

The Hidden Legacy of *Palsgraf*: Modern Duty Law in Microcosm

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The elements of the debate between Judges Cardozo and Andrews in Palsgraf are canonical: (1) What is the nature of duty—is it relational or act-centered?; (2) Is plaintiff-foreseeability a duty inquiry or an aspect of proximate cause?; (3) Is court or jury the proper arbiter of foreseeability? An exhaustive examination of the case law on these questions reveals a deep disconnect between what most of us learned in law school and what is playing out in modern courts. Close scrutiny of Palsgraf’s present-day incarnations also lends an invaluable birds-eye view of duty law, an area so rife with inconsistency and contradiction that it often bears more resemblance to constitutional law than the quintessential common-law doctrine that we expect from tort cases. This article melds the doctrinal with the theoretical. It is the first comprehensive survey of Palsgraf since Prosser’s Palsgraf Revisited, in 1953, and it is also a bottom-up inquiry into the “meaning” of duty in today’s courts. The most significant findings of the article are as follows: (1) Most courts have not bought into Cardozo’s relational view of duty—instead, courts are nearly unified in the view that duty is, at its core, a multi-factor policy analysis, although courts do not agree on the relevant factors; (2) Cardozo has overwhelmingly won the day on plaintiff-foreseeability’s place in duty versus proximate cause—a fact which contradicts Palsgraf’s common treatment in law school classrooms as well as the Restatement (Third) of Torts—although Cardozo’s directive that foreseeability is to be decided categorically has not been broadly adopted; and (3) In a bizarre twist, a majority of courts leave duty-foreseeability’s determination to the jury. This final discovery provides important insight into a hidden tension that has smoldered in courts’ negligence jurisprudence at least since Palsgraf was decided eighty-three years ago.

The majority and dissenting opinions in *Palsgraf v. Long Island Railroad*² parallel the events giving rise to the case—a series of bizarre twists so curious and mesmerizing that one has trouble averting one’s gaze. Yet there is no denying the fame of the case. Every torts casebook features *Palsgraf*—nearly all in the section on proximate cause.³ A Westlaw search of state and federal cases produces over fifteen hundred citations to the decision, and the rate of citation has not tapered with time.⁴ Nor has scholarly interest in the case waned. A search of law journals finds over seven hundred citations to *Palsgraf* in the recent decade alone.⁵ And in law school

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² *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928).

³ See, e.g., MARC A. FRANKLIN, ROBERT L. RABIN & MICHAEL D. GREEN, *TORT LAW AND ALTERNATIVES* 425 (8th ed. 2006); RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 519 (9th ed. 2008); GEORGE C. CHRISTIE, JAMES E. MEEKS, ELLEN S. PRYOR, JOSEPH SANDERS, *CASES AND MATERIALS ON THE LAW OF TORTS* 276 (4th ed. 2004).

⁴ Westlaw search of “*Palsgraf v. Long*” in the “All State and Federal Cases” database on 9/5/10.

⁵ Westlaw search of “*Palsgraf*” in the “Journals and Law Reviews” database, limited by a “last 10 years” date restriction, on 9/10/10.

classrooms, “*Palsgraf* Day” is often celebrated with food and drink, dramatic reenactments, interpretive poems, even mock duels between Judges Cardozo and Andrews.

For professors, *Palsgraf*'s popularity lies less in the point of law for which the case stands than in the themes so poignantly debated in its opinions. The elements of the debate are canonical: (1) What is the nature of duty—is it relational or act-centered?; (2) Is plaintiff-foreseeability a duty inquiry or an aspect of proximate cause?; and (3) Is court or jury the proper arbiter of foreseeability? In short, the Judges battled over a sizeable claim on the essence of negligence doctrine.

In courts, *Palsgraf* continues to be cited as law—but what law, precisely? In 1928, Cardozo garnered a majority of New York Court of Appeals Judges for his views that duty is relational, that plaintiff-foreseeability lies at the heart of the duty determination, and seemingly, that the court is the proper decisionmaker in that regard. After eighty-odd years, however—and particularly with so much attention and analysis—no case can escape the patina of interpretation, of context, of accretion. Since *Palsgraf*, tort law has evolved in dramatic ways, and the politics of the courtroom have contracted, expanded, and contracted again. Distilling the influence of *Palsgraf* must therefore consist of a review of all courts that have faced its central issues within the context of negligence doctrine as it has evolved.

This article is the product of such an inquiry—a fifty-one jurisdiction survey of the lasting impact of *Palsgraf* on the negligence cause of action. In part, the article succumbs to an American fascination with the ultimate question in any contest—who won? Has Cardozo's vision of duty survived, or has Andrews won a war of attrition? As is the case with any worthy legal dilemma, the answer is complicated. The following sections assess the current landscape with regard to the major elements of the Cardozo-Andrews debate and in the process offer a bird's-eye picture of modern duty law. Part I explores whether courts understand duty to be relational or act-centered, a topic which necessarily extends to a broader investigation of courts' vision of the essence of duty. Part II surveys courts' treatment of plaintiff-foreseeability, examining whether it is most commonly a duty inquiry or an aspect of proximate cause. Part III focuses on what is arguably the most pragmatic consequence of *Palsgraf*—whether court or jury is the proper arbiter of foreseeability. Each of these sections reveals that much of the common wisdom surrounding *Palsgraf* does not reflect its path in modern negligence jurisprudence.

I offer one caveat before turning to the substance of the paper. 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 state of duty law. All who read the common law are aware of this general shortcoming—common law is made by the accretive steps of individual judges who, as human beings, are imperfect at best. But in duty cases, the problem seems particularly endemic. Courts sometimes apply law long overturned by their superiors. Courts use reasoning and reach results diametrically opposed to decisions of their sister courts, almost as if the judges are unaware of each other's existence. And internal contradictions and overlapping inquiries within negligence doctrine lead to sometimes laughable opinions.⁶ I write this article with the hope that a sharper focus on the relevant questions might eventually lead to

⁶ See, e.g., *Patrick v. Union State Bank*, 681 So. 2d 1364, 1372 (Ala. 1996) (“We have determined that, as a matter of law, the fraudulent acts of the imposter here were foreseeable to the extent that a duty may be imposed on the bank. . . . We conclude that Ms. Patrick submitted substantial evidence creating a genuine issue of material fact as to whether the fraudulent acts of the imposter were foreseeable to the extent of supporting a finding of proximate cause.”).

more self-aware and consistent answers with regard to the issues present in *Palsgraf* and in duty cases generally.

I. Is Duty Relational or Act-Centered?

As a centerpiece of academic tort theory, *Palsgraf* is most commonly cited for the idea that duty is “relational.”⁷ This stems in part from Cardozo’s use of the term “relation” thrice:

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.⁸

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, nor conduct ‘wrongful’ because unsocial, but not ‘a wrong’ to any one. . . . 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.⁹

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.¹⁰

As an initial matter, it is interesting that Cardozo, a careful wordsmith, did not use the term “duty” in conjunction with “relation”—rather, he stated that the “risk,” “wrong,” or “negligence” must be in relation to the plaintiff. Had this locution been interpreted as deliberate and meaningful, *Palsgraf* likely would not have enjoyed such longstanding notoriety. It is (and was at the time) unobjectionable that a defendant’s *negligence* must be in relation to the plaintiff. But these passages are commonly understood to require something more specific—that the *existence of a duty* turns on the defendant’s relation to the particular plaintiff or to a class of plaintiffs of which the plaintiff is a member.¹¹

An alternative interpretation of Cardozo’s language—one more careful, although much less commonly cited by courts—is that even where a defendant owed some duty to the plaintiff, and even where defendant breached a duty of care owed to someone, only a breach *of the duty owed*

⁷ John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1819 (1998).

⁸ *Palsgraf*, 162 N.E. at 99.

⁹ *Id.* at 100.

¹⁰ *Id.* at 101.

¹¹ *See, e.g., State Dep’t of Corrs. v. Cowles*, 151 P.3d 353, 363 (Alaska 2006) (imposing a duty in claim by family of decedent killed by parolee, “only where officials know, or reasonably should know, that a parolee poses a danger to a . . . ‘victim class’”); *Smith v. Hope Village, Inc.*, 481 F.Supp.2d 172, 193 (D.D.C. 2007) (stating that duty depends, in part, on whether victim “falls within the class of people who were foreseeably at risk of being harmed”).

to the plaintiff may result in liability.¹² The latter is known as the “duty-breach nexus” requirement.¹³

Either interpretation of Cardozo’s majority opinion stands in contrast to Judge Andrews’s view, in dissent, that a duty arises from an act that creates risk, regardless of whom the risk might be expected to harm. In Andrews’s words, “Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone.”¹⁴ Thus, risk-creation imposes a duty of care without respect to any relationship between the parties—a duty “to all the world,” in Andrews’s words.¹⁵ According to Andrews, the requisite relationality of the defendant’s negligence to the plaintiff’s injury should be left to factual and proximate causation.¹⁶

The question of whether duty is relational or act-centered is important for two correlative reasons—whether plaintiff-foreseeability is to be decided in the context of duty or proximate cause and whether court or jury is the proper decisionmaker (matters discussed below). But the inquiry is also important in its own respect. Most duty decisions are made pursuant to specific doctrinal rules or standards. This doctrine arguably exists, in part, as an embodiment of cumulative, over-the-centuries theory (if often unarticulated) with respect to the relationality question. Understanding the influence of relationality on duty doctrine might help one predict, and perhaps influence, a court’s application of that doctrine. Furthermore, a court’s conscious understanding of relationality might shape the development of doctrine going forward. Perhaps most importantly, some percentage of duty decisions fall in the interstices of doctrine. A court’s theoretical understanding of duty helps give shape to such decisions in a consistent, principled way.

There can be no doubt that relationality plays a significant role in some areas of duty doctrine. With respect to affirmative duties in particular (and here I include most landowner and governmental duty cases), the relationship between the parties is the central inquiry. This, of course, matches our natural intuition in such cases—although an affirmative duty to aid another typically does not lie, a special relationship with another might cause one to feel an exceptional obligation to protect him or her, as well as a corresponding expectation of protection by the person in need. But to recognize the relevance of relationality in affirmative duty cases is not to say that relationality is central to duty analysis generally. Moreover, as I have elaborated elsewhere,¹⁷ the variant of relationality at issue in affirmative duty cases is of a different species than that embraced by Cardozo in *Palsgraf*. The former consists of an examination of *ex ante* relationships or dealings between the parties—a “substantive relationality.” The relationality in *Palsgraf* might be referred to as “circumstantial relationality,” an inquiry into the temporal or physical proximity of the parties to one another. A thorough examination of the role of relationality in duty must capture both concepts.

¹² *E.g.*, Goldberg & Zipursky, *supra* note 7, at 1820.

¹³ John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 685 (2001).

¹⁴ *Palsgraf*, 162 N.E. at 102.

¹⁵ *Id.* at 103 (“Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.”).

¹⁶ *Id.*

¹⁷ W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 U.S.C. L. REV. 671, 715 (2008).

One way to get at the broader question at hand—that is, whether relationality lies at the heart of courts’ duty decisions—is to examine cases in which doctrine does not command a result. In such cases, courts often examine the principles underlying their duty rules—the theoretical essence of duty.

An examination of fifty-one jurisdictions (the fifty states and the District of Columbia) reveals that no court looks to relationality as the central pillar of its duty analysis. Rather, where duty is not controlled by statute or specific common-law rule (and sometimes even when it is), duty almost universally is articulated as a multi-factoral policy decision, just as Prosser so famously described.¹⁸ The most frequently-adopted set of factors stems from the California Supreme Court’s decisions in *Biakanja v. Irving*¹⁹ and *Rowland v. Christian*.²⁰ These factors include (1) foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness of the connection between the defendant's conduct and the injury suffered, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and (7) the availability, cost, and prevalence of insurance for the risk involved.²¹

Eight jurisdictions have adopted these factors verbatim as an expression of the essence of duty,²² and another five have embraced the factors with various additions or subtractions.²³

¹⁸ “‘Duty’ is simply an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.” W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 358 (5th ed. 1984).

¹⁹ *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958).

²⁰ *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968).

²¹ *Id.* at 564-65.

²² *State v. Sandsness*, 72 P.3d 299, 305 (Alaska 2003); *Rowland*, 69 Cal.2d at 112-13; *Boots ex rel. Boots v. Winters*, 179 P.3d 352, 356-57 (Idaho Ct. App. 2008); *Lowery v. Echostar Satellite Corp.*, 160 P.3d 959, 969 & n.4 (Okla. 2007); *Banks v. Bowen’s Landing Corp.*, 522 A.2d 1222, 1225 (R.I. 1987); *Langle v. Kurkul*, 510 A.2d 1301, 1305 (Vt. 1986); *Berry v. Tessman*, 170 P.3d 1243, 1245 (Wyo. 2007). In *Eisel v. Board of Education*, 597 A.2d 447, 452-56 (Md. 1991), the Maryland Supreme Court adopted the California factors. In *Jacques v. First National Bank of Maryland*, 515 A.2d 756, 760 (Md. 1986), however, the court stated that “In determining whether a tort duty should be recognized in a particular context, two major considerations are: the nature of the harm likely to result from a failure to exercise due care, and the relationship that exists between the parties.”

²³ See *Pulawa v. GTE Hawaiian Tel*, 143 P.3d 1205, 1214 (Haw. 2006) (adopting California factors plus relationship between parties, fairness, public policy, and nature of the risk); *Blair v. Ing*, 21 P.3d 452, 464-65 (Haw. 2001) (“In determining whether or not a duty is owed, we must weigh the considerations of policy which favor the [plaintiffs’] recovery against those which favor limiting the [defendants’] liability. . . taking into consideration the social and human relationships of our society.”); *Ruf v. Honolulu Police Dep’t*, 972 P.2d 1081, 1092 (Haw. 1999) (holding that duty “entails ‘a question of fairness that involves a weighing of the nature of the risk [to which the novel duty relates], the magnitude of the burden of guarding against the risk, and the *public interest in the proposed solution*’”); *Valcaniant v. Detroit Edison Co.*, 679 N.W.2d 689, 691 (Mich. 2004) (adopting California factors minus the seventh factor—the availability of insurance); *Hinkle v. Shepherd Sch. Dist. No. 37*, 93 P.3d 1239, 1244 (Mont. 2004) (jettisoning the second and third factors—the degree of certainty that plaintiff suffered injury and the closeness of connection between conduct and injury); *Scafide v. Bazzone*, 962 So. 2d 585, 594 (Miss. Ct. App. 2006) (adopting California factors, plus (1) The injury is too remote from the negligence; (2) The injury is too wholly out of proportion to the tortfeasor's culpability; (3) In retrospect it appears too highly

Although the “California factors” first arose in the context of cases involving economic harm and landowner liability, these thirteen jurisdictions now apply the factors in any case in which the existence of a duty is deemed questionable under the circumstances. Moreover, although early courts used the California factors to impose a duty where one had not previously existed, the factors are now commonly used also to deny liability in cases where accepted law might otherwise impose a duty.²⁴

The California factors do not list relationality expressly. The first factor, however—foreseeability of harm to the plaintiff—might be read as an incarnation of circumstantial relationality. This depends on whether the interpretive emphasis is on foreseeability of “harm” or harm “to the plaintiff.” Most often, courts’ discussion of this factor focuses on the former rather than the latter.²⁵ Thus, should these courts embrace circumstantial relationality, they typically do so by separate analysis.²⁶

Despite their relative popularity, the California factors remain a minority approach. In 30 jurisdictions, courts list other (albeit sometimes related) factors as foundational duty considerations.²⁷ I catalog at least 22 various incarnations, seven of which have garnered support

unlikely that the negligence should have resulted in harm; (4) Allowing recovery would place too unreasonable a burden on the tortfeasor; (5) Allowing recovery would be too likely to open the way for fraudulent claims; and (6) Allowing recovery would enter a field that has no sensible or just stopping point.”). In *Hurt v. Freeland*, 589 N.W.2d 551, 555 (N.D. 1999), North Dakota adopted the California factors, but in *Azure v. Belcourt Public School District*, 681 N.W.2d 816, 820 (N.D. 2004) stated that the relationship between the parties was also of central importance.

