of duty.[396] But it also clearly suggests that Cardozo should have held that Mrs. Palsgraf was owed a duty of care.

It is, of course, true that a railroad station is rather different from a parking lot, because the former is a highly segmented space divided by tracks on which passengers are forbidden to step foot. But Mrs. Palsgraf was not just on the Railroad's premises; she was on the very same platform as the one where the hurrying passenger dropped his package.[397] It seems unlikely that a court in 2021, which found itself facing facts similar to those in *Palsgraf*, would deny that the modern Mrs. Palsgraf would have been owed a duty of care. It might be, in other words, that Cardozo was right about the significance of identity-based relational theory, but that he was wrong about how to apply it in *Palsgraf* itself.

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390. *Id.*

391. *Id.*

392. It seems likely that, after conducting various checks during the stop, the officers would have discovered Kaisner's name by the time of the impact. But, because he suffered physical injury, that was not necessary for the purposes of establishing a duty of care.

393. 729 N.W.2d 444, 446, 449-50 (Iowa 2007).

394. *Id.* at 446, 449-50.

395. *Id.* at 450.

396. *See supra* notes 297-303 and accompanying text.

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

I. Omissions

Like non-contractual relationships, omissions are another type of case that Cardozo did not get to address. The issue at stake in such cases is whether and when a defendant owes a duty of care to the victim for the purposes of the law of negligence, even though the defendant neither performed an act nor uttered a statement.[398] But it turns out that, as the California case of *People v. Heitzman* illustrates, identity-based relational theory is so straightforward and versatile that it can be applied to omissions in much the same way as to acts and statements.[399]

Heitzman revolved around the death of 76-year-old Robert Heitzman, who was both paralyzed down the left side of his body and doubly incontinent.[400] His death was caused by septic shock due to sores caused by malnutrition, dehydration, and neglect.[401] He had been living in the home of his adult son, Richard Sr., together with another son, Jerry (who was the primary caregiver), and Richard's three sons.[402] His adult daughter, Susan, had lived there too until a year before Robert's death, and had continued to visit the house on a regular basis.[403] She had noticed that, since moving out, the house had become filthy, and she had encouraged Jerry to talk to a social worker and take their father to see a doctor.[404]

Jerry and Richard Sr. were charged with involuntary manslaughter, and with willfully causing their father to suffer the infliction of unjustifiable pain and mental suffering;[405] Susan was charged with willfully permitting that suffering.[406] As the California Supreme Court noted, "It was thus her *failure to act, i.e.*, her failure to prevent the infliction of abuse on her father, that created the potential for her criminal liability under the statute."[407] This meant that "she must first be under an existing legal duty to take positive action."[408]

Writing on behalf of the majority, and in language reminiscent of that employed by Cardozo in both *Palsgraf* and *Ultramares*, Chief Justice Lucas rejected the prosecution's contention that the Penal Code

398. *See* People v. Heitzman, 886 P.2d 1229, 1233 (Cal. 1994).

399. *See id.* at 1245. I am grateful to my colleague, Professor Rebecca Morgan, for bringing this case to my attention.

400. *See id.* at 1231-32.

401. *Id.* at 1232.

402. *See id.* at 1231-32.

403. *See id.* at 1232.

404. *Id.*

405. *Id.* Such charges were contrary to Section 368(a) of the California Penal Code.

406. *Id.*

407. *Id.* at 1233 (emphasis in original).

408. *Id.*

imposed a blanket duty on everyone to prevent the abuse of any elder.[409] That would be to cast too "wide [a] net."[410] In other words, *Heitzman* raised a question that is, in many ways, the mirror-image of that at stake in *Palsgraf* and *Ultramares*. In the latter two cases, the question was whether there was an indeterminate class of plaintiffs. In *Heitzman*, the question was whether there was an indeterminate class of *defendants*.

Because the statute under which the charge against Susan was brought did not itself specify when such a duty would arise, "liability for [her] failure to act must be premised on the existence of a duty found elsewhere."[411] The court fell back on the common law of negligence which, as Lucas correctly noted, meant that the existence of a duty depended on establishing "some legal or special relationship."[412]

As we have already seen, such relationships may take more than one form.[413] One of relevance in *Heitzman* was that between defendant and victim. That suggested two possibilities: one with a statutory source, and one derived from common law. The statutory possibility would have meant "equat[ing] the statutory duty of financial support with the duty to prevent physical harm triggering felony criminal liability,"[414] for which Lucas could "discern no reasonable basis."[415] As for the common law, while "parents have long had a duty to care for and protect their minor, there is no corresponding common law obligation on adult children to protect and care for their aging parents."[416]

The other potentially relevant relationship involved that between the defendant and a third party. That would have meant a "relationship between the defendant and the person inflicting pain or suffering on the elder . . . such that the defendant [was] under [a] duty to supervise and control that individual's conduct."[417] Lucas himself observed that such a "class of potential offenders may indeed be relatively small,"[418] and so would avoid the indeterminacy problem.