²⁴ *State v. Sandsness*, 72 P.3d 299, 305-07 (Alaska 2003) (denying liability even though “it was sufficiently foreseeable that [the defendant] might commit new crimes after his release from custody to satisfy the first *D.S.W.* duty consideration,” and concluding that “the policy of preventing future harm would not obviously be served by imposing a duty.”); *Weissich v. County of Marin*, 274 Cal. Rptr. 342, 349 (Cal. Ct. App. 1990) (denying liability after considering several of the California factors); *Lowery*, 160 P.3d at 964-65 (relying on the California factors as the basis for denying liability).

²⁵ *See, e.g., Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 588-89 (Cal. 1997) (“The foreseeability of a particular kind of harm plays a very significant role in this calculus [citation], but a court’s task-in determining duty-is not to decide whether a particular plaintiff’s injury was reasonably foreseeable in light of a particular defendant’s conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.”) (internal quotations & citation omitted); *Boots ex rel. Boots*, 179 P.3d at 357-58 (“The degree of foreseeability, however, was very low because the Wintorses has no knowledge of any dangerous propensities of the brown dog”).

²⁶ *See infra* notes 35 through 38 and accompanying text.

²⁷ *See Taylor v. Smith*, 892 So. 2d 887, 891-92 (Ala. 2004) (“The existence of a duty is determined by a number of factors, including “(1) the nature of the defendant’s activity; (2) the relationship between the parties; and (3) the type of injury or harm threatened. The key factor is whether the injury was foreseeable by the defendant.”) (citations omitted); *Wertheim v. Pima County*, 122 P.3d 1, 6 (Ariz. Ct. App. 2005) (“Courts traditionally fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability.”); *Gast v. City of Fountain*, 870 P.2d 506, 508 (Colo. Ct. App. 1993) (“Several factors are relevant in making this [duty] determination including the risk involved, the foreseeability and likelihood of injury as weighed against the social utility of defendant’s conduct, the magnitude of the burden required to guard against the injury, and the consequence of placing the burden

upon the defendant.”); *RK Constructors, Inc. v. Fusco Corp.*, 650 A.2d 153, 155-56 (Conn. 1994) (noting that duty consists of an examination of the relationship between the parties, foreseeability of the general type of harm that occurred, and a desire to “limit the legal consequences of wrongs to a controllable degree”); *Monk v. Temple George Assoc., LLC*, 869 A.2d 179, 184-87 (Conn. 2005) (“In considering whether public policy suggests the imposition of a duty, we ... consider the following four factors: (1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions.”); *In re Asbestos Litig.*, No. 04C-07-099-ASB, 2007 WL 4571196, at *5 (Del. Super. Ct. December 21, 2007) (stating that duty is determined by consideration of the relationship between the parties, foreseeability, and a balancing of risk of injury against defendant’s cost of preventing it); *Board of Tr. of Univ. of Dist. of Columbia v. DiSalvo*, 974 A.2d 868, 871-72 & n.2 (D.C. 2009) (explaining that duty consists of judgments regarding the relationship between the parties, foreseeability of the risk, fairness, and public policy); *Biglen v. Florida Power & Light Co.*, 910 So. 2d 405, 409 (Fla. Dist. Ct. App. 2005) (“Finding that a legal duty exists in a negligence case involves the public policy decision that a ‘defendant should bear a given loss, as opposed to distributing the loss among the general public.’”); *Levy v. Fla. Power & Light Co.*, 798 So. 2d 778, 780 (Fla. Dist. Ct. App. 2001), rev. den. 902 So. 2d 790 (Fla. 2005) (“Duty is an allocation of risk determined by balancing the foreseeability of harm, in light of all the circumstances, against the burden to be imposed.”); *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 209 (Ga. 2005) (imposing duty if defendant’s conduct created some foreseeable risk of harm to others and stating that “in fixing the bounds of duty, not only logic and science, but policy play an important role. . . . However, it must also be recognized that there is a responsibility to consider the larger social consequences of the notion of duty and to correspondingly tailor that notion so that the illegal consequences of wrongs are limited to a controllable degree.”); *Schmid v. Fairmont Hotel Company-Chicago*, 803 N.E.2d 166, 178 (Ill. App. Ct. 2003) (“In resolving whether a duty exists, a court must determine whether there is a relationship between the parties requiring that a legal obligation be imposed upon one for the benefit of the other. The factors relevant to the courts’ imposition of a duty include the reasonable foreseeability of injury, the likelihood of such injury, the magnitude of guarding against the injury, and the consequences of placing that burden on the defendant.”); *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991) (“We now conclude that three factors must be balanced [in determining the existence of a duty], viz. (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns.”); *Berry v. National Medicalservs., Inc.*, 205 P.3d 745, 749-50 (Kan. Ct. App. 2009) (explaining that three elements must be satisfied before a legal duty arises: (1) “the plaintiff must be a foreseeable plaintiff, i.e., within the range of apprehension”; (2) “the probability of harm must be foreseeable”; and (3) “there must be no public policy against imposing the claimed duty on the defendant”); *Higginbotham v. Keeneland Ass’n*, No. 2009-CA-000301-MR, 2010 WL 323287, at *4 (Ky. Ct. App. Jan. 29, 2010) (“[I]n order to impose a duty of care, the Court must consider, among other things, whether the harm was foreseeable based on the facts as viewed by a reasonable person in like or similar circumstances as well as several other factors including public policy, statutory, and common law theories.”); *Verdun v. State of Louisiana*, 598 So. 2d 1091, 1096 (La. Ct. App. 1992); *writ denied*, 604 So. 2d 1003 (La. 1992) (“The existence of a duty may be determined by considering the ease of association between the alleged duty and the risk encountered, as well as social, moral, and economic factors. “); *Trusiani v. Cumberland & York Distribs., Inc.*, 538 A.2d 258, 261 (Me. 1988) (considering “the hand of history, our ideals of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall. . . . the mores of the community “always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind.”); *Cameron v. Pepin*, 610 A.2d 279, 282 (Me. 1992) (holding that duty “often also turns ‘on recognizing and weighing relevant policy implications’” and that “[f]oreseeability, then, is one consideration among many that must be taken into

account”); *Jupin v. Kask*, 849 N.E.2d 829, 835-36 (Mass. 2006) (holding that duty turns on social values and customs and foreseeability of the risk of harm); *Hoffman v. Union Elec. Co.*, 176 S.W.3d 706, 708 (Mo. 2005) (en banc) (holding that the existence of a duty depends on a judgment of “sound public policy,” specifically: “In considering whether a duty exists in a particular case, a court must weigh the foreseeability of the injury, the likelihood of the injury, the magnitude of the burden of guarding against it and the consequences of placing that burden on defendant.”); *Strickland v. Taco Bell Corp.*, 849 S.W.2d 127, 132 (Mo. Ct. App. 1993) (“The question of whether a duty will be imposed rests upon several policy factors, including: (1) the social consensus that the interest is worthy of protection, (2) the foreseeability of the injury and the degree of certainty that the protected person suffered injury, (3) the likelihood of the injury, (4) the moral blame society attaches to the conduct, (5) the prevention of future harm, (6) consideration of cost and the ability to spread the risk of loss, and (7) the consequences of placing that burden on the defendant.”); *Merluzzi v. Larson*, 610 P.2d 739, 742 (Nev. 1980) (reversed on other grounds) (“[D]uty’ is only an expression of the aggregate of those policy considerations which cause the law to conclude that protection is owed.”); *Ashwood v. Clark County*, 930 P.2d 740, 743 (Nev. 1997) (“Foreseeability of harm is, of course, a predicate to establishing the element of duty.”); *Everitt v. General Elec. Co.*, 979 A.2d 760, 762 (N.H. 2009) (stating that duty “ultimately rests on a judicial determination that the social importance of protecting the plaintiff’s interest outweighs the importance of immunizing the defendant from extended liability”); *Cui v. Chief, Barrington Police Dep’t*, 924 A.2d 397, 399-400 (N.H. 2007) (“The existence of a duty depends upon what risks, if any, are reasonably foreseeable under the particular circumstances.”); *Press v. Borough of Point Pleasant Beach*, 2010 WL 307931, at *4 (N.J. Super. Ct. Jan. 28, 2010) (noting that duty “involves identifying, weighing, and balancing several factors—the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution” and that “A major consideration in the determination of the existence of a duty under ‘general negligence principles’ is the foreseeability of the risk of injury”); *Talbott v. Roswell Hosp. Corp.*, 118 P.3d 194, 201 (N.M. Ct. App. 2005) (“The recognition of a legal duty involves consideration of both foreseeability and policy.”); *Gabalton v. Erisa Mortgage Co.*, 949 P.2d 1193, 1201 (N.M. Ct. App. 1997) (“The ultimate question is whether the law should give recognition and effect to an obligation from one person to another. In making these policy decisions, courts should be guided by ‘community moral norms and policy views, tempered and enriched by experience, and subject to the requirements of maintaining a reliable, predictable, and consistent body of law.’ The court should take into account the relationship of the parties, the plaintiff’s injured interests, and the defendant’s conduct.”); *Peralta v. Henriquez*, 790 N.E.2d 1170 (N.Y. 2003) (“Courts have long fixed the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability”); *Brashear v. Liebert Corp.*, No. 06AP-252, 2007 WL 184888, at *3 (Ohio Ct. App. Jan. 25, 2007) (“Under the law of negligence, a defendant’s duty to a plaintiff depends upon the relationship between the parties and the foreseeability of injury to someone in the plaintiff’s position. ‘Any number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall.’”); *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d 1218, 1222-23 (Pa. 2002) (“[T]he legal concept of duty is necessarily rooted in often amorphous public policy considerations, which may include our perception of history, morals, justice, and society. . . . [O]ur courts are to balance in determining whether a common law duty of care exists: (1) the relationship between the parties; (2) the social utility of the actor’s conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution.”); *Huddleston v. Infertility Center of Am., Inc.*, No. 1995-C-5893, 1996 WL 932123, at 158-59 (Pa. Apr. 30, 1996) (holding that “In the decision [of] whether or not there is a

in two or three states. A near-comprehensive list of the factors considered by these courts is as follows: (1) the foreseeability of some general risk of harm, (2) the foreseeability of the harm that in fact materialized, (3) the relationship between the parties, (4) the nature of the activity in which the defendant engaged, (5) the type of injury risked by defendant's conduct, (6) the nature of the plaintiff's injured interest, (7) the social utility of the defendant's conduct, (8) the burden

duty, many factors interplay: The hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall. In the end the court will decide whether there is a duty on the basis of the mores of the community" and noting that an analysis of the relationship between the parties and foreseeability of risk are key factors); *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 365 (Tenn. 2008) ("When the existence of a particular duty is not a given or when the rules of the established precedents are not readily applicable, courts will turn to public policy for guidance. Doing so necessarily favors imposing a duty of reasonable care where a 'defendant's conduct poses an unreasonable and foreseeable risk of harm to persons or property. When conducting this analysis, the courts have considered, among other factors: (1) the foreseeable probability of the harm or injury occurring; (2) the possible magnitude of the potential harm or injury; (3) the importance or social value of the activity engaged in by the defendant; (4) the usefulness of the conduct to the defendant; (5) the feasibility of alternative conduct that is safer; (6) the relative costs and burdens associated with that safer conduct; (7) the relative usefulness of the safer conduct; and (8) the relative safety of alternative conduct."); *Chavez Constr., Inc. v. McNeely*, 177 S.W.3d 593, 599 (Tex. App. 2005) ("In determining duty, a court should consider "several interrelated factors, including the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant." Of these factors, foreseeability is the dominant consideration."); *Graff v. Beard*, 858 S.W.2d 918, 920 (Tex.1993) ("Duty is not based on foreseeability alone. Factors a court may consider in determining whether a duty exists include whether one party has superior knowledge of the risk, and whether a party has a right to control the actor whose conduct precipitated the harm."); *Normandeau v. Hanson Equipment, Inc.*, 215 P.3d 132, 158 (Utah 2009) ("A court determines whether a duty exists by analyzing the legal relationship between the parties, the foreseeability of injury, the likelihood of injury, public policy as to which party can best bear the loss occasioned by the injury, and other general policy considerations."); *Kellermann v. McDonough*, 684 S.E.2d 786, 803 (Va. 2009) ("[I]n determining whether a duty exists, the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant must be taken into account."); *Colbert v. Moomba Sports, Inc.*, 135 P.3d 485, 490 (Wash. Ct. App. 2006) ("Duty is a question of law that relies on mixed considerations of logic, common sense, justice, policy, and precedent."); *Hansen v. Washington Natural Gas Co.*, 615 P.2d 1351, 1353-54 (Wash. Ct. App. 1980) (overturned on other grounds) ("Absent public policy to the contrary, a common law duty is measured by the foreseeability of the risk of harm to others."); *Robertson v. LeMaster*, 301 S.E.2d 563, 568 (W.Va. 1983) ("Beyond the question of foreseeability, the existence of duty also involves policy considerations underlying the core issue of the scope of the legal system's protection[.]" "Such considerations include the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant."); *Alwin v. State Farm Fire and Cas. Co.*, 610 N.W.2d 218, 221 (Wis. Ct. App. 2000) (noting that although typically one owes a duty where one's conduct created some foreseeable risk, the court may decline to impose a duty nevertheless due to the following policy reasons: "(1) the injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tortfeasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligent tortfeasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance for recovery would enter a field that has no sensible or just stopping point.").

on the defendant of taking precautions against the risk, (9) the defendant's ability to exercise due care, (10) the consequences on society of imposing the burden on the defendant, (11) public policy, (12) the normal expectations of participants in the defendant's activity, (13) the expectations of the parties and of society, (14) the goal of preventing future injuries by deterring conduct in which the defendant engaged, (15) the desire to avoid an increase in litigation, (16) the decisions of other jurisdictions, (17) the balance of the foreseeable risk of injury versus the burden of preventing it (i.e., the Learned Hand formula), (18) fairness, (19) logic and science, (20) the desire to limit the consequences of wrongs (expressed in New York as the desire to curb the likelihood of unlimited or insurer-like liability), (21) the hand of history, (22) ideals of morality and justice, (23) the convenience of administration of the resulting rule, (24) social ideas about where the plaintiff's loss should fall, (25) whether there is social consensus that the plaintiff's asserted interest is worthy of protection, (26) community mores, (27) whether the injury is too remote from the defendant's conduct, (28) whether the injury is out of proportion to the defendant's wrong, (29) whether the imposition of a duty would open the way to fraudulent claims, (30) whether the recognition of a duty would enter a field with no sensible stopping point, (31) the cost and ability to spread the risk of loss, (32) the court's experience, (33) the desire for a reliable, predictable, and consistent body of law, (34) public policies regarding the expansion or limitation of new channels of liability, (35) the potential for disproportionate risk and reparation allocation, (36) whether one party had superior knowledge of the relevant risks, (37) whether either party had the right to control or had actual control over the instrumentality of harm, (38) the degree of certainty that the plaintiff suffered injury, (39) the moral blame attached to the defendant's conduct, (40) the foreseeability of the plaintiff, (41) economic factors, and (42) a consideration of which party could better bear the loss.²⁸

Examining the 43 (total) jurisdictions that look to a multi-factoral policy analysis as the core of duty, it is immediately apparent that *Palsgraf*'s relationality is not the common thread. Instead, foreseeability is the nearly ubiquitous, and often cited as the most important, factor in duty.²⁹ Only five of these courts base novel duty decisions on factors that do not (or at least may not) include foreseeability.³⁰ Courts are less homogenous regarding the precise form of

²⁸ *Id.*

²⁹ See, e.g., *Lowery v. Echostar Satellite Corp.*, 160 P.3d 959, 964 (Okla. 2007) (partially superseded on other grounds) ("The most important consideration in determining the existence of a duty of care is foreseeability of harm to the plaintiff.")

³⁰ Arizona and Wisconsin, citing the Restatement Third, have expressly purged duty of all consideration of foreseeability. *Gipson v. Kasey*, 150 P.3d 228, 231-32 (Ariz. 2007); *Behrendt v. Gulf Underwriters Ins. Co.*, 768 N.W.2d 568, 575-76 (Wis. 2009). In Washington, the Supreme Court *en banc* recently stated that "'Foreseeability does not create a duty but sets limits once a duty is established.' Once this initial determination of legal duty is made, the jury's function is to decide the foreseeable range of danger therefore limiting the scope of that duty." *Simonetta v. Viad Corp.*, 197 P.3d 127, 131 n.4 (Wash. 2008). At least one court has followed this statement as law, see *Rosengren v. City of Seattle*, 205 P.3d 909, 913, (Wash. Ct. App. 2009), but time will reveal the reach of the holding. New York has held that foreseeability is not relevant to the existence of a duty, but to what seems to be treated as a sixth element in negligence, called "scope of duty." See *Madden v. Ceglie*, 841 N.Y.S.2d 821, at *2 (N.Y. Sup. 2007) ("In analyzing questions regarding the scope of an individual actor's duty, Courts look to whether the relationship of the parties is such as to give rise to a duty of care, whether the plaintiff was within the zone of foreseeable harm, and whether the accident was within the reasonably foreseeable risks."); *Demshick v. Community Housing Mgmt. Corp.*, 34 A.D.3d 518, 520 (N.Y. App. Div. 2006)

foreseeability considered, on two metrics. First, courts differ in how they define the object of the foreseeability inquiry. In fourteen jurisdictions, courts define it as “the foreseeability of the harm”—typically, the focus being on the type of harm suffered by the plaintiff.³¹ Consistent with the California courts, twelve jurisdictions state the inquiry as “the foreseeability of harm to the plaintiff,” with its previously-mentioned ambiguity.³² Ten jurisdictions consider the “foreseeability of the risk,” which might include unrealized risks as well as the plaintiff’s actual injury.³³ Two jurisdictions describe the factor as an unspecified “foreseeability.”³⁴

Second, courts differ in the scope of generality with which they described the object of the foreseeability analysis. Some jurisdictions claim that it is not the precise type, extent, or manner of injury that is relevant, but merely “whether the defendant’s conduct created a foreseeable class of risk, which includes the plaintiff’s injury.”³⁵ Such an inquiry is not truly categorical, however. In practice, such courts commonly frame the injury in a particularized manner despite the seemingly categorical wording of the standard. For example, rather than aiming the foreseeability lens at a generalized “physical harm,” a court might describe the relevant harm as “homicide” or “that someone would lose control of their car to such a degree that they would hit defendant on that particular portion of the roadside.”³⁶ Nor is such a standard purely categorical

(“Foreseeability does not define duty; it merely determines the scope of the duty once a duty is found to exist.”). Louisiana’s law is particularly confounding. The state has adopted a so-called “ease of association” test, which includes an analysis of foreseeability. Courts are inconsistent, however, in stating whether the ease of association test is for duty or proximate cause. *Compare* *Pinsonneault v. Merchants & Farmers Bank & Trust Co.*, 738 So. 2d 172, 181 (La. App. 1999); *Khalimsky v. Liberty Mut. Fire Ins. Co.*, No. 07-8959, 2009 WL 1565934, at *5 (E.D. La. June 2, 2009) (“[T]he Court used the terms “foreseeability” and “proximate cause” interchangeably.”) *with* *Williams ex rel. Williams v. Jones*, No. 09-CA-839, 2010 WL 653293, at *2 (La. Ct. App. Feb. 23, 2010) (“A risk is not within the scope of a duty where the circumstances of that injury to the plaintiff could not reasonably be foreseen or anticipated, because there was no ease of association between the risk of that injury and the legal duty.”); *Verdun v. State of Louisiana*, 598 So. 2d 1091, 1096 (La. App. 1992); writ denied, 604 So. 2d 1003 (La. 1992) (“The existence of a duty may be determined by considering the ease of association between the alleged duty and the risk encountered . . .”).

³¹ *See supra* note 27 (Alabama, Colorado, Connecticut, Illinois, Kentucky, Michigan, Missouri, Nevada, Ohio, Tennessee, Texas, Utah, Virginia, West Virginia).

³² *See id.* (Alaska, California, Hawai’i, Idaho, Indiana, Maryland, Mississippi, North Dakota, Oklahoma, Rhode Island, Vermont, Wyoming).

³³ *See id.* (Delaware, District of Columbia, Florida, Georgia, Kansas, Massachusetts, Montana, New Hampshire, New Jersey, Pennsylvania).

³⁴ *See id.* (Maine, New Mexico).

³⁵ *See, e.g.*, *Kirlin v. Halverson*, 758 N.W.2d 436, 451 (S.D. 2008) (stating that “is not contingent upon foreseeability of the ‘extent of the harm or the manner in which it occurred.’ This means that the *exact harm* need not be foreseeable. Rather, the harm need only be *within the class* of reasonably foreseeable hazards that the duty exists to prevent.”).

³⁶ *See, e.g.*, *Brown v. Kerr*, . 2009-CA-000943-MR, 2010 WL 1404785, at *3-4 (Ky. Ct. App. Apr. 9, 2010) (citing standard as “the general foreseeability of such harm, not whether the specific mechanism of the harm could be foreseen In determining whether an injury was foreseeable, we look to whether a reasonable person in a defendant’s position would recognize undue risk to another, not whether a reasonable person recognized the specific risk to the injured party,” but then holding that even in light of evidence that defendants’ son might be dangerous to others, his murder of decedent was not foreseeable); *Higginbotham v. Keeneland Ass’n*, No. 2009-CA-000301-MR, 2010 WL 323287, at *4 (Ky. Ct. App. Jan.

even in theory, for to decide whether the plaintiff's injury is a member of a class of foreseeable injuries is to decide the specific facts—and to make normative classificatory judgments—with regard to the plaintiff's claim. Most jurisdictions, however, do not even pay lip service to categorical foreseeability, but instead decide whether the plaintiff's actual injury or risk was foreseeable.³⁷ Only four jurisdictions limit the duty-foreseeability inquiry, with some degree of consistency, to whether the defendant's actions created "some general range of risk or harm," leaving the foreseeability of the plaintiff's particular injury to proximate cause.³⁸

29, 2010) (holding that defendant "could not have foreseen the injuries sustained by Appellants or that Moureaux would lose control to the extent that she could not bring her vehicle to a complete stop utilizing the portions of the shoulder available to her on that morning"). *See also* Laabs v. Southern Cal. Edison Co., 97 Cal. Rptr. 3d 241, 251 (Cal. Ct. App. 2009) ("The 'general character of the event' with which we are concerned in this case is a vehicle leaving a roadway where vehicle speeds commonly reach 62 miles per hour or more and striking a fixed concrete light pole placed 18 inches away from the curb.").

³⁷ *See, e.g.*, *Mussivand v. David*, 544 N.E.2d 265, 272 (Ohio 1989) ("[W]hether appellant owed appellee a duty turns on whether a reasonably prudent person would have anticipated that appellee would be injured by way of appellant's alleged negligence. In this case appellant, allegedly infected with a venereal disease, engaged in sexual relations with a married woman. . . . Hence liability to a third party for failure to disclose to the original sexual partner turns on whether, under all the circumstances, injury to the third-party spouse was foreseeable.").

³⁸ In Alaska, foreseeability of a general sort is decided by the judge as a matter of duty. For example, in a case in which a parolee harmed plaintiff on release from prison, the court explained that in deciding whether the state owed a duty, the question is not whether this particular parolee posed a threat, or whether this parolee posed a threat to this plaintiff, but whether releasing parolees might ever pose a threat to others. Foreseeability of a particular risk or plaintiff was thus left to the jury for determination in breach and proximate cause. *See* P.G. v. State Dep't of Health and Human Servs., Div. of Family and Youth Servs., 4 P.3d 326, 331 n.11 (Alaska 2000) ("In the context of determining the existence of a duty, we have made it clear that foreseeability is a broad concept and does not require that the precise harm in a given case be predictable.") As a practical matter, however, courts seem sometimes to rule on more specific foreseeability without deference to the jury. *See, e.g.*, *State Dep't of Corrs. v. Cowles*, 151 P.3d 353, 363 (Alaska 2006) (imposing a duty in claim by family of decedent killed by parolee, "only where officials know, or reasonably should know, that a parolee poses a danger to a particular individual or identifiable group. Thus, our foreseeability analysis . . . is quite similar to the requirement of a particularized relationship to an identifiable 'victim class'"). A similarly broad standard has been adopted in Florida. *See* *McCain v. Florida Power Corp.*, 593 So. 2d 500, 502-04 (Fla. 1992) (stating that duty generally "is a minimal threshold legal requirement for opening the courthouse doors," and that the duty question is "whether the defendant's conduct foreseeably created a broader 'zone of risk' that poses a general threat of harm to others."). Occasionally, Florida courts deviate from this path, however. *See, e.g.*, *Levy v. Fla. Power & Light Co.*, 798 So. 2d 778, 780 (Fla. Dist. Ct. App. 2001), rev. den. 902 So. 2d 790 (Fla. 2005) (A legal "[d]uty is an allocation of risk determined by balancing the foreseeability of harm, in light of all the circumstances, against the burden to be imposed."). This pattern is also true of Georgia and Indiana courts. *See* *Orkin Exterminating Co., Inc. v. Carder*, 575 S.E.2d 664, 670 (Ga. Ct. App. 2002) ("With reference to foreseeability of injury, the correct rule is that in order for a party to be held liable for negligence, it is not necessary that he should have been able to anticipate the particular consequences which ensued. It is sufficient if, in ordinary prudence, he might have foreseen that some injury would result from his act or omission, and that consequences of a generally injurious nature might result. Adequate evidence was presented from which the jury could have found that it was foreseeable to Orkin that someone in the office building would suffer personal injury as a result of exposure to the subject pesticides if improperly applied."); *Humphrey v. Duke Energy Ind., Inc.*, 916 N.E.2d 287, 291-92

The next most frequently-cited factor in jurisdictions that utilize multi-factor duty tests is the open-ended consideration of “public policy.” Thirty-six jurisdictions list this factor as central to duty decisions.³⁹

Alas, we come to the “relationship between the parties”—a distant third among factors listed by courts as being central to duty analysis. Fifteen jurisdictions list this factor as part of duty’s essence.⁴⁰ Taking this on its face, it is evidence that at best only a minority of jurisdictions embrace Cardozo’s theoretical vision of a relational duty. Moreover, even among this minority of jurisdictions, listing relationality as a basic duty factor does not necessarily mean that they view duty as essentially relational versus act-centered. A court might conceive of duty as generally act-centered, and yet consider relationality when deciding whether to impose an affirmative duty. Or a court might consider the lack of a relationship between the parties as relevant to, although not conclusive of, a no-duty decision in cases where the defendant’s conduct created a risk. Thus, the most that one can conclude from this evidence is that a minority of courts view relationality as one important factor to consider in rendering duty decisions. This is a much weaker claim than that commonly associated with Cardozo’s opinion in *Palsgraf*.

I offer two final observations regarding the jurisdictions described above. First, it is dismaying to find seven jurisdictions that expressly incorporate the Learned Hand formula for breach as part of their foundational test for the existence of a duty.⁴¹ To be sure, many iterations of multi-factoral tests (particularly the California test) contain some or all of the elements of PL

(Ind. Ct. App. 2009) (“Some case law from this court holds that the analysis of the foreseeability component of duty is not fact-specific, unlike the analysis for determining proximate cause:

. . . the foreseeability component of proximate cause requires an evaluation of the facts of the actual occurrence, while the foreseeability component of duty requires a more general analysis of the broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence.

Other case law, however, holds that the foreseeability analysis with respect to a party’s duty is fact-specific and, as such, identical to the foreseeability analysis for proximate cause. *E.g.*, *State v. Cornelius*, 637 N.E.2d 195, 198 (Ind. Ct. App. 1994) (“[P]art of the inquiry into the existence of a duty is concerned with exactly the same factors as is the inquiry into proximate cause”) (quotations omitted).”)

³⁹ *See supra* notes 22, 23 & 27 (all jurisdictions applying the California factors, plus Connecticut, District of Columbia, Indiana, Kansas, Florida, Massachusetts, Georgia, Hawai’i, Kentucky, Louisiana, Maine, Missouri, New Jersey, Nevada, New Hampshire, Washington, New Mexico, New York, Ohio, Pennsylvania, Tennessee, Utah, Wisconsin.)

⁴⁰ *See supra* note 27 (Alabama, Maryland, North Dakota, Connecticut, Delaware, Illinois, District of Columbia, Indiana, Hawai’i, Missouri, New Jersey, New Mexico, Ohio, Pennsylvania, Utah). It is exceedingly difficult to catalog whether these courts examine substantive or circumstantial relationality in the context of this factors—it seems to be a messy mixture of both.

⁴¹ *See id.* (Colorado, Delaware, Florida, Massachusetts, Hawai’i, Missouri, Tennessee). Some jurisdictions adopting the California factors do the same. *See, e.g.*, *Isaacs v. Huntington Mem’l Hosp.*, 695 P.2d 653, 658 (1985) (balancing factors in duty context); *Sharp v. W.H. Moore, Inc.*, 796 P.2d 506, 510 (Idaho 1990) (stating, in deciding the existence of a duty, that “[w]here the degree of result or harm is great, but preventing it is not difficult, a relatively low degree of foreseeability is required. Conversely, where the threatened injury is minor but the burden of preventing such injury is high, a higher degree of foreseeability may be required.” (citing *U.S. v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Judge Learned Hand))).

> B—a harmful practice, itself, in the view of many observers⁴²—, but to express duty as an explicit weighing of these factors is to render the element of breach largely superfluous. Second, I reiterate the inconsistency of courts’ statements of their core duty law. Not only do courts often fail to cite correctly their own basic duty analyses, even when applying the proper test they often do so incorrectly or at least in a manner inconsistent with their sister courts.