Because Susan's relationship with her brothers was nothing other than a regular sibling relationship—which certainly does not imply an obligation on one to control another—she could not be said to have been

409. *Id.* at 1235.
410. *Id.*
411. *Id.* at 1234.
412. *Id.* at 1236.
413. *See supra* Part V (describing various types of relationships, such as third-party relationships, relationships between plaintiffs and defendants, public relationships, and relationships based on omissions).
414. *Heitzman*, 886 P.2d at 1243.
415. *Id.*
416. *Id.* at 1243.
417. *Id.*
418. *Id.* at 1244.

under a legal duty to control the conduct of either of her brothers. Accordingly, the charges against her were dismissed,[419] though whether *Heitzman* was decided correctly according to California criminal law is not relevant for current purposes.[420] The point is that the analysis of duty in cases of allegedly negligent omissions was clearly correct.

J. Relationships at One Remove

1. Vicarious Liability

We have now seen how identity-based relational theory can easily determine whether a defendant owed a duty of care to a victim in cases caused by acts, statements, and omissions, irrespective of whether they lead to physical or purely economic loss. In each case, the approach requires proof that the defendant was in a position to know the victim's identity.[421] In all such cases, this will be established where the defendant was in a relevant relationship that made it possible to know the victim's name at the time of the tort.[422] In cases of physical harm, identity will also be established if the victim had been in the defendant's presence at the time of the tort.[423]

Eagle-eyed readers will, moreover, have noted that the various methods of establishing identity mirror the forms of relational contracts listed in Part IV.[424] In other words, identity-based relational negligence theory turns out to be remarkably analogous to relational contract theory. We have still to see, however, how it addresses the issue of vicarious liability. Yet cases like *Glanzer*, *Macpherson*, *Ultramares*, and even *Palsgraf* involved suits against a defendant who was allegedly vicariously liable for the acts of someone else.

But there is nothing surprising here. Vicarious liability always arises out of a special relationship between the direct tortfeasor and the vicarious party.[425] Typically this is an employer-employee relationship

419. *Id.* at 1245.

420. *See id.* This was the decision of a bare majority of 4–3. As Justice Baxter pointed out in his powerful dissent, it is by no means clear that the emphasis on the number of people likely to be affected by the statute is a relevant consideration in criminal law, for "*most* criminal statutes apply either expressly or by implication to all persons who commit the proscribed act." *Id.* at 1247 (emphasis in original).

421. *See supra* Part V.

422. *See supra* Part V.

423. *See* Kaisner v. Kolb, 543 So. 2d 732, 733 (Fla. 1989) (describing how the victim was clearly in the officer's presence and, thus, a special relationship could be easily found).

424. *See supra* Part IV.

425. "The question is merely this, whether the defendants, having delegated the performance of this work to agents of their own selection, are responsible for the manner in which the business of

or a relationship between a car owner and someone whom the owner allows to drive. This must also, naturally, be a *relevant* relationship, which has already been defined as being concerned with the type of interest that was ultimately harmed by the defendant's negligence.[426] This is why, for example, an employee must have been "acting in the course of his employment" in order to fix the employer with liability.[427] Acting "on a frolic of his own" would mean going outside the scope of that relationship and thus involving different interests.[428] It would then make no sense to hold that the employer nevertheless owed a duty of care to the victim in such circumstances.

But where, because of a relevant relationship, a potentially vicarious tortfeasor had the opportunity by the time of the tort to identify the victim (whether by name[429] or through the victim's physical presence),[430] then they too owe the victim a duty of care. As a consequence, the victim may then seek recovery from *both* the direct *and* the vicarious tortfeasor.[431]

2. Secondary Victims

The law's recognition of secondary (i.e., vicarious) defendants surely made it only a matter of time before the law would also be forced to face the possibility of secondary victims. Sometimes misleadingly referred to as "bystanders," these are individuals who suffer emotional distress because of physical injury sustained by the primary victim.[432] But whereas the law has been prepared to embrace vicarious liability quite readily, it has always been reluctant to treat secondary victims in anything like the same manner.[433] Green noted this reluctance nearly a century ago:

> It is clear that the courts in the denial of protection to the relational interest were influenced by the fear of imposing a double recovery.

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the agency was done. As to that the answer is not doubtful." Ultramares Corp. v. Touche, 174 N.E. 441, 450 (N.Y. 1931).