Only eight jurisdictions depart from a multi-factoral policy approach to duty. Five of these states cite only foreseeability as the keystone to duty, deciding novel claims with otherwise unbounded reasoning, analogy to precedent, and reference to the law in other jurisdictions.⁴³ Iowa and Nebraska have expressly adopted the approach of the Restatement Third of Torts⁴⁴—embracing a strong default duty where the defendant’s conduct created a risk of harm, then departing from this duty only when faced with an extraordinary reason of policy or principle.⁴⁵ Finally, Oregon has created a system which disclaims altogether the role of policy in duty decisions. In Oregon, where the defendant’s conduct creates a risk of harm, the defendant owes a duty, full stop.⁴⁶ Of course, the Oregon courts do recognize exceptions to this strong default in

⁴² See, e.g., John C. P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 713 (2001) (“As many before us have pointed out, ... courts, both knowingly and unwittingly, sometimes decide what are surely breach questions under the guise of deciding the question of ‘duty’ ... thus surreptitiously shrink[ing] the scope of the rule stating that the breach issue ordinarily is for the jury.”)

⁴³ See *Coca-Cola Bottling Co. of Memphis, Tenn. v. Gill*, 100 S.W.3d 715, 724 (Ark.2003) (holding that duty turns on foreseeability of harm); *Austin v. Metro. Life Ins. Co.*, 152 N.W.2d 136, 138 (Minn. 1967) (“The common-law test of duty is the probability or foreseeability of injury to plaintiff.”); *Winters v. Lee*, 446 S.E.2d 123, 124 (N.C. Ct. App. 1994) (“An inherent component of any ordinary negligence claim is reasonable foreseeability of injury.”); *Terlinde v. J.F. Neely, Sr.*, 271 S.E.2d 768, 770 (S.C. 1980) (citing foreseeability as the key to duty decisions). *Luke v. Deal*, 692 N.W.2d 165, 170 (S.D. 2005) (“When a duty is alleged based on the common law, its existence depends on the foreseeability of injury.”). Note that of these, only Arkansas purports to decide foreseeability of a general scope. *Coca-Cola*, 100 S.W.3d at 724 (“The question, however, is not whether a defendant could have reasonably foreseen the exact or precise harm that occurred, or the specific victim of the harm. It is only necessary that the defendant be able to reasonably foresee an appreciable risk of harm to others.”).

⁴⁴ See *Thompson v. Kaczinski*, 774 N.W.2d 829, 834-39 (Iowa 2009) (adopting Restatement Third approach to duty in toto); *A.W. v. Lancaster County School Dist.*, 784 N.W.2d 907, 918 (Neb. 2010) (same).

⁴⁵ Restatement (Third) of Torts: Liability for Physical Harm § 7 (2010).

⁴⁶ *Donaca v. Curry County*, 734 P.2d 1339, 1340-42 (Or. 1987) (“‘Duty’ plays no affirmative part in a plaintiff’s case that does not invoke an obligation arising from or defined by a status, relationship, statute, or other legal source outside negligence law itself; and, unless the plaintiff invokes such a specific legal source, ‘no duty’ is only a defendant’s way of denying legal liability for conduct that might be found in fact to have unreasonably caused a foreseeable risk of harm to an interest of the kind for which the plaintiff claims damages. ‘No duty’ defenses are argued broadly or narrowly, as the occasion demands. Sometimes ‘no duty’ excludes whole categories of claimants or of claims, for instance economic or psychic loss caused by physical injury to another person. At other times ‘no duty’ refers narrowly to an aspect of the particular circumstances before the court. This often amounts to a claim that no rational factfinder could find defendant’s conduct unreasonably to pose a foreseeable risk to the plaintiff but does not really assert any categorical rule.” “We do not follow the quoted approach of the Wisconsin court, as we have not embraced freewheeling judicial “policy declarations” in other cases.”); *Fazzolari v. Portland Sch. Dist. No. 1J*, 734 P.2d 1326 (Or. 1987) (“In short, unless the parties invoke a status, a relationship, or

broad categories, such as where the defendant caused only economic or emotional harm.⁴⁷ Such exceptions seem difficult to understand if not by reference to public policy. Still, the role of policy is much more tremulous in Oregon than in other states.

In summary, it is safe to say that courts do not often directly engage *Palsgraf*'s theoretical inquiry into whether duty is relational or act-centered. When courts address the essence of duty, they ubiquitously describe it as a multi-pronged policy analysis, of which the relationship between the parties is, in a minority of jurisdictions, a factor. In my view, this is strong, if inconclusive, evidence against positive theoretical models of duty built primarily on the relationality concept. I do note that many courts that fail to list "relationship between the parties" as a factor yet analyze plaintiff-foreseeability in the context of duty. This aspect of courts' duty jurisprudence is discussed in Section II, below.

II. Is Plaintiff-Foreseeability a Duty Inquiry or an Aspect of Proximate Cause?

Even if courts do not see relationality as a basic theoretical building block from which all (or most) duty analysis extends, it is another, more specific question whether courts require a plaintiff to establish that the defendant owed a duty to him or her particularly. On this score, Cardozo has clearly won the day. When faced with the issue, thirty-three (of fifty-one) courts hold with fair consistency that whether the plaintiff was a foreseeable victim is a question to be decided in the duty context.⁴⁸ Only four jurisdictions clearly follow Judge Andrews in holding

a particular standard of conduct that creates, defines, or limits the defendant's duty, the issue of liability for harm actually resulting from defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff.").

⁴⁷ See *Donaca*, 734 P.2d at 1340; *Fazzolari*, 734 P.2d at 1330.

⁴⁸ See *Martin v. Arnold*, 643 So. 2d 564, 567 (Ala. 1994) ("To establish negligence, a plaintiff must prove: (1) a duty to a foreseeable plaintiff . . ."); *Coca-Cola*, 100 S.W.3d at 724-25 (holding that plaintiff custodian was foreseeable plaintiff where plaintiff was harmed by touching defendant's electrified concessions stand); *Oddone v. Superior Court*, 101 Cal. Rptr. 3d 867, 871 (Cal. Ct. App. 2009) (analyzing plaintiff-foreseeability in determining the "scope of the defendant's duty"); *Leppke v. Segura*, 632 P.2d 1057, 1059 (Colo. Ct. App. 1981) ("The scope of the duty, as well as the existence thereof, is a question for the court. The duty to exercise reasonable care extends only to foreseeable damages and injuries to foreseeable plaintiffs. The [plaintiffs'] . . . , as a matter of law, . . . were foreseeable plaintiffs; therefore, the defendants' duty extended to them for the relief which they seek."); *In re Asbestos Litig.*, No. 04C-07-099-ASB, 2007 WL 4571196, at *12 (Del. Super. Ct. December 21, 2007) ("[J]ust as in *Palsgraf*, . . . [plaintiff's] position at the time of the alleged wrong, far removed from ICI's property, is such that she cannot be considered a reasonably foreseeable victim of the alleged breach of the duty ICI owed to her husband (in failing to warn and/or implement safety precautions)."); *Powell v. District of Columbia*, 602 A.2d 1123, 1133 (D.C. 1992) ("[I]n deciding duty] we must ask "whether the injury to that individual (to whom a duty was owed) was reasonably foreseeable to the defendant."); *Doe Parents No. 1 v. State Dep't of Educ.*, 58 P.3d 545, 583 (Haw. 2002) ("[I]f it is not reasonably foreseeable that the particular plaintiff will be injured if the expected harm in fact occurs, the defendant does not owe that plaintiff a duty reasonably to prevent the expected harm."); *Colonial Inn Motor Lodge, Inc., for Use and Benefit of Cincinnati Ins. Co. v. Gay*, 680 N.E.2d 407, 413 (Ill. App. Ct. 1997) ("Although reasonable foreseeability is an important consideration in the duty equation, we believe that the trial court erred by using as its touchstone the foreseeability of the particular injury or damages rather than the foreseeability of an injury to the particular plaintiff. We believe the latter is crucial to the legal determination of duty, while the

former is more appropriately considered in determining the factual issue of proximate causation.”); *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 250 (Ind. 1996) (holding that “as *Palsgraf* makes clear, [defendant] Grunau had a duty of care to all reasonably foreseeable plaintiffs, including [plaintiff] Tibbs.”); *Berry v. National Medical Services, Inc.*, 205 P.3d 745, 749 (Kan. Ct. App. 2009) (“Three elements must be satisfied before a legal duty arises in Kansas. First, the plaintiff must be a foreseeable plaintiff, i.e., ‘within the range of apprehension.’”); *Jenkins v. Best*, 250 S.W.3d 680, 690-91 (Ky. Ct. App. 2007) (noting, despite seemingly contradictory precedent imposing a “universal duty,” that Kentucky follows Cardozo’s majority in requiring proof of relationality defined by foreseeability); *Henley v. Prince George’s County*, 503 A.2d 1333, 1341-42 (Md. 1986) (holding that plaintiff-foreseeability plays a role in both duty and proximate cause, although holding that “under the circumstances of this case the question of the sufficiency of the nexus between the alleged negligence of Jones and the fatal assault upon Donald, involving as it does a retrospective consideration of the precise facts of the occurrence, is properly addressed as an issue of proximate cause rather than one involving the existence of a duty owed to the plaintiff.”); *Moning v. Alfonso*, 254 N.W.2d 759, 765 (Mich. 1977) (imposing a duty on the defendants only after reasoning that “[plaintiff] Moning, as a playmate of a child who purchased a slingshot marketed by the defendants, was within the foreseeable scope of the risk created by their conduct in marketing slingshots directly to children. Moning was a foreseeable plaintiff”); *Jam v. Independent School Dist. No. 709*, 413 N.W.2d 165, 169 (Minn. App. 1987) (“[T]he common law test of duty for negligence purposes is based on the probability or foreseeability of risk to the particular plaintiff.”) (citing *Palsgraf*); *Krause v. U.S. Truck Co.*, 787 S.W.2d 708, 710 (Mo. 1990) (citing *Palsgraf* in stating that “[n]o duty is owed to persons outside ‘the orbit of the danger as disclosed to the eye of reasonable vigilance’”); *Fisher v. Swift Transp. Co., Inc.*, 181 P.3d 601, 607-08 (Mont. 2008) (analyzing plaintiff-foreseeability as part of duty); *Macie v. Helms*, 934 A.2d 562, 565 (N.H. 2007) (holding that defendant did not owe duty to particular plaintiff, citing *Palsgraf*); *Carter Lincoln-Mercury, Inc., Leasing Div. v. EMAR Group, Inc.*, 638 A.2d 1288, 1294 (N.J. 1994) (“[I]n addressing the imposition of a duty based on principles of foreseeability, that a plaintiff may be found within the ‘range of harm’ emanating from a tortfeasor’s activities is more significant than whether the parties stand in a direct contractual relationship.”); *Herrera v. Quality Pontiac*, 73 P.3d 181, 196 (N.M. 2003) (noting that court considers plaintiff-foreseeability in duty context, but suggesting that court reconsider this practice in light of Restatement Third); *Estate of Mullis v. Monroe Oil Co.*, 505 S.E.2d 131, 137 (N.C. 1998) (citing *Palsgraf* for holding that court must establish a duty with regard to plaintiff); *Sime v. Tvenge Assocs. Architects & Planners, P.C.*, 488 N.W.2d 606, 610 (N.D. 1992) (“[O]ne who undertakes to design and construct a structure has a duty to exercise ordinary care and skill to protect any who foreseeably, or with reasonable anticipation, may be injured by the failure to do so.”); *Albright, ex rel. Albright v. Univ. of Toledo*, No. 01AP-130, 2001 WL 1084461, at *2 (Ohio Ct. App. Sept. 28, 2001) (“Whether a duty of due care is owed to a particular plaintiff depends upon whether the defendant should have foreseen that his conduct would likely cause a person in the plaintiff’s position harm.”); *Iglehart v. Bd. of County Comm’rs of Rogers County*, 60 P.3d 497, 502 (Okla. 2002) (holding that duty turns on plaintiff-foreseeability, and holding that plaintiff was a foreseeable victim); *Splendorio v. Bilray Demolition Co., Inc.*, 682 A.2d 461, 466-67 (R.I. 1996) (citing *Palsgraf* in holding that defendant did not owe a duty to the plaintiffs as they were not “within the range of apprehension”); *Sharpe v. South Carolina Dep’t of Mental Health*, 354 S.E.2d 778, 781-82 (S.C. Ct. App. 1987) (explaining South Carolina’s adherence to Cardozo’s view of duty to specific plaintiff) (Bell, J., concurring); *Bland v. Davison County*, 507 N.W.2d 80, 81 (S.D. 1993) (“A court must determine if a relationship exists between the parties such that the law will impose upon the defendant a legal obligation of reasonable conduct for the benefit of the plaintiff.”); *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 367 (Tenn. 2008) (finding, in the context of duty, that plaintiff was foreseeable); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 551 (Tex. 1985) (stating that the requirements of duty-foreseeability are (1) “that the injury be of such a general character as might reasonably have been anticipated””; and (2) “

that plaintiff-foreseeability is properly a matter for proximate cause.⁴⁹ There may, however, be the beginning of a movement afoot in Andrews' direction. Three of the four states reserving plaintiff-foreseeability to proximate cause have done so within the past three years, each by express adoption of the recently published Restatement (Third) of Torts.⁵⁰ It remains to be seen whether the Restatement's position takes hold as a general trend.⁵¹

In the remaining fourteen jurisdictions, the proper doctrinal home for plaintiff-foreseeability remains unclear. This is remarkable, considering *Palsgraf*'s continued prominence in legal discourse for over eighty years. In some jurisdictions, the question is difficult to answer because courts conceptualize *Palsgraf*-like scenarios in terms of harm-foreseeability rather than plaintiff-foreseeability.⁵² Indeed, *Palsgraf* itself was susceptible to such a conceptualization—rather than

‘that the injured party should be so situated with relation to the wrongful act that the injury to him or to one similarly situated might reasonably have been foreseen.’”) (quoting *Carey v. Pure Distrib. Corp.*, 124 S.W.2d 847, 849 (Tex. 1939)); *Barrus v. Western Union Tel. Co.*, 62 P.2d 113, 115-16 (Utah 1936) (adopting Cardozo's approach in the context of a claim for economic loss—later cited in broader array of fact patterns); *Guilmette v. Alexander*, 259 A.2d 12, 13 (Vt. 1969) (“The right to recover for negligence is based upon a breach of duty owing to the plaintiff and does not accrue derivatively.”); *Dudley v. Offender Aid and Restoration of Richmond, Inc.*, 401 S.E.2d 878, 882 (Va. 1991) (recognizing that Virginia courts follow Cardozo's view that duty “must be linked to some specific person or class of discernible victims”); *Alexander v. County of Walla Walla*, 929 P.2d 1182, 1185 (Wash. Ct. App. 1997) (“[T]he duty must be one owed to the injured plaintiff individually and not one owed to the public in general.”); *Goodrich v. Seamands*, 870 P.2d 1061, 1064 (Wyo. 1994) (“A duty exists where, ‘upon the facts in evidence, such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other-or, more simply, whether the interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant.’”).

⁴⁹ See *Gipson v. Kasey*, 150 P.3d 228, 231-32 (Ariz. 2007) (rejecting consideration of foreseeability and fact specific relationality in the context of duty); *Thompson v. Kaczinski*, 774 N.W.2d 829, 834-39 (Iowa 2009) (adopting Restatement Third approach in purging foreseeability from duty altogether, leaving foreseeability of plaintiff to proximate cause); *A.W. v. Lancaster County School Dist.*, 784 N.W.2d 907, 918 (Neb. 2010) (same); *Alvarado v. Sersch*, 662 N.W.2d 350, 353 (Wis. 2003) (“Wisconsin has long followed the minority view of duty set forth in the dissent of *Palsgraf*... ‘[E]veryone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.’”) (internal citation omitted) (quoting *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting)). Although Louisiana, New York, and Washington have all demonstrated some indication that foreseeability generally is not a duty consideration, these jurisdictions also seem fairly clearly to require plaintiff-foreseeability. Further clarification is therefore needed.