426. *Id.* at 448.

427. Philadelphia & Reading R. Co. v. Derby, 55 U.S. 468, 486 (1853).

428. Joel v. Morrison, 172 Eng. Rep. 1338 (1834).

429. *See, e.g.*, Glanzer v. Shepard, 135 N.E. 275, 276 (N.Y. 1922).

430. *See, e.g.*, MacPherson v. Buick Motor Co., 111 N.E. 1050, 1050-52 (N.Y. 1916).

431. *Id.* at 1052.

432. *See, e.g.*, Thing v. La Chusa, 771 P.2d 814, 815 (Cal. 1989); Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm: A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477 (1982); John L. Diamond, *Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477 (1984).

433. Green, *supra* note 13, at 473.

> Also, the lack of adequate legal theory doubtless blurred the problems presented for judgment. The courts erroneously placed emphasis upon the wrongful conduct of defendant rather than upon the two interests involved.[434]

As all United States jurisdictions now more-or-less recognize, however, there is no reason to perpetuate this error. It certainly cannot be justified by identity-based relational theory which, as we have just seen in the context of vicarious liability, has no trouble in principle with recognizing the significance of parties at one remove. In practice—and just as in every other instance—what the theory requires is that the plaintiff can establish that they were indeed identifiable by the defendant at the time of the tort, so that they were owed a duty of care.[435]

Ochoa v. Superior Court[436] provides the classic example, and also highlights why the identity-based relational approach should be adopted.[437] A teenager, Rudy Ochoa, was taken into juvenile custody, where he developed bilateral pneumonia and a fever.[438] Despite repeated requests and pleading from his mother, who was regularly at his bedside to witness his pain and distress, Rudy was treated for nothing more than a bad cold.[439] No X-rays were taken, and no blood or urine test performed. After three days, he was dead.[440] Rudy's mother then brought a negligence action against the County and four of its agents and employees for compensation for the trauma she had suffered in witnessing her son's plight.[441]

Every judge on the Supreme Court of California held that she had made out the requirements necessary to show that she had been owed a duty of care.[442] It might be thought that this means that the California courts had found this case easy. But far from it; Mrs. Ochoa was appealing to have her claim reinstated after a lower court had dismissed it.[443] The problem was recognized by all the judges who wrote an opinion: it revolved around trying to apply a set of guidelines laid down in a previous case, known as *Dillon v. Legg*[444]:

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434. *Id.*
435. *MacPherson*, 111 N.E. at 1054.
436. 703 P.2d 1, 5 (Cal. 1985).
437. *See id.* at 5.
438. *Id.* at 3.
439. *Id.*
440. *Id.* at 4.
441. *Id.*
442. *Id.*
443. *Id.*
444. 441 P.2d 912 (Cal. 1968).

> In determining, in such a case, whether defendant should reasonably foresee the injury to plaintiff, or, in other terminology, whether defendant owes plaintiff a duty of due care, the courts will take into account such factors as the following: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.[445]

Writing for the majority, Justice Broussard emphasized that these were "merely guidelines."[446] But, of course, that hardly clarified things. Chief Justice Bird argued that: "What has followed in *Dillon*'s wake is confusion rather than clarity [which] has led to arbitrary, inconsistent and inequitable results antithetical to principles enunciated in *Dillon*."[447] While Justice Grodin hit the nail on the head, noting that the *Dillon* guidelines had caused "[t]he principle of *foreseeability*, normally a question for the jury, [to] bec[o]me fused . . . with the concept of *duty*."[448]

Applying identity-based relational approach greatly simplifies and rationalizes the judge's task. It simply asks (a) whether the secondary victim had a relevant relationship with the primary victim; and (b) whether the defendant could have identified the plaintiff at the time of the tort. In the case of the five defendants sued by Mrs. Ochoa, the answer to both questions was an unequivocal "yes." Not only was she (a) Rudy's mother, but (b) she was known both by name and by her physical presence at the scene.[449]

The fact that Mrs. Ochoa was a secondary victim, rather than a primary victim, is relevant only to the following extent. We know that a relationship between the defendant and a third party is capable of generating a duty of care to a primary victim.[450] In the case of a secondary victim, however, the relevant third party is actually the secondary victim themselves—the first and second parties are, of course, the primary victim and the direct tortfeasor.[451] So what matters when a

445. *Id.* at 920.
446. *Ochoa*, 703 P.2d at 12.
447. *Id.* at 17.
448. *Id.* at 14 (emphasis in original).
449. *Id.* at 3.
450. *See supra* notes 251-57 and accompanying text.
451. *See supra* notes 251-57 and accompanying text.

duty to a potential secondary victim is being considered is whether there was a relevant relationship between the primary victim and the third party secondary victim.

Because this identity-based relational approach has yet to be adopted, confusion has continued to reign in the courts over when a duty may be owed to a secondary victim. In California, this confusion famously manifested itself again in *Thing v. La Chusa*.[452] There Justice Broussard once again emphasized that *Dillon* had merely laid down guidelines,[453] while Justice Kaufman played King Canute[454] and argued that the law should be turned back to a time when the law refused to recognize the owing of any duty at all to secondary victims.[455] Identity-based relational theory rejects both positions. Broussard's is unnecessarily complicated and unpredictable, while Kaufman's is simply not relational at all.

The majority opinion, set out by Justice Eagleson, got much closer to an identity-based relational approach, but it is unduly restrictive. It decided that it was time to treat the *Dillon* guidelines as having ossified into rules, which seems much more apt for a question of law for the court to decide. These dictate that a secondary victim will be owed a duty only when "closely related to the [primary] injury victim . . . present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim."[456]

There can be no doubt that the requirement of a close relationship with the primary victim is correct. Such a relationship fulfills the relevancy requirement because it concerns, among other things, the secondary victim's psychological interest in the well-being of the primary victims. The problem is with the requirements quoted after the ellipsis.

First, as we have seen, presence at the scene is one way of establishing identity in order to be owed a duty of care.[457] But it is not the only way. In fact, it is more common for identity to be proved by showing that the defendant was aware of the victim's name.[458] There seems little reason why this should not be permitted as an alternative to the "presence at the scene" requirement.

Second, identity-based relational theory considers the *Thing* court's requirement that the secondary victim be aware that the tort "is causing

452. 771 P.2d 814 (Cal. 1989).
453. *Id.* at 841.
454. *Id.* at 836.
455. *Id.*
456. *Id.* at 829.
457. *Id.*
458. *See supra* Part V.J.1.

injury to the victim" to be entirely redundant. In fact, such a requirement views the issue from entirely the wrong perspective. What the secondary victim could perceive is irrelevant, because the plaintiff does not have the information necessary to make decisions that take account of the defendant's potential actions. It is the ability of the *defendant* to be aware of the identity of the victim—whether primary or secondary—that matters.[459]

Thirdly, such a redundant requirement has the potential to be highly discriminatory. An unsighted secondary victim might not, for example, be able to perceive what is happening to the primary victim only because of a lack of visual faculties. The law should not be in the business of adopting tests for duty that have the effect of establishing second-class citizens who will rarely qualify as secondary victims.

In any event, it should be remembered that the purpose of duty is to ensure that there is no prospect of liability to an indeterminate class.[460] Identity-based relational theory holds that the secondary victim needs to prove (a) a duty owed by the defendant to the primary victim, and (b) a relevant relationship between the primary and secondary victims.[461] Those who can establish both those requirements will inevitably be very small in number. Adopting this approach will hardly cause the floodgates of liability to an indeterminate class to be forced open, but it will make the law both easier to apply and easier to predict. Much confusion and litigation will thereby be avoided.

K. Summary

A Cardozo-inspired, identity-based relational theory of duty of care in negligence revolves around proof of a relevant relationship.[462] In this context, a relationship is relevant if it involves the type of interest that was ultimately harmed.[463]

For primary victims—those who suffer injury not predicated on an injury to someone else—such a relationship may be found between the plaintiff and the defendant, or between the defendant and a third party, or between the plaintiff and an organization that owes a duty to the

459. *See* Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931) (limiting those to whom duty is owed to prevent defendant from owing a duty to unknown classes of potential plaintiffs); MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916) (finding that a manufacturer has fair warning of owing a duty to all users of an automobile because of its inherently dangerous nature).

460. *See Ultramares Corp.*, 174 N.E. at 444.

461. *See id.* at 444; Thing v. La Chusa, 771 P.2d 814, 829 (Cal. 1989).

462. *See Ultramares Corp.*, 174 N.E. at 444 (limiting duty to an established relationship).