⁵⁰ Restatement Third, *supra* note 46, at §29, reporters' note to cmt. n. Wisconsin, although following Andrews for many years, also has now explicitly adopted the Restatement Third's approach to foreseeability. *Behrendt v. Gulf Underwriters Ins. Co.*, 768 N.W.2d 568, 575-76 (Wis. 2009).

⁵¹ One state has expressly rejected the Restatement Third approach. See *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 366-67 (Tenn. 2008) (with a dissenting opinion on this issue by the Chief Justice).

⁵² See, e.g., *Nelson by Tatum v. Commonwealth Edison Co.*, 465 N.E.2d 513 (Ill. App. Ct. 1984) (“From an analytical perspective, the *Cunis* decision seems to meld into one what had previously appeared to be two distinct problems in negligence theory—the unforeseen plaintiff problem and the problem of the foreseeable injury resulting from unforeseen means.”); *Schultz v. Gould Academy*, 332 A.2d 368, 370 (Me. 1975) (“Whether the harm that befell plaintiff was within ‘the range of reasonable apprehension’ was a question of fact for the jury.”); *Garcia v. Cross*, 27 S.W.3d 152, 155-56 (Tex. App. 2000) (describing overlap in inquiries). In some of these jurisdictions, harm-foreseeability is a proximate cause question and is left to the jury. See, *infra*, note 88.

asking whether harm to Helen Palsgraf was foreseeable to the railroad employees assisting the late-arriving passenger, the court might have asked whether it was foreseeable that someone would be harmed by a distant falling scale. In other jurisdictions, courts analyze plaintiff-foreseeability only in certain types of cases—particularly those involving purely economic harm or third-party crime—but do not seem to have embraced it as a general principle.⁵³ I hesitate to characterize these jurisdictions as Cardozoan because plaintiff-foreseeability is rather transparently used in such scenarios as a pragmatic tool to cabin liability due to external policy considerations.⁵⁴ Finally, in some jurisdictions, the case law is simply contradictory or insufficiently specific. Three such jurisdictions appear to lean toward considering plaintiff-foreseeability in duty.⁵⁵ Five lean toward proximate cause.⁵⁶

⁵³ See, e.g., Oregon, *infra* note 87.

⁵⁴ I have discussed this phenomenon at length elsewhere. See W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. REV. 921, 983-86 (2005); W. Jonathan Cardi, *Purging Foreseeability*, 58 VAND. L. REV. 739, 762-67 (2005); see also *Zimmermann v. Netemeyer*, 462 N.E.2d 502, 507 (Ill. App. Ct. 1984) (“The principal utility of the phrase ‘foreseeability of harm’ seems to be merely that of a vehicle for the pronouncement of the court’s decision on the duty issue after that decision has been reached on the basis of policy considerations, the true basis of all duty decisions by Illinois courts.”).

⁵⁵ Compare *Sacks v. Necaise*, 991 So. 2d 615, 619 (Miss. Ct. App. 2007) (holding that in medical malpractice actions, “[T]he plaintiff bears the burden of proof and must show the following four elements of negligence by a preponderance of the evidence: (1) the defendant had a duty to act in accordance with a standard of reasonable care so as to prevent injury to a foreseeable plaintiff.”—but this language only appears in the malpractice context) with *Mississippi Dep’t. of Transp. v. Johnson*, 873 So. 2d 108, 115, n.6 (Miss. 2004) (“Curiously, this Court has never adopted *Palsgraf* and has never cited it in a personal injury case.”). Like most states, Miss considers foreseeability of risk in duty, but the state has not expressly adopted plaintiff-foreseeability as a general proposition. In Massachusetts, courts sometimes talk about foreseeable plaintiffs, but for the most part only in bystander emotional distress and third-party crime/premises liability contexts. Massachusetts courts do, however, consider foreseeability of risk in duty (and in proximate cause). See *Whittaker v. Saraceno*, 635 N.E.2d 1185, 1187-88 (Mass. 1994) (“The word ‘foreseeable’ has been used to define both the limits of a duty of care and the limits of proximate cause. As a practical matter, in deciding the foreseeability question, it seems not important whether one defines a duty as limited to guarding against reasonably foreseeable risks of harm or whether one defines the necessary causal connection between a breach of duty and some harm as one in which the harm was a reasonably foreseeable consequence of the breach of a duty. This court has used each approach, perhaps based as much as anything on the way in which the issue was preserved below or argued to us on appeal.”). Pennsylvania clearly conditions duty on the relationship between plaintiff and defendant, and its courts distinguish plaintiff-foreseeability from proximate cause. But the plaintiff-foreseeability analysis is part of the “scope of duty” analysis—and the courts are unclear whether this is part of existence of a duty or something different entirely. See *Alumni Ass’n, Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan*, 535 A.2d 1095, 1098 (Pa. Super. Ct. 1987) (“Duty, in any given situation, is predicated upon the relationship existing between the parties at the relevant time. Where the parties are strangers to each other, such a relationship may be inferred from the general duty imposed on all persons not to place others at risk of harm through their actions. The scope of this duty is limited, however, to those risks which are reasonably foreseeable by the actor in the circumstances of the case. Only when the question of foreseeability is undeniably clear may a court rule as a matter of law that a particular defendant did not have a duty to a particular plaintiff.”); *Hoffman v. Sun Pipe Line Co.*, 575 A.2d 122, 126 (Pa. Super. 1990) (“Whether the analysis proceeds in terms of ‘duty’, ‘foreseeability’, or ‘proximate cause’, we must remain mindful of Prosser and Keeton’s admonition that our essential inquiry in these cases is the same.”).

In jurisdictions where plaintiff-foreseeability is decided as part of duty, courts face an issue similar to that relevant to harm-foreseeability—how to define the subject of the analysis. In an attempt to render plaintiff-foreseeability decisions categorical, a minority of jurisdictions claim to examine foreseeability of the “class of plaintiffs of which the plaintiff is a member.”⁵⁷ Thus,

⁵⁶ See *Torres v. Dep’t of Corr.*, 912 A.2d 1132, 1145-46 (Conn. Super. 2006) (“Connecticut courts tend to follow the dissent of Judge Andrews in the case of *Palsgraf v. Long Island R. Co.* instead of Judge Cardozo’s majority opinion. As a result, foreseeability in Connecticut is generally only an inquiry into whether an act was negligent-without taking Judge Cardozo’s second step of determining whether the plaintiff was foreseeable. Over time, a few appellate cases, however, have included language seemingly requiring a foreseeable plaintiff.”). In Florida, the Supreme Court in *McCain v. Florida Power Corp.*, 593 So. 2d 500, 502-04 (Fla. 1992) held that duty “is a minimal threshold legal requirement for opening the courthouse doors” and that the duty question is “whether the defendant’s conduct foreseeably created a broader ‘zone of risk’ that poses a general threat of harm to others,” leaving fact-specific determination of whether risk or plaintiff was foreseeable to jury in context of breach and proximate cause). See also *U.S. v. Stevens*, 994 So. 2d 1062, 1269-70 (Fla. 2008) (holding that research facility owed decedent duty where third party stole anthrax and mailed it to defendant’s employer, killing defendant—duty owed because storing anthrax creates risk to general public—whether defendant breached duty or proximately caused plaintiff’s death is left to jury); *Prime Hospitality Corp. v. Simms*, 700 So. 2d 167, 169 (Fla. Dist. Ct. App. 1997) (“we think the issue of foreseeability goes to proximate cause, rather than duty, in this case and was a question for the jury.”). Not all lower level courts have followed *McCain* correctly. See, e.g., *Smith v. Florida Power and Light Co.*, 857 So. 2d 224, 230 (Fla. Dist. Ct. App. 2003) (interpreting *McCain* to allow foreseeability of particular plaintiff to limit duty to that plaintiff, citing *Palsgraf*). Idaho courts seem to embrace the general duty of care to all others. See, e.g., *Alegria v. Payonk*, 619 P.2d 135, 137 (Idaho 1980) (“In general, it is held that ‘one owes the duty to every person in our society to use reasonable care to avoid injury to the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury.’”) (citations omitted). And although Idaho embraces the California factors, courts don’t seem to decide cases according to plaintiff-foreseeability. New York is also a bit schizophrenic, but has been moving toward saying that foreseeability is not relevant to duty, but to what seems to be treated as a sixth element in negligence, “scope of duty”: *Compare* *Madden v. Ceglie*, 841 N.Y.S.2d 821, at *2 (N.Y. Sup. Ct. 2007) (“In analyzing questions regarding the scope of an individual actor’s duty, Courts look to whether the relationship of the parties is such as to give rise to a duty of care, whether the plaintiff was within the zone of foreseeable harm, and whether the accident was within the reasonably foreseeable risks.”) with *Demshick v. Community Housing Mgmt. Corp.*, 34 A.D.3d 518, 520 (N.Y. App. Div. 2006) (“Foreseeability does not define duty; it merely determines the scope of the duty once a duty is found to exist.”). In Oregon, duty seems to exist with risk-creating conduct. Foreseeability of risk and plaintiff are decided by the jury as part of “scope of duty.” One might therefore characterize this as an Andrews jurisdiction, but because the court has not directly addressed the issue, I characterize it as unclear.

⁵⁷ See, e.g., *State Dep’t of Corrs. v. Cowles*, 151 P.3d 353, 363 (Alaska 2006) (imposing a duty in claim by family of decedent killed by parolee, “only where officials know, or reasonably should know, that a parolee poses a danger to a . . . ‘victim class’”); *Smith v. Hope Village, Inc.*, 481 F.Supp.2d 172, 193 (D.D.C. 2007) (stating that duty depends, in part, on whether victim “falls within the class of people who were foreseeably at risk of being harmed”); *Valentine v. On Target, Inc.*, 727 A.2d 947, 949 (Md. 1999) (ascertaining “duty owed by this defendant to this plaintiff or to a class of persons of which this plaintiff is a member”); *Eklund v. Trost*, 151 P.3d 870, 880 (Mont. 2006) (stating that “foreseeability does not require that the particular accident or particular victim need have been foreseen” and concluding that that plaintiff was foreseeable because he was a member of a class of “people using the streets and

for example, the Montana Supreme Court held that the duty of police in a high speed chase was not to foresee harm to the particular plaintiff but to “people using the streets and highways where the chase occurred.”⁵⁸ On one level, this appears to be categorical duty reasoning—the court put itself in the shoes of the police defendants at the time of the chase and imagined the class of people potentially injured by the defendants’ actions, limiting the scope of the defendants’ duty to that class of people. But the court’s analysis did not stop there. It also applied the second part of the standard—determining whether the plaintiff was a member of that class.⁵⁹ This second step required a narrow, fact-specific judgment. The reality is that even where courts express the plaintiff-foreseeability standard in categorical terms, the standard is commonly little more than window-dressing for a fact-specific examination of plaintiff-foreseeability.⁶⁰

The inherent instability of categorical formulations of plaintiff-foreseeability stems in part from the lack of any principle by which courts define the scope of the foreseeable class. Take, for example, the police chase case cited in the previous paragraph. Although the Montana court defined the class quite broadly—“people using the streets and highways where the chase occurred”—the class would have excluded a plaintiff injured by the careening police chase while watching it from the front porch of his house. A broader definition—for example, “people present in the area of the chase”—would allow recovery by such a victim. In the alternative, a court might deny liability by defining the class more narrowly—“people asleep in their car on the side of the road,” “people interfering with the chase,” or “drunk drivers.” I discern no guidelines according to which courts determine how narrowly or broadly to define the class of plaintiffs into which a particular plaintiff must fit.⁶¹ In fact, courts rarely even disclose the reasoning by which they have derived the class.⁶²

Notwithstanding the operational limits of categorical plaintiff-foreseeability, the approach is also arguably at odds with *Palsgraf* itself. Cardozo’s vision of duty is that the concept is relational, an inquiry into whether the defendant owed an obligation to the particular plaintiff. At base, this is a corrective justice notion that ties the defendant to the plaintiff on moral grounds and gives rise to the right of the plaintiff to seek relief in court.⁶³ Pursuant to this view, whether the defendant owed a duty to a class of people not before the court ought to be irrelevant. Moreover, to expand any particular holding to bind future similarly, but not identically, situated plaintiffs is to deprive those plaintiffs of their right to prove a wrong done to them specifically. Again, this theoretical dilemma is avoided by most courts, which do not attempt to define

highways.”); *Dudley v. Offender Aid and Restoration of Richmond, Inc.*, 401 S.E.2d 878, 882 (Va. 1991) (recognizing that duty “must be linked to some specific person or class of discernible victims”).

⁵⁸ Eklund, 151 P.3d at 880.

⁵⁹ *Id.*

⁶⁰ One might yet argue that although courts commonly decide plaintiff-foreseeability in a fact-specific manner, the categorical statement of the standard should result in broad rules applicable to future cases, and therefore be categorical at least in effect. I see very little evidence of this in the case law. Instead, later courts readily distinguish arguably categorical holdings in light of different facts.

⁶¹ *Cf. Clohesy v. Food Circus Supermarkets, Inc.*, 694 A.2d 1017, 1024-26 (N.J. 1997) (noting the arbitrariness of the “prior similar incidents” test for judging the foreseeability of third-party crime due to the lack of any standard for defining the scope of “similar”).

⁶² This is a common “scope problem” in the common law, documented famously by Herman Oliphant. See Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71 (1928).

⁶³ Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 440 (1987).

plaintiff-foreseeability categorically, but instead expressly decide whether the specific plaintiff was foreseeable at the time of the defendant's actions.⁶⁴

In light of the fact that a majority of courts render fact-specific plaintiff-foreseeability rulings, one might argue that whether duty or proximate cause is the proper home for plaintiff-foreseeability is no longer of particular relevance to tort law. With the widespread adoption of some version of foreseeability as the heart of proximate cause analysis,⁶⁵ the plaintiff-foreseeability issue is often the same regardless of its doctrinal context.⁶⁶ On the other hand, the overarching analytical structures of duty and proximate cause are distinct. The doctrinal location of the *Palsgraf* question might therefore influence the manner in which the question is analyzed. For example, duty analysis is the gatekeeper in a negligence suit. Duty asks from the *ex ante* perspective whether the defendant should have even engaged in a reasonableness calculation under the circumstances and, if so, whether a court ought to enforce that obligation in tort. Duty analysis is also typically categorical, rather than fact-specific, and sometimes involves broad moral and policy questions. Proximate cause, by contrast, is a fact-specific, *ex post* examination of whether, despite obligation and unreasonable behavior, there ought to be some limitation on liability under the specific facts.⁶⁷ These are arguably dissimilar analytical starting-points and might lead to different results in a given case.⁶⁸

But the most obvious reason that the doctrinal home for plaintiff-foreseeability might be important is that duty is resolved by the court,⁶⁹ whereas proximate cause is decided, in the first instance, by the jury.⁷⁰ I turn now to a discussion of this aspect of *Palsgraf*.

III. Is Court or Jury the Proper Arbiter of Foreseeability?

⁶⁴ See, e.g., *Colonial Inn Motor Lodge, Inc., for Use and Benefit of Cincinnati Ins. Co. v. Gay*, 680 N.E.2d 407, 412-13 (Ill. App. Ct. 1997) (stating that duty is determined, in part, by determination of the foreseeability of injury to the “particular plaintiff”); *Migyanko v. Thistlethwaite*, 419 A.2d 12, 14 (Pa. 1980) (holding that duty turns, in part, on foreseeability of the “particular plaintiff”).