463. *See* Palsgraf v. Long Island R.R., 162 N.E. 99, 100 (N.Y. 1928).

general public.[464] But establishing such a relevant relationship is still not quite enough. In addition, the relationship must have been such as to enable the defendant to know the victim's identity.[465] This may be established in either of two ways. One is where the defendant was in a position to know the victim's name at the time of the tort.[466] In cases of physical harm, identity may alternatively be established if the victim had been present at the scene at the time of the tort.[467]

Where either the plaintiff or defendant is at one remove from the immediate nexus between primary victim and direct tortfeasor, additional relationships are required.[468] For vicarious liability, this requires the addition of a relevant relationship between the direct tortfeasor and vicarious defendant.[469] Secondary victims, on the other hand, need to establish both a relevant relationship between the defendant and primary victim and a relevant relationship between the primary and secondary victims.[470]

Identity-based relational theory does not need a long list of "factors" to be "taken into account."[471] It does not involve using a criterion of foreseeability, which is too unpredictable for questions of law. It does not even require that judges factor in matters of policy, since the policy of avoiding liability to an indeterminate class of potential plaintiffs is already built-in. Instead, it provides a simple and predictable method of answering the question of whether a plaintiff is owed a duty of care in negligence. It is time for the courts to adopt it.

VI. POSTSCRIPT: RESOLVING NEW CONTROVERSIES

It is one thing to show how identity-based relational theory can explain the outcome of past cases. It is, admittedly, quite another to show how it can be used to resolve emerging issues without fuss or complexity. Yet, as will now be seen, it makes resolving the duty issue in such cases far more straightforward than the current approaches with which the courts have forced themselves to grapple.

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464. *See Ultramares Corp.*, 171 N.E. at 444; *Thing*, 771 P.2d at 829; Kaisner v. Kolb, 543 So. 2d 732, 734 (Fla. 1989).

465. *See supra* Part V.A–B.

466. *See supra* Part V.D, G, J.1.

467. *See supra* Part V.D, J.1.

468. *See supra* Part V.D.

469. *See supra* Part V.J.1.

470. *See supra* Part V.J.2.

471. *See supra* Part V.J.2.

A. Prenatal Injuries and Wrongful Conceptions, Births, and Lives

Cases of prenatal injury, "wrongful conception," "wrongful birth," and "wrongful life" present classic examples. The meaning of prenatal injury is self-evident: an injury caused to a fetus before birth.[472] The other terms, however, might be less familiar.

Wrongful conception may be alleged when a vasectomy or female sterilization procedure is carried out negligently, so that the patient remains fertile and conception occurs against the wishes of the parents.[473] The harm alleged here is not suffered by the child, who is born healthy, but to one or both parents.[474] Their harm is potentially one or more of the following:

> (a) the pain endured by the mother while pregnant;
> (b) the medical costs of pregnancy;
> (c) the cost to the parents of the upkeep and upbringing of a child whom they had not planned to have;
> (d) emotional distress to the parents at the fact of conception;
> (e) emotional distress to the parents at the prospect of bringing up a(nother) child (especially if they are already in dire financial straights or are suffering from, or are prone to, some sort of psychological disorder); and/or
> (f) emotional distress to the parents at the prospect of having to have a termination.

Similar costs are involved in a "wrongful birth" claim, which is an action brought by parents claiming that medical negligence caused them not to know that the fetus was damaged, so that the mother was effectively denied the opportunity to have a termination.[475] A "wrongful life" claim, on the other hand, is one brought on behalf of a child in similar circumstances on the grounds that their pain and suffering is so excruciating that they should never have been born.[476] In *Procanik By Procanik v. Cillo*, for example, the mother's doctors had failed to diagnose that she had contracted rubella (German measles) in the first trimester of her pregnancy, so that her son was born with congenital rubella syndrome.[477]

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472. *See What Are Prenatal Injuries?*, LAWS (Dec. 22, 2019), https://tort.laws.com/limited-duty/prenatal-injuries.

473. *Wrongful Conception*, BLACK'S LAW DICTIONARY (6th ed. 1990).

474. *Id.*

475. *Wrongful Birth*, BLACK'S LAW DICTIONARY (6th ed. 1990).

476. Procanik By Procanik v. Cillo, 478 A.2d 755, 760 (N.J. 1984).

477. *Id.* at 757.

The law in this area is currently a mess. Although a duty to the child has been recognized in cases of prenatal injury since the 1950s,[478] some states have refused to recognize claims for wrongful life.[479] When adjudicating upon a wrongful birth claim, the Supreme Court of Kentucky declared baldly: "The parents of a normal healthy child whom they now love have not suffered any injury or damage. The benefits conferred by the child's existence clearly outweigh any economic burden involved."[480]

According to the identity-based relational approach, such a sentiment is clearly misplaced. The types of harm listed above are clearly real, and the law of torts does not normally allow defendants to confer undesired benefits on plaintiffs so as to claim that the latter have not actually suffered any harm at all.[481] Gut reactions over whether the law should be prepared to award compensation for the birth of a human being should not be allowed to distract attention away from the legal issues at stake, which are really no different from those in any other case of medical malpractice.