⁶⁵ See David G. Owen, *Figuring Foreseeability*, 44 WAKE FOREST L. REV. 1277, 1293-94 (2009) (“Today, as has been true for many years, the concept of “foreseeability,” in one formulation or another, is the “touchstone” or “cornerstone” of proximate cause.”).

⁶⁶ I have elsewhere urged that foreseeability is equally at home in duty or proximate cause. See generally Cardi, *Reconstructing Foreseeability*, *supra* note 54.

⁶⁷ See *Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 156 n.1 (Mo. 2000) (en banc) (“Foreseeability for purposes of establishing whether a defendant's conduct created a duty to a plaintiff depends on whether the defendant should have foreseen a risk in a given set of circumstances. In this setting, foreseeability is forward-looking. In the context of determining proximate causation, however, foreseeability refers to whether a defendant could have anticipated a particular chain of events that resulted in injury or the scope of the risk that the defendant should have foreseen. This type of foreseeability relies upon hindsight to determine whether the precise manner of a particular injury was a natural and probable consequence of a negligent act.”).

⁶⁸ See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 816 (2001) (explaining the effects of “hindsight bias” and other biases on the decisionmaking of judges).

⁶⁹ RESTATEMENT (SECOND) OF TORTS § 328B (1965); DAN B. DOBBS, *THE LAW OF TORTS* § 149, at 355 (2000).

⁷⁰ KEETON ET AL., *supra* note 18, § 45, at 321.

The judge/jury issue is often cited as the most important consequence of *Palsgraf*.⁷¹ In the case itself, the trial court allowed the case to go to a jury, which found in favor of Helen Palsgraf.⁷² Andrews's dissent would have upheld the verdict on the grounds that what Andrews saw as the relevant issue—the peculiarity of the sequence of events that led to Mrs. Palsgraf's injury—was properly decided by the jury as a matter of proximate cause. Judge Cardozo's majority opinion instead overturned the jury's verdict and dismissed the plaintiff's claim on no-duty grounds.⁷³ The common interpretation of Cardozo's opinion is that because plaintiff-foreseeability is a duty question, and because duty is determined by the court, the jury had no place in deciding plaintiff-foreseeability. On closer examination, however, this explanation is belied by the text of Cardozo's opinion. In a rarely cited sentence in the pivotal paragraph, Cardozo stated:

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. . . . 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*.⁷⁴

Then, in the following sentences, Cardozo seemingly reasoned that varying inferences were not possible with regard to the foreseeability of harm to Mrs. Palsgraf:

Here, by concession, there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station. If the guard had thrown it down knowingly and willfully, he would not have threatened the plaintiff's safety, so far as appearances could warn him. His conduct would not have involved, even then, an unreasonable probability of invasion of her bodily security. Liability can be no greater where the act is inadvertent.⁷⁵

Interpreting these sentences in conjunction with the former, Cardozo was explaining that there was “nothing in the situation”—that is, no evidence from which a jury might make “varying inferences”—to support a conclusion that injury to Mrs. Palsgraf was foreseeable. Spelled out in doctrinal terms, although Cardozo held that plaintiff-foreseeability is a duty consideration, he also held that plaintiff-foreseeability is properly decided by the jury—unless, in modern parlance, reasonable minds could not differ on the matter. Thus, in dismissing Mrs. Palsgraf's claim, Cardozo held that no reasonable jury could find that Mrs. Palsgraf was a foreseeable plaintiff.

⁷¹ See, e.g., Kenneth Vinson, *Disentangling Law and Fact: Echoes of Proximate Cause in the Workers' Compensation Coverage Formula*, 47 ALA. L. REV. 723, 754 (1996) (“The real battle in *Palsgraf* . . . was whether judge or jury should determine if the scope of railroad liability should be extended to cover cases such as Palsgraf's.”).

⁷² *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 99 (N.Y. 1928).

⁷³ *Id.* at 101.

⁷⁴ *Id.* at 100-01 (emphasis added).

⁷⁵ *Id.* at 101.

This understanding of Cardozo's opinion is jarring because it contradicts the basic axiom that duty's existence is to be decided by the court. Of course, juries commonly resolve factual disputes upon which duty decisions turn.⁷⁶ For example, in *Palsgraf* it would have been within the jury's province to determine where Mrs. Palsgraf had been standing on the platform or whether the package had been labeled "explosive." Foreseeability, however, is not a fact to be ascertained. It is a normative construct, requiring judgment and choice. As described in Section II *supra*, the decisionmaker must define the subject of the foreseeability inquiry—in the context of *Palsgraf*, for instance, is the proper subject Helen Palsgraf? A person standing some distance away? A person standing on the platform next to a scale? All non-passenger licensees and invitees? The choice among many such possibilities requires nuanced judgment and is frequently outcome-determinative. A second judgment must be made as to the degree of foreseeability that will trigger a duty.⁷⁷ "More than zero" cannot be the standard, for virtually every occurrence is foreseeable with some imagination.⁷⁸ Indeed, courts often express the standard as "reasonable foreseeability,"⁷⁹ which explicitly calls for the decisionmaker to draw a normative line. Thus arises the following question: If tort law relies on judges to make other normative duty judgments (which clearly it does), can Cardozo really be read to except foreseeability?

If Cardozo's language is to be taken at face value, it creates a basic tension in negligence doctrine and renders moot the most salient consequence of the duty/proximate cause debate—whether court or jury is to decide plaintiff-foreseeability. The jury would determine plaintiff-foreseeability regardless of its doctrinal home. As it turns out, although this portion of Cardozo's opinion is rarely cited,⁸⁰ an extraordinary number of courts have reached the same conclusion independently, leaving plaintiff-foreseeability to the jury in the duty context.

Ferretting out answers to the judge-jury question is challenging, for in an overwhelming majority of duty cases, courts simply do not address the issue. It is typical, for example, for a court to hold that "As a matter of law, the defendant should have foreseen the plaintiff (or risk or harm), and therefore a duty exists." Such a statement is ambiguous as to whether the question is to be decided in the first instance by court or jury. "As a matter of law" might indicate that no

⁷⁶ See, e.g., *Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 156 n.1 (Mo. 2000) (en banc). ("[D]uty is not a fact question but in some cases the jury may be charged with determining whether facts exist that may give rise to a finding of foreseeability and, in turn, duty."); *Selby v. Conquistador Apartments, Ltd.*, 990 P.2d 491, 494-95 (Wyo. 1999) ("Although the issue of duty is usually decided by the district court as a matter of law, we have held that when the duty issue involves questions which are basic issues of fact, it should be resolved by the jury.")

⁷⁷ See Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 94 (Gerald Postema ed., 2001) (explaining the normative judgment required in duty-foreseeability determinations).

⁷⁸ ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 105 (1999).

⁷⁹ See, e.g., *Colonial Inn Motor Lodge, Inc., for Use and Benefit of Cincinnati Ins. Co. v. Gay*, 680 N.E.2d 407, 412-13 (Ill. App. Ct. 1997) (stating that the "reasonable foreseeability" of the particular plaintiff is an important consideration in the duty equation).

⁸⁰ A Westlaw search of the language on 1/23/11 returned only twenty-three case citations. The vast majority of these cases are from New York and apply to that jurisdiction's unique "scope of duty" inquiry, which is distinct from an analysis of the existence of a duty. Other cases refer to foreseeability's role in proximate cause. E.g. *Brandvain v. Ridgeview Institute, Inc.* 372 S.E.2d 265, 273 (Ga. App. 1988).

reasonable jury could hold otherwise. Or it might mean—particularly where the court has introduced the discussion by stating that duty is a question for the court—that the court need show no deference to the jury.⁸¹ The same problem arises when a court simply “holds” that a plaintiff was or was not foreseeable. Without addressing the judge/jury question directly, the court might be holding implicitly that “no reasonable jury could find” or deciding without deference to the jury. It is notable that in many cases in which a court declines to impose a duty due to lack of foreseeability, courts state that there is “no evidence” of foreseeability.⁸² Although still nebulous, such a statement might imply that were there such evidence, the matter would be resolved by the jury. But all of this is reading tea leaves—courts can and should do better to express the procedural context of their foreseeability decisions.

Ambiguities aside, the case law may conservatively summarized as follows. Of the forty-seven (of fifty-one) jurisdictions that either expressly place plaintiff-foreseeability in duty or are unclear on the matter, thirteen hold that plaintiff foreseeability is to be decided by the jury.⁸³ Fourteen jurisdictions reserve plaintiff-foreseeability for the court.⁸⁴

⁸¹ See, e.g., *W.C. & A.N. Miller Companies v. U.S.*, 963 F. Supp. 1231, 1243 (D.D.C. 1997) (“The question whether a duty is owed is a question of law to be determined by the court.” “In determining the existence of a duty owed to a plaintiff, [courts] have applied a ‘foreseeability of harm’ test, . . .” “Applying these principles to the present case, the Court concludes that, as a matter of law, the defendant owed a duty to warn the plaintiff, a subsequent occupant of the land, of the buried munitions.”). On the other hand, such an introduction does not necessarily have any consequence. Recall the many jurisdictions that yet leave foreseeability to the jury despite the stating that duty is for the court.

⁸² See, e.g., *Carroll v. Shoney's, Inc.*, 775 So. 2d 753, 757 (Ala. 2000) (finding that “there was no evidence in this case that any employee of Captain D's was told, or should have reasonably foreseen, that Ronnie Harris would enter the Captain D's restaurant and murder his wife”).

⁸³ See *Gast v. City of Fountain*, 870 P.2d 506, 508 (Colo. Ct. App. 1993) (“In evaluating the issue of foreseeability in the context of a legal duty, if different inferences may be drawn from the evidence presented, that issue must be resolved by the jury.”); *Torres v. Dep't of Corr.*, 912 A.2d 1132, 1146 (Conn. 2006) (finding that “[b]ecause genuine issues of material fact exist as to whether the harm suffered was foreseeable and whether the plaintiff and her decedent were foreseeable victims, summary judgment in inappropriate on the issue of whether a duty exists in the present case”); *Smith v. Hope Village, Inc.*, 481 F.Supp.2d 172, 193 (D.D.C. 2007) (holding, in the context of a duty determination, that “whether the plaintiff's daughter falls within the class of people who were foreseeably at risk of being harmed by Kelly is, at the very least, a disputed issue of material fact not appropriate for summary judgment.”); *State v. Cornelius*, 637 N.E.2d 195, 199 (Ind. Ct. App. 1994) (holding that the existence of a duty turns, in part, on whether “a reasonably foreseeable victim is injured by a reasonably foreseeable harm” and then leaving to the jury whether plaintiff was foreseeable—“If the jury concludes that it was foreseeable that a motorist would leave the roadway and strike the utility pole, then the foreseeability factor would weigh in favor of imposing a duty on the defendants.”); *Wagner v. SFX Motors Sports, Inc.*, 460 F.Supp.2d 1263, 1269 (D. Kan. 2006) (in allowing jury to decide foreseeability in the context of duty, the court explained: “Although the existence of a duty is ultimately a question of law, foreseeability is a fact-driven inquiry to be decided by the jury. The Court may determine foreseeability as a matter of law only where the record contains no evidence that the cause of plaintiff's injuries was foreseeable.”) (citations omitted); *Whiteford by Whiteford v. Yamaha Motor Corp., U.S.A.*, 582 N.W.2d 916, 918 (Minn. 1998) (“[I]n this case, the question that must be answered is whether T. Whiteford's accident was sufficiently foreseeable to impose a duty on Yamaha to protect T. Whiteford. When the issue of foreseeability is clear, the courts, as a matter of law, should decide it. In close cases, the question of foreseeability is for the jury.”); *Lee v. GNLV Corp.*, 22 P.3d 209, 212 (Nev. 2001) (“Courts are reluctant to grant summary judgment in

negligence cases because foreseeability, duty, proximate cause and reasonableness usually are questions of fact for the jury.... But when plaintiff as a matter of law cannot recover, defendant is entitled to a summary judgment.”); *Foster v. Winston-Salem Joint Venture*, 281 S.E.2d 36, 40 (N.C. 1981) (ruling that in considering the existence of a landowner’s duty to protect visitors from third-party harm, foreseeability is a question for the jury in the first instance); *Barsness v. General Diesel & Equip. Co., Inc.*, 383 N.W.2d 840, 843 (N.D. 1986) (holding that “the existence of a duty is contingent upon a jury’s determination of foreseeability of the injury to the plaintiff”); *Fazzolari v. Portland Sch. Dist. No. 1J*, 734 P.2d 1326 (Or. 1987) (“In short, unless the parties invoke a status, a relationship, or a particular standard of conduct that creates, defines, or limits the defendant’s duty, the issue of liability for harm actually resulting from defendant’s conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff. The role of the court is what it ordinarily is in cases involving the evaluation of particular situations under broad and imprecise standards: to determine whether upon the facts alleged or the evidence presented no reasonable factfinder could decide one or more elements of liability for one or the other party.”); *Migyanko v. Thistlethwaite*, 419 A.2d 12, 14 (Pa. 1980) (“Only when the question of foreseeability is undeniably clear may a court rule as a matter of law that a particular defendant did not have a duty to a particular plaintiff.”); *Mitchell v. Missouri-Kansas-Texas R.R. Co.*, 786 S.W.2d 659, 662 (Tex. 1990) (“[W]here the risk reasonably to be perceived defines the duty to be obeyed; i.e., where knowledge and foreseeability are important elements of duty,” the issue is “properly and best resolved by the finder of fact.”); *Simonetta v. Viad Corp.*, 197 P.3d 127, 131 n.4 (Wash. 2008) (“Foreseeability does not create a duty but sets limits once a duty is established.’ Once this initial determination of legal duty is made, the jury’s function is to decide the foreseeable range of danger therefore limiting the scope of that duty.”). Note that I have included Colorado in this category despite at least one dissenting opinion. The opinion a bit long in the tooth and appears impliedly to have been superseded. *Compare Leppke v. Segura*, 632 P.2d 1057, 1059 (Colo. Ct. App. 1981) (“The scope of the duty, as well as the existence thereof, is a question for the court. The duty to exercise reasonable care extends only to foreseeable damages and injuries to foreseeable plaintiffs. The [plaintiffs] . . . , as a matter of law, . . . were foreseeable plaintiffs; therefore, the defendants’ duty extended to them for the relief which they seek.”) *with Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89 (Colo. Ct. App. 1997) (explaining, in the proximate cause context: “As already noted, defendant’s policy against stacking auger boxes on top shelves was adopted because of the foreseeability of injury to someone in the position of plaintiffs at the time of the accident. The evidence did not present a jury question whether plaintiffs were persons within the foreseeable zone of danger created by defendant’s negligence. Hence, as the trial court determined, the instruction should not have been given to the jury.”); *Sewell v. Public Serv. Co. of Colo.*, 832 P.2d 994, 998 (Colo. Ct. App. 1991) (“context within which the factor of foreseeability is to be considered, all of it recognized that the issue was one for the fact finder, unless all of the facts and factual inferences are undisputed. And, while Metropolitan Gas Repair Service, Inc. and its progeny may have changed the context within which the factor of foreseeability is to be considered, nothing within any of those opinions suggests that a change was to be made in this basic premise. Second, the courts in other jurisdictions which have concluded, as our supreme court has concluded, that the factor of foreseeability is to be considered within the context of the question of the existence of a duty, have also concluded that differing reasonable inferences upon the question of foreseeability create an issue for the finder of fact.”).