In fact, there should really be nothing problematic about a wrongful birth claim at all. The defendant in such a case will clearly know the identity of the mother and, almost certainly, the father (or other parent in the case of same-sex couples). A duty of care will thus be established, and the case should proceed like any other claim of medical malpractice. Cases of wrongful conception should be treated in much the same way, and for precisely the same reasons. Denying such claims would create anomalies in the law and achieve nothing worthwhile, whereas applying identity-based relational theory would ensure consistency and predictability. From a legal standpoint, these should surely be easy cases.

Cases of wrongful life should hardly be more problematic. As we know, the identity-based relational approach requires that the defendant can identify the plaintiff at the time of the tort.[482] There can be no doubt that a doctor can identify a fetus, and that a fetus is also, without doubt, a separate entity:

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478. *See* Rainey v. Horn, 72 So. 2d 434, 439-40 (Miss. 1954); Tucker v. Howard L. Carmichael & Sons, Inc., 65 S.E.2d 909, 912 (Ga. 1951); Damasiewicz v. Gorsuch, 79 A.2d 550, 560-61 (Md. 1951); Mitchell v. Couch, 285 S.W.2d 901, 906 (Ky. 1955); Mallison v. Pomeroy, 291 P.2d 225, 228 (Or. 1955); Worgan v. Greggo & Ferrara, Inc., 128 A.2d 557, 557 (Del. 1956); Poliquin v. MacDonald, 135 A.2d 249, 251 (N.H. 1957).

479. *See, e.g.*, Etkind v. Suarez, 519 S.E.2d 210, 215 (Ga. 1999).

480. Schork v. Huber, 648 S.W.2d 861, 862 (Ky. 1983).

481. *See, e.g.*, Smith v. Brennan, 157 A.2d 497, 503 (N.J. 1960) (discussing a problem within the law when both a mother and child are left without remedy after being subject to medical negligence).

482. *See supra* Part III.F.

> If the law in cases of negligently inflicted prenatal injuries were to . . . consider an unborn child as part of its mother, then the mother should be able to recover for the pain, suffering, and incapacity to this part of her, just as to any other part. We know of no case allowing such recovery. As early as 1908, the New Hampshire Supreme Court specifically denied it, holding that "[s]uch damages pertain to the child alone. The mother is no more entitled to them than the father is."[483]

The only question left is whether the fetus is an entity with independent legal personality sufficient to enable it to qualify as an identifiable plaintiff. Yet this question has been answered consistently in the positive for over half a century. As the Supreme Court of New Jersey observed back in 1960: "If neither mother nor child can recover, then a life impaired by another's fault must be endured without the recompense which the law provides for other persons wrongfully injured. The law should take care that, wherever possible, a wrong should not go completely unrequited."[484]

The court, therefore, went on to hold that the fetus had been owed a duty of care such that the child, after birth, could maintain an action against those negligently responsible for his prenatal injuries.[485] There seems no reason to treat cases of wrongful life any differently.

B. Non-Delegable Duties

Non-delegable duties are duties originally taken on by one party that, no matter the circumstance, cannot be passed off to a third party.[486] Such duties arise when "the responsibility is so important to the community that the [defendant] should not be permitted to transfer it to another."[487] Attorneys, for example, have a non-delegable duty towards their clients.[488] They cannot contract this duty out to a third party.[489] For so long as they are the client's attorney, they owe such a duty.[490]

Duties owed (in respect of physical injury) by those who own or manage premises to those coming onto those premises are another prime

483. *Smith*, 157 A.2d at 502-03 (quoting Prescott v. Robinson, 69 A. 522, 524 (N.H. 1908)).
484. *Id.* at 503.
485. *Id.* at 504.
486. *See* Kleeman v. Rheingold, 614 N.E.2d 712, 715 (N.Y. 1993).
487. *Id.* at 716.
488. *Id.*
489. *Id.* at 714, 716.
490. *Agency—The Basic Law*, STIMMEL LAW, https://www.stimmel-law.com/en/articles/agency-basic-law (last visited Aug. 1, 2021).

example,[491] and identity-based relational theory provides a simple rationale for such cases. For it is self-evident that whoever comes onto a person's premises is present on scene, and so the owner or manager is in a position to know the visitor's identity. This does not, of course, prevent others from also owing a duty to the visitor—as we have seen, relational theory recognizes that there may be multiple relevant relationships—but it does mean that the owner or manager cannot divest themselves of such a duty by contracting it out to a third party. While the visitor remains on the premises, the duty remains in existence.