⁸⁴ *Coca-Cola Bottling Co. of Memphis, Tennessee v. Gill*, 100 S.W.3d 715, 724-25 (Ark. 2003) (holding without deference to jury that plaintiff was foreseeable); *Clarke v. Hoek*, 219 Cal. Rptr. 845, 849 (Cal. Ct. App. 1985) (“While it is the province of the jury, as trier of fact, to determine whether an unreasonable risk of harm was foreseeable under the particular facts of a given case, the trial court must still decide as a matter of law whether there was a duty in the first place, even if that determination includes a consideration of foreseeability.”); *Pulawa v. GTE Hawaiian Tel*, 143 P.3d 1205, 1215 (Haw. 2006) (“in

In the remaining twenty jurisdictions, precedent is too inconclusive to justify a firm characterization. In eight states, courts have reached contradictory rulings of the question, often flatly ignoring (or remaining ignorant of) the split in their own authority.⁸⁵ In two others, courts

the context of determining the existence and scope of a duty, foreseeability is a question of law for the court to resolve”); *Lee v. Farmer's Rural Elec. Co-op. Corp.*, 245 S.W.3d 209, 218 (Ky. Ct. App. 2007) (“Under Kentucky law, it is clear that the existence of a duty of care to the plaintiff, and its underlying foreseeability inquiry, is a pure question of law for the court.”); *Jupin v. Kask*, 849 N.E.2d 829, 836 n.7 (Mass. 2006) (“insofar as foreseeability bears on the existence of a duty, it is not appropriate to leave such an issue to the jury”); *Donald v. Amoco Prod. Co.*, 735 So. 2d 161, 174 (Miss. 1999) (“While duty and causation both involve foreseeability, duty is an issue of law, and causation is generally a matter for the jury. Juries are not instructed in, nor do they engage in, consideration of the policy matters and the precedent which define the concept of duty. This Court has held that the existence vel non of a duty of care is a question of law to be decided by the Court. Therefore, the lower court properly decided [foreseeability as] a matter of law.”); *Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 156 n.1 (Mo. 2000) (en banc). (“[D]uty is not a fact question but in some cases the jury may be charged with determining whether facts exist that may give rise to a finding of foreseeability and, in turn, duty. Once these facts are found to exist, it is for the court to determine whether the facts given rise to a duty.”); *Macie v. Helms*, 934 A.2d 562, 565 (N.H. 2007) (“Whether a defendant's conduct creates a sufficiently foreseeable risk of harm to others sufficient to charge the defendant with a duty to avoid such conduct is a question of law.”); *Herrera v. Quality Pontiac*, 73 P.3d 181, 196 (N.M. 2003) (“[Foreseeability] is used first by the judge as ascertaining whether the defendant owes a legal duty of care, and later by the jury in determining factual issues of breach and causation.” The concurring judge questions the wisdom of this practice, however, and indicates that the court should consider adopting the Restatement Third approach.); *Mussivand v. David*, 544 N.E.2d 265, 270-72 (Ohio 1989) (deciding that the existence of a duty, of which foreseeability or harm is an element, presents an issue of law for the court to decide); *Iglehart v. Bd. of County Comm'rs of Rogers County*, 60 P.3d 497, 502 (Okla. 2002) (holding that duty turns on plaintiff-foreseeability, and holding that plaintiff was a foreseeable victim, but also holding that foreseeability of risk is a matter for the jury's decision in breach and proximate cause); *Martin v. Marciano*, 871 A.2d 911, 917 (R.I. 2005) (“The concept of foreseeability ‘plays a variety of roles in tort doctrine generally; in some contexts it is a question of fact for the jury, whereas in other contexts it is part of the calculus to which a court looks in defining the boundaries of “duty.”’ and consequently finding foreseeability without deference to the jury); *Smith ex rel. Ross v. Lagow Constr. & Dev. Co.*, 642 N.W.2d 187, 192 (S.D. 2002) (“Although foreseeability is a question of fact in some contexts, foreseeability in defining the boundaries of a duty is always a question of law.”); *Normandeau v. Hanson Equip., Inc.*, 215 P.3d 132, 158-59 (Utah 2009) (holding that foreseeability in the context of duty is a purely legal question to be decided by the court).

⁸⁵ **Alabama:** Alabama seems not to have arrived at a consistent rule. In some cases, courts decide foreseeability as a matter of law; in others, they leave it to the jury. *Compare* *Lance, Inc. v. Ramanauskas*, 731 So. 2d 1204, 1208-09 (Ala. 1999) (holding that “A duty of care arises when it is foreseeable that harm may result if care is not exercised” and holding that the plaintiff submitted sufficient evidence to get to a jury on whether injury to plaintiff child by defendant's vending machine was foreseeable); *R.B.Z. v. Warwick Development Co.*, 681 So. 2d 566, 568-69 (Ala. Civ. App. 1996) (“The issue of whether the crimes against R.B.Z. and C.Z. was foreseeable is a question for a jury to answer. Foreseeability does not require that the particular consequence should have been anticipated, but rather that some general harm or consequence could have been anticipated.”) *with* *Patrick v. Union State Bank*, 681 So. 2d 1364, 1372 (Ala. 1996) (“We have determined that, as a matter of law, the fraudulent acts of the imposter here were foreseeable to the extent that a duty may be imposed on the bank.”). It is interesting that in many of the “no foreseeability” cases, the court's holding is that there is “no evidence”

of foreseeability—thus, the court might implicitly be giving deference to the jury. *See, e.g.*, *Carroll v. Shoney's, Inc.*, 775 So. 2d 753, 757 (Ala. 2000) (finding that “there was no evidence in this case that any employee of Captain D's was told, or should have reasonably foreseen, that Ronnie Harris would enter the Captain D's restaurant and murder his wife”).

Delaware: *Streevy v. Roberts*, 2008 WL 4215971, at *1 (Del. Super. 2008) (“In this case, the issues of the duty to properly secure the weapon and the reasonable foreseeability of use of the weapon are fact-driven. The Court cannot determine the precise parameters as a matter of law. It is up to the jury to decide whether the gun owner or possessor had a reason to believe that the gun was likely to be misused.”); *In re Asbestos Litig.*, No. 04C-07-099-ASB, 2007 WL 4571196, at *7 (Del. Super. Ct. December 21, 2007) (“Even when the foreseeability prong is incorporated into the duty analysis, the Court cannot discern a relationship between the plaintiff and the defendant that would support a legal duty. ICI clearly owed a duty to Mr. Riedel just as the conductor in *Palsgraf* owed a duty to the passengers he was helping onto the train. But, just as in *Palsgraf*, the duty owed to Mr. Riedel does not vicariously pass on to Mrs. Riedel in the absence of some independent relationship between ICI and Mrs. Riedel that would justify the imposition of the duty. Her position at the time of the alleged wrong, far removed from ICI's property, is such that she cannot be considered a reasonably foreseeable victim of the alleged breach of the duty ICI owed to her husband (in failing to warn and/or implement safety precautions). There can be no “transferred negligence” under these facts.”); *Marshall v. University of Del.*, 1986 WL 11566, at *11 (Del. Super. 1986) (“It is this Court's opinion that a reasonable person could find that KAO had reason to foresee Kappa Alpha's election eve party. Indeed, that fraternities hold open parties from time to time is a matter of common knowledge. The issue of whether KAO had reason to foresee Kappa Alpha's election eve party, therefore, should go to the jury.”).

KAO's duty of care, again as a duty of reasonable care only, is further limited by the doctrine of the foreseeable plaintiff. KAO's duty of care extends only to those persons who would foreseeably be within the scope of the risk created by KAO's breach of its duty to control Kappa Alpha—in other words, those persons who would foreseeably be within the scope of the risk created by Kappa Alpha's election eve party. It is this Court's opinion that a reasonable person could conclude that the plaintiff in the present controversy, as an invited guest at the party, was a foreseeable plaintiff.”).

Illinois: *Compare Schmid v. Fairmont Hotel Company-Chicago*, 803 N.E.2d 166, 178 (Ill. App. Ct. 2003) (“Over the years, the ambiguity in Illinois precedent regarding the proper role of foreseeability in a negligence determination, to which the Nelson court was referring, has disappeared: ‘The legal principles governing our review are well established. * * * Whether a duty exists is a question of law for the court to decide. In resolving whether a duty exists, a court must determine whether there is a relationship between the parties requiring that a legal obligation be imposed upon one for the benefit of the other. The factors relevant to the courts' imposition of a duty include the reasonable foreseeability of injury, the likelihood of such injury, the magnitude of guarding against the injury, and the consequences of placing that burden on the defendant.’ Accordingly, we must decide, as a matter of law, whether plaintiff's injury was foreseeable, as a part of our duty analysis in the instant case.”); *with Nelson by Tatum v. Commonwealth Edison Co.*, 465 N.E.2d 513, 520 (Ill. App. Ct. 1984) (“While foreseeability is thus a proper matter for a court to consider in making its duty determination, the sounder approach would be to recall that the duty issue is broad in its implication and it is only the jury's negligence determination which need be strictly confined to the facts of the particular case. In other words, foreseeability is a determinative consideration only where a particular occurrence is so extreme that, as a policy decision, it would be unwise to require defendant to guard against it. In the majority of cases, where varying inferences are possible from the facts, a court should permit the jury to decide the foreseeability issue, including the foreseeability of the particular cause and effect of plaintiff's injury, as a factual matter in its proximate cause determination. This approach would strike a sound balance between inviting trial courts to invade the jury's province on what is essentially a factual matter, and permitting a sympathetic jury to find an event foreseeable in even

the most bizarre cases.”); *Zimmermann v. Netemeyer*, 462 N.E.2d 502, 507 (Ill. App. Ct. 1984) (“the term “foreseeability of harm” is in actuality vague and uncertain; it furnishes no standards or guidelines of any sort for a court to follow in determining the existence of a duty. Because the jury determines whether a negligent breach of duty has occurred by applying the test of foreseeability, the term “foreseeability of harm” has a factual orientation. This factual orientation renders it ineffective and unreliable for use by a court that must resolve the duty question as a matter of law. The principal utility of the phrase “foreseeability of harm” seems to be merely that of a vehicle for the pronouncement of the court’s decision on the duty issue after that decision has been reached on the basis of policy considerations, the true basis of all duty decisions by Illinois courts.”). Although *Schmid* claims that *Nelson* is no longer good law, this does not appear to be the case when reading the case law. *Schmid* has not been followed on this point (or on its reasoning). But it might be the law in Illinois that plaintiff-foreseeability is a matter for the court in duty, and risk/manner-foreseeability is a question for the jury in breach/PC—the Su. Ct. has not established this, but this is how it might be playing out in the lower courts. See *Colonial Inn Motor Lodge, Inc., for Use and Benefit of Cincinnati Ins. Co. v. Gay*, 680 N.E.2d 407, 412-13 (Ill. App. Ct. 1997) (“The existence of a duty is a question of law and depends on whether the defendant and the plaintiff stood in such a relationship that the defendant is obliged to conform to a certain standard of conduct for the benefit of the plaintiff. . . . Although reasonable foreseeability is an important consideration in the duty equation, we believe that the trial court erred by using as its touchstone the foreseeability of *the particular injury or damages* rather than the foreseeability of *an injury to the particular plaintiff*. We believe the latter is crucial to the legal determination of duty, while the former is more appropriately considered in determining the factual issue of proximate causation. True, the case law is less than perfectly lucid or consistent in its treatment of the densely intertwined ideas of duty, proximate causation, and reasonable foreseeability. However, it appears that, because duty is based on the relationship of the plaintiff and the defendant, that relationship, and not the type of injury that resulted, is crucial.”).

Louisiana: Louisiana seems to adopt an “ease of association” test for proximate cause (which they often call, alternatively “legal cause” or “scope of duty”), a test which often uses the “duty-risk” analysis, and which includes plaintiff-foreseeability. See, e.g., *Pinsonneault v. Merchants & Farmers Bank & Trust Co.*, 738 So. 2d 172, 181 (La. App. 1999). The Supreme Court, however, has held that proximate cause is a question for the court, not the jury. *Todd v. State Through Dept. of Social Services, Office of Community Services*, 699 So. 2d 35, 37 (La. 1997); see also *Khalimsky v. Liberty Mut. Fire Ins. Co.*, 2009 WL 1565934, at *5 (E.D. La. 2009); (“[T]he Court used the terms “foreseeability” and “proximate cause” interchangeably. Technically, the foreseeability element of the duty-risk analysis employed in Louisiana courts differs from the proximate cause analysis used in other courts in that it is a question of policy for the Court and not for the jury. See 12 LA. CIV. L. TREATISE § 1.16. The analysis is similar, though, in that the question to be answered is whether the harm to the plaintiff was foreseeable to the defendant.”). Nonetheless, the debate over this question continues in Louisiana. See, e.g., *Perkins v. Entergy Corp.*, 756 So. 2d 388, 412-13 n.52 (La. App. 1999) (expressly giving deference to jury in applying “manifestly erroneous” standard of review of foreseeability determination and explaining that despite the holding in *Todd*, Louisiana courts remain unclear as to whether proximate cause and foreseeability is a court or jury question). Finally, to make matters even more confused, at least a few courts have held that the “ease of association” test is really the test for existence of a duty. See, e.g., *Verdun v. State of Louisiana*, 598 So. 2d 1091, 1096 (La. App. 1992); writ denied, 604 So. 2d 1003 (La. 1992) (“The existence of a duty may be determined by considering the ease of association between the alleged duty and the risk encountered, as well as social, moral, and economic factors.”).

Michigan: Compare *Murdock v. Higgins*, 559 N.W.2d 639, 642-45 (Mich. 1997) (stating that “whether a duty exists, is a question of law, an issue ‘solely for the court to decide.’ In determining whether to impose a duty, this Court evaluates factors such as: . . . the foreseeability of the harm” and then deciding

foreseeability in that case without deference to the jury); *Farwell v. Keaton*, 240 N.W.2d 217, 224-25 (Mich. 1976) (“[Plaintiff] contends further that the determination of the existence of a duty must rest with the jury where questions of foreseeability and the relationship of the parties are primary considerations. . . . The relationship of the parties and the question of foreseeability does not require that the jury, rather than the court, determine whether a legal duty exists.”); *with Downie v. Kent Products*, 333 N.W.2d 528, 533 (Mich. App. 1983) (“As a general rule, the question of whether a duty exists is one that must be resolved by a trial judge as a matter of law. However, when the facts at trial are in dispute and give rise to a reasonable difference of opinion as to the foreseeability of a particular risk and the reasonableness of a defendant's conduct in that regard, the jury should resolve the issue after proper instruction.”) (reversed on other grounds); *Wilson ex rel. Wilson v. Detroit School of Indus. Arts*, 2006 WL 1237033, at *5 Mich. App. 2006) (holding, in considering the existence of a duty, that “Plaintiff is correct that whether the risk of harm from third-party criminal activity is foreseeable in a particular case is generally a question of fact for the jury.”); *Chaney v. Whiting Corp.*, 298 N.W.2d 681, 682 (Mich. App. 1980) (holding that where persons who were injured by explosion of device behind brick wall, issue of whether plaintiffs were within class of persons whom manufacturer could have foreseen as being within zone of danger was question for jury); *Barger v. Sheet Metal Industries*, 209 N.W.2d 877, 878 (Mich. App. 1973) (overturning trial court’s holding “no duty running to the plaintiff” and stating that “Since defendant's ‘duty’ is dependent upon whether plaintiff's presence upon the roof and stepping upon the hatch cover was foreseeable, and inasmuch as the question of foreseeability is a question of fact, the trial judge erred in granting the motion for a directed verdict in favor of defendant, rather than allowing the jury to do its job.”); *Elbert v. City of Saginaw*, 109 N.W.2d 879, 887 (Mich. 1961) (citing *Palsgraf* and giving deference to the jury in holding that reasonable minds could not differ in finding that two year-old child was foreseeable victim of water-filled excavation left by defendant). Also, in distinguishing two early Michigan cases holding that plaintiff-foreseeability in the duty context was to be decided by the jury, the court in *Smith v. Allendale Mut. Ins. Co.*, 303 N.W.2d 702, 714-15 (Mich. 1981) explained: “It is commonplace to say that a particular defendant owes a duty to a particular plaintiff, but such a statement, although not incorrect, merges two distinct analytical steps. It is for the court to determine, as a matter of law, what characteristics must be present for a relationship to give rise to a duty the breach of which may result in tort liability. It is for the jury to determine whether the facts in evidence establish the elements of that relationship. Thus, the jury decides the question of duty only in the sense that it determines whether the proofs establish the elements of a relationship which the court has already concluded give rise to a duty as a matter of law. . . . In the instant cases we are satisfied that the evidence, taken most favorably to plaintiffs, failed to create a jury question on whether the scope and nature of the relationships gave rise to an undertaking which would create a duty on the part of the insurers.”

Montana: Although there is dictum in a case rejecting the foreseeability test for proximate cause: *Busta v. Columbus Hosp. Corp.*, 916 P.2d 122, 139 (Mont. 1996) (“Fourth, legal concepts such as . . . “foreseeability” are best left to arguments between attorneys for consideration by judges or justices; they are not terms which are properly submitted to a lay jury, and when submitted can only serve to confuse jurors and distract them from deciding cases based on their merits.”), there is also evidence that the courts instruct juries on foreseeability in the context of duty. *See, e.g., Samson v. State*, 69 P.3d 1154, 1161 (Mont. 2003) (“As the majority notes, foreseeability is necessary to establish duty which is an element of negligence and was presented to the jury”); *Ekwortzel v. Parker*, 482 P.2d 559, 563 (Mont. 1971) (upholding jury instruction on duty-foreseeability).

New Jersey: *Compare Arvanitis v. Hios*, 705 A.2d 355, 357 (N.J. Super. A.D. 1998) (“A prerequisite to recovery on a negligence theory is, of course, a duty owed by a defendant to a plaintiff. The existence of a duty is a question of law to be determined by a judge and, ultimately, is a question of fairness and policy. Ordinarily, on the other hand, whether there was . . . foreseeability, . . . are issues ‘peculiarly within the competence of a jury’” and holding that defendant owed a duty of care because “construed most favorably

appear to lean toward court resolution of plaintiff-foreseeability without deference to the jury, although with some internal contradiction.⁸⁶ And in two jurisdictions, courts appear generally to instruct the jury on the issue, despite some authority reserving it for judicial determination.⁸⁷

for plaintiff, the evidence would support a reasonable inference that Efstathia was aware of her husband's violent behavior when he did not take his medicine") *with Gaita v. Laurel Grove Cemetery Co.*, 731 A.2d 1245, 1248 (N.J. Super. 1998) (noting, in context of third-party crime premises liability claim, that precedent had "differentiated foreseeability as it relates to duty, which is an issue for the Court to decide initially, from foreseeability as it relates to proximate cause, which is a jury question").

Wyo: Wyoming courts say that duty is for court, but facts underlying duty decisions are for jury. Some of the determinations they consider to be factual, however, seem to include judgments regarding foreseeability. *Compare Selby v. Conquistador Apartments, Ltd.*, 990 P.2d 491, 494-95 (Wyo. 1999) ("The application of the natural accumulation rule relates to the threshold question of whether a duty exists on the part of the defendant. . . . To prove that an accumulation of ice or snow is unnatural, a plaintiff must show: (1) that the defendant created or aggravated the hazard; (2) that the defendant knew or should have known of the hazard; and (3) that the hazardous condition was substantially more dangerous than it would have been in its natural state. . . . Although the issue of duty is usually decided by the district court as a matter of law, we have held that when the duty issue involves questions which are basic issues of fact, it should be resolved by the jury."); *Thunder Hawk by and through Jensen v. Union Pacific Railroad Company*, 844 P.2d 1045, 1048-49 (Wyo. 1992) (determining whether a defendant owes a duty to a child trespasser under the "attractive nuisance" doctrine, a portion of which is whether plaintiff or injury was foreseeable, and leaving resolution to jury) *with Hatton v. Energy Elec. Co.*, 148 P.3d 8, 13 (Wyo. 2006) ("Unlike the Selby case, we do not need to determine basic facts before we can rule on the duty issue in this case. Consequently, the case at bar is not one of the rare circumstances where the determination of whether a duty exists should be made by the trier of fact.").

⁸⁶ **New York:** *Compare Travelers Ins. Co. v. Federal Pacific Elec. Co.*, 211 A.D.2d 40, 42-43 (N.Y.A.D. 1995) ("Federal's contention that there was no duty to warn, since the circuit breaker was used in a way in which it as the manufacturer could not reasonably foresee, is without merit. "The question of foreseeability is one for the court when the facts are undisputed and but one inference can be drawn; it is for the jury when varying inferences may be drawn" Since the evidence raised varying inferences, it was the province of the jury to decide whether the risk was foreseeable by defendant so as to impose a duty to warn.") *with Ohlhausen v. City of New York*, --- N.Y.S.2d ----, 2010 WL 1235609, at *2 (N.Y.A.D. 2010) ("Judge Cardozo's classic formulation in *Palsgraf*, that "[t]he risk reasonably to be perceived defines the duty to be obeyed" emphasizing the link between duty and the foreseeability of harm to a particular person, may have undergone some adjustment in the more recent formulation that '[f]oreseeability of injury does not determine the existence of duty.' Nevertheless, it remains true that a defendant will be held liable in tort only where that defendant can be said to have breached a legal duty to the plaintiff 'to conform to a certain standard of conduct, for the protection of others against unreasonable risks,' and the question of whether a duty is owed by a defendant to a plaintiff, unlike the factual issues of foreseeability and causation, remains an issue of law to be decided by the court.").

Tennessee: Tennessee's negligence law is circular. It holds that a defendant owes a duty if his or her conduct posed a foreseeable and unreasonable risk. Once a duty is found, the jury is to find whether the defendant's conduct was unreasonable. Whether foreseeability is a question for judge or jury is also perhaps unclear. Recently, *Satterfield* found foreseeability as a question of law for the court, but without stating that that is what it was doing, and without addressing precedent which said that foreseeability is a question for the jury. One might argue that the law as it stands right now is that plaintiff-foreseeability is for the court to decide, but risk-foreseeability is for the jury, but one would have to read between the lines to do so. *Compare Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 365 (Tenn. 2008) (finding plaintiff-foreseeability as a question of law for the court in the context of duty); *Patterson-Khoury v.*

In six states, courts do not address foreseeability in terms of the plaintiff, but rather only by reference to the risk or harm. In five of these jurisdictions, courts appear to lean strongly in favor of letting juries decide foreseeability.⁸⁸ In one, there exists inconsistent precedent on the matter.⁸⁹

Wilson World Hotel-Cherry Road, Inc., 139 S.W.3d 281, 287 (Tenn. Ct. App. 2003) (“evidence of crime in the vicinity is an element which may establish foreseeability, which must be considered by the jury in determining whether the defendant has breached its duty of care. According to the approach adopted in *McClung*, however, the foreseeability of criminal acts must, in the first instance, be considered by the court to determine, as a matter of law, the scope of the duty owed”) *with Garcia v. Norfolk Southern Ry. Co.*, 266 S.W.3d 917, 922 (Tenn. Ct. App. 2008) (“There was some dispute between the parties at oral argument regarding whether, for purposes of the instant case, the existence of duty (and the element of foreseeability as a component of duty) is a question for the jury or for the judge. In a sense, the correct answer is: both. . . . It is for the court to determine, as a matter of law, what characteristics must be present for a relationship to give rise to a duty the breach of which may result in tort liability. It is for the jury to determine whether the facts in evidence establish the elements of that relationship. Thus, the jury decides the question of duty only in the sense that it determines whether the proofs establish the elements of a relationship which the court has already concluded give rise to a duty as a matter of law.”); *Shorter v. McManus*, 1997 WL 718972, at *4 (Tenn. App. 1997) (stating that “We are cognizant of the multitude of cases which hold that foreseeability is generally a question for the jury” and then holding that no reasonable jury could find that the injury was foreseeable) (citations omitted); *McCall v. Wilder*, 913 S.W.2d 150, 157 (Tenn. 1995) (holding that “this issue of foreseeability, recognized initially in this opinion as the key to the duty issue, is generally a question of fact for the jury, unless no reasonable person could dispute the only reasonable outcome” and concluding that “we have no difficulty concluding that a jury could find that an accident with resulting injury to others was reasonably foreseeable. . . . [and therefore that defendant] would owe a duty to act reasonably in light of the inherent dangers associated with driving”).

⁸⁷ **Maryland:** *Valentine v. On Target, Inc.*, 727 A.2d 947, 949 (Md. 1999) (“The existence of all of the elements including a legally recognized duty owed by this defendant to this plaintiff or to a class of persons of which this plaintiff is a member is vital to sustaining a cause of action in negligence. . . . the existence of a legal duty is a question of law to be decided by the court.”). But courts also leave foreseeability to jury in a couple of situations. *Matthews v. Amberwood Associates Ltd. Partnership, Inc.*, 719 A.2d 119, 131-32 (Md. 1998). The Maryland Court of Appeals affirmed the submission of a take home exposure claim to the jury in *Adams v. Owens-Illinois, Inc.*, 705 A.2d 58, 66 (Md. Ct. App. 1998), upon concluding that the trial court properly afforded the plaintiff an opportunity at trial to prove “that [defendant] owed a duty to [plaintiff] and breached that duty.” Apparently, the trial courts in Maryland instruct the jury to determine whether the defendant owed a duty to the plaintiff rather than requiring the judge to make the determination as a matter of law. *Anchor Packing Co. v. Grimshaw*, 692 A.2d 5, 33-34 (Md. App. 1997) (“[M]anufacturers have a duty to warn all individuals in the foreseeable zone of danger. We hold that the dangers Granski suffered as a result of her exposure to OC's product were not unforeseeable as a matter of law, and thus the trial court properly denied appellants' motion for judgment. Whether it was foreseeable to OC that asbestos workers would bring home asbestos-covered clothes and expose their households to harm is an issue to be determined by the jury.”).

Virginia: *Virginia Ry. & Power Co. v. McDermick*, 86 S.E. 744 (Va. 1915) (requiring jury instruction on foreseeability in third-party crime case, seemingly in the duty context).

⁸⁸ **Alaska:** In Alaska, foreseeability of a general sort is decided by the judge as a matter of duty. For example, in a case in which a parolee harmed plaintiff on release from prison, the court explained that in deciding whether the state owed a duty, the question is not whether this particular parolee posed a threat, or whether this parolee posed a threat to this plaintiff, but whether releasing parolees might ever pose a

threat to others. Foreseeability of a particular risk or plaintiff is thus left to the jury for determination in breach and proximate cause. As a practical matter, however, courts seem sometimes to rule on more specific foreseeability without deference to the jury. *P.G. v. State, Dept. of Health and Human Services, Div. of Family and Youth Services*, 4 P.3d 326, 331 n.11 (Alaska 2000) (“In the context of determining the existence of a duty, we have made it clear that foreseeability is a broad concept and does not require that the precise harm in a given case be predictable.”); *Division of Corrections, Dept. of Health & Social Services v. Neakok*, 721 P.2d 1121, 1127 (Ala. 1986) (“consideration of the foreseeability of injury is central to a determination of whether a duty of care exists. The state may be held liable for its failure to act reasonably and carefully only if it could have foreseen that its failure to do so might cause harm to Neakok. While a specific case-by-case determination of foreseeability and causation lies within the province of a jury, the existence of a duty is a question of law.”); *State v. Sandsness*, 72 P.3d 299, 306 n.41 (Alaska 2003) (“in reviewing whether Whitaker’s crime was sufficiently foreseeable to justify imposing a duty, we are not deciding whether the state should have foreseen the crime. Rather, we are deciding whether, as a matter of judicial policy, a jury should be permitted to consider whether Whitaker’s actions were foreseeable.”).

Florida: *McCain v. Florida Power Corp.*, 593 So. 2d 500, 502-04 (Fla. 1992) (holding that duty “is a minimal threshold legal requirement for opening the courthouse doors” and that the duty question is “whether the defendant’s conduct foreseeably created a broader ‘zone of risk’ that poses a general threat of harm to others,” leaving fact-specific determination of whether risk or plaintiff was foreseeable to jury in context of breach and proximate cause). Unlike Alaska, the McCain court was careful to limit the duty-foreseeability analysis to whether defendant’s conduct created some risk of any kind to anyone, leaving to the jury to decide whether the plaintiff’s precise injury was foreseeable. *See id.* at 503. Not all lower level courts have followed McCain correctly. *See, e.g., Smith v. Florida Power and Light Co.*, 857 So. 2d 224, 230 (Fla. App. 2003) (interpreting McCain as allowing foreseeability of particular plaintiff to limit existence of a duty to that plaintiff, citing *Palsgraf*). But most seem to fall in line. *See, e.g., U.S. v. Stevens*, 994 So. 2d 1062, 1269-70 (Fla. 2008) (holding that research facility owed decedent duty where third party stole anthrax and mailed it to defendant’s employer, killing defendant—duty owed because storing anthrax creates risk to general public—whether defendant breached duty or proximately caused plaintiff’s death is left to jury); *Prime Hospitality Corp. v. Simms*, 700 So. 2d 167, 169 (Fla. App. 1997) (“we think the issue of foreseeability goes to proximate cause, rather than duty, in this case and was a question for the jury.”); *Pittman v. Volusia County*, 380 So. 2d 1192, 1195 (Fla. App. 1980) (“In the instant case, there were facts from which a jury could conclude that there was a duty occasioned by foreseeability that someone would fall on the slippery steps and there was a reasonable opportunity to have corrected this danger before the fall occurred.”).

Georgia: Didn’t find case that addressed matter generally, but cases seem generally to leave foreseeability decisions to the jury. *Orkin Exterminating Co., Inc. v. Carder*, 575 S.E.2d 664, 670 (Ga. App. 2002) (“With reference to foreseeability of injury, the correct rule is that in order for a party to be held liable for negligence, it is not necessary that he should have been able to anticipate the particular consequences which ensued. It is sufficient if, in ordinary prudence, he might have foreseen that some injury would result from his act or omission, and that consequences of a generally injurious nature might result. Adequate evidence was presented from which the jury could have found that it was foreseeable to Orkin that someone in the office building would suffer personal injury as a result of exposure to the subject pesticides if improperly applied.”); *General Motors Corp. v. Davis*, 233 S.E.2d 825, 827 (Ga. App. 1977) (“General Motors also claims that, under the rule expressed by Judge Cardozo in *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), it owed no duty to the decedent because he was outside of their “ambit of risk” in construction of the alternator. . . . A jury could reasonably find that the malfunction of a piece of automotive equipment would place any person using a highway in danger of property damage or bodily injury.”); *Jordan v. City of Rome*, 417 S.E.2d 730, 735-36 (Ga. App. 1992)

Finally, two jurisdictions (incredibly) have not addressed whether judge or jury is the proper arbiter of foreseeability.⁹⁰

In summary, out of forty-seven jurisdictions that arguably assign plaintiff-foreseeability to duty, twenty hold or lean toward holding that foreseeability is to be decided by the jury, and sixteen hold or lean toward