There is, however, one apparent anomaly in American law's application of this concept. It manifests itself when a patient receives medical treatment in a hospital. If the patient slips on a greasy floor that should have been cleaned, she will have a claim against the hospital on the basis of either vicarious liability or non-delegable duty; and, if injured by the negligence of a nurse, she will have a claim against the hospital on the basis of vicarious liability. Yet, if injured by the negligence of a doctor, she will typically be unsuccessful in bringing either type of claim against the hospital and will have to sue the doctor personally—and only the doctor.[492]

For almost all common lawyers from outside the United States, identity-based relational theory would clearly reach a different conclusion. They would perceive a relevant relationship between patient and hospital, from which the latter would be in a position to identify the former (whether by name or by presence at the scene). From that it follows that the hospital would owe a duty to the patient in respect of the medical care as much as for the state of the premises. And, since such a duty is "so important to the community," the duty would be non-delegable.[493]

Perhaps this is also the approach that should be adopted in American jurisdictions.[494] But currently it seems that American tort law is beguiled by the concept of the "attending physician," according to which a patient has a relationship for medical care with that particular doctor, but not with the hospital.[495] Thus the requirement of relevance in the relationship with the latter does not exist so far as the medical care is concerned; the hospital's responsibility relates instead solely to management of the premises.

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491. Such a non-delegable duty may sometimes be extended to cover general contractors too, although, as the New York case of *Rizzuto v. Wenger Contracting Co.* demonstrates, this is more typically achieved via statute. 693 N.E.2d 1068, 1070 (N.Y. 1998).

492. *See* Roessler v. Novak, 858 So. 2d 1158, 1162 (Fla. Dist. Ct. App. 2003).

493. *Kleeman*, 614 N.E.2d at 716.

494. As argued by Altenbernd, C.J., in *Roessler*, 858 So. 2d at 1163-64.

495. *Id.* at 1162.

C. Relinquishing a Duty

Closely related to the issue of non-delegable duties is the question of whether (and, if so, when) the law permits a person to relinquish a duty. The *Heitzman* case, discussed above, implicitly raised this issue.[496] For the court did not make it clear whether Susan had never been in a position to control the conduct of either of her brothers, or whether she had previously been in such a position but had somehow relinquished the duty to do so after she had moved out of the house that she had formerly shared with them.[497]

According to identity-based relational theory, a duty of care in negligence is established through a relevant relationship.[498] It therefore follows that there can be no duty where no such relationship exists.[499] This also means that, if someone wishes to relinquish a duty that they currently owe, then they must take steps to end the relevant relationship. The problem, of course, is working out how that should be done. This is complicated by two factors: (a) the absence of a discrete formation phase in the law of negligence; and (b) the need to ensure that the law does not permit potential defendants to compromise the safety of the plaintiff who, as we have already established, lacks the information necessary to make decisions that take account of the defendant's potential actions.

In the case of what I have called public relationships, it is submitted that the only way to relinquish a duty of care effectively is to ensure that the duty is taken on by someone of at least equal expertise.[500] Someone appointed as a legal guardian, for example, should be able to relinquish such a duty only by having a court agree to pass it on to someone else. Similarly, a receiver appointed to administer a bankruptcy should be able to relinquish the relevant duties of care only by having a court appoint a replacement receiver or by the termination of the receivership.[501]

It would seem to be a similar story so far as duties arising out of a relationship between plaintiff and defendant are concerned. A doctor, for example, cannot relinquish a duty to a patient unless the duty has been passed on to another doctor (although the patient can, of course, unilaterally withdraw from the relationship and thus terminate the

496. *See* People v. Heitzman, 886 P.2d 1229, 1234, 1243, 1245 (Cal. 1994).

497. *Id.*

498. *See supra* Part V.

499. *See supra* Part V.

500. *See supra* Part V.I; *infra* Part VI.C.

501. A guardianship or receivership may, of course, come to an end. But that would not involve a relinquishing of a duty so much as the circumstances that give rise to such a duty being no longer in existence.

doctor's duty). A parent cannot give up a duty to a child unless it is successfully passed to someone else acting *in loco parentis*, such as a school. And a school that wishes to relinquish a duty to a child in its care cannot merely abandon the child; it will ordinarily pass the child back into the care of a parent, or else into the care of a public authority or social services.

Where the relevant relationship is one involving a third party, however, it is submitted that the position is very different. It was this type of relationship that was at stake in *Heitzman*, for only if Susan had previously been under a duty to control the behavior of her brothers could she have at the same time owed a duty of care to her father.[502] So if she terminated the relationship with her brothers that gave her such control, then it would seem to follow that she would also have successfully relinquished the duty she had previously owed to her father.

That should not, as a matter of principle, have endangered her father's safety because her brothers both still owed him a duty of care. The fact that, in practice, they breached that duty should not change the legal position; it is always possible for someone who owes a duty to breach it. Indeed, without such breaches, there would be no need for the law of negligence at all.

Similarly, if the therapist in *Tarasoff* had no longer been treating the murderous Poddar, he would no longer have owed a duty to Tatiana.[503] And, in *Mussivand*, if the lover had stopped having an affair with the plaintiff's wife, then he too would have successfully relinquished the duty of care.[504]

D. Data Privacy and Security

Finally, we come to the issue of organizations that obtain and store personal information about clients, customers, and sales prospects. Professor Jack Balkin has termed such organizations "information fiduciaries," but coining new terms is less important than understanding what they represent.[505] As Balkin himself recognizes, that concept "does not solve all of the problems," and it seems at least arguable that such a label only adds to the confusion.[506] A "fiduciary" is someone with obligations that are regulated in equity by the law of trusts,[507] but it is

502. *Heitzman*, 886 P.2d at 1234, 1243, 1245.

503. *See* Tarasoff v. Regents of University of California, 551 P.2d 334, 339-41 (Cal. 1976).

504. *See* Mussivand v. David, 544 N.E.2d 265, 269-70, 272-73 (Ohio 1989).

505. Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV 1183, 1194, 1207-08 (2016).

506. *Id.* at 1187.

507. Stone v. Ritter, 911 A.2d 362, 363, 370 (Del. 2006).

unclear if Balkin intends to invoke such law, or whether he really means to talk of special relationships for the purposes of the law of torts.[508] Unless and until he attempts to address the question of remedies for breaches of the relationship, this will remain unclear.

The truth is that, at least so far as the law of torts is concerned, such levels of complexity are unnecessary. It is already clear that identity-based relational theory means the law of negligence should recognize that a duty of care is owed to any data subject whose personal information is held by another, if the latter can thereby identify the data subject.[509] This will always be the case where the person using or storing the information has the ability to retrieve the data subject's name in plain text. This means that, only if the information is anonymized, or if the data subject's name is encrypted, will such a duty not apply. Otherwise, whether the information was obtained from the data subject themselves—here is a relationship between the plaintiff and defendant—or as the result of a relationship with a third party, the data subject will be owed a duty by those in a position to manage the data concerned.

E. Conclusion

As the issues discussed in this postscript make clear, identity-based relational theory is not just effective at explaining past case law on duty of care in negligence. It also provides a straightforward and easily applicable method of approaching duty in cases that either involve novel fact-patterns or apparently intractable issues of principle. Instead of confusing the issue with discussion of foreseeability, or requiring that a set of "factors" or "guidelines" be "taken into account,"[510] it simply asks the following questions in sequence:

1. Was there a relevant relationship (i.e., a relationship about the type of interest that was ultimately harmed) between the plaintiff and the defendant, or between the defendant and a third party, or between the plaintiff and an organization that owes a duty to the general public?

   If not, no duty was owed. But if so:

508. *See, e.g.*, Balkin, *supra* note 505, at 1207 ("The answer is that doctors, lawyers, and accountants have special relationships of trust and confidence with their clients. These are fiduciary relationships.").

509. *See id.* at 1222.

510. Dillon v. Legg, 441 P.2d 912, 920 (Cal. 1968).

2. Was that a relationship that was qualitatively different from any relationship that the defendant might have had with the public at large?

   If not, no duty was owed. But if so:

3. In a case of physical harm, was the victim (or the victim's property) present at the scene at the time of the tort?

   If so, the plaintiff was owed a duty of care. But if not, or if the case does not involve physical harm:

4. Was the defendant in a position to know the victim's name at the time of the tort?

   If so, the plaintiff was owed a duty of care. If not, the plaintiff was not owed a duty of care.

   If the answers to questions (3) and (4) establish that the plaintiff was owed a duty of care, then the following questions also need to be asked:

5. Was there a relevant relationship between the direct tortfeasor and any potentially vicarious defendant?

   If so, then the latter also owed the plaintiff a duty of care.

6. Was there a relevant relationship between the primary victim and any secondary victim (i.e., a person whose emotional distress occurred because of physical injury to the primary victim)?

   If so, then the defendant(s) also owed a duty of care to the secondary victim(s).

If adopted, this approach would save countless hours of litigation and confusion (not to mention simplify the job of every torts professor) and make the law vastly more predictable.

None of this Article means, of course, that identity-based relational theory leads to the "best" or most morally appropriate outcomes. The theory simply makes explicit the approach that the law appears hitherto to have taken implicitly. But, even in situations where someone wishes to argue that the law should behave differently, it should at least have the

useful effect of meaning that both those advocating for change and those resisting it should be starting from the same page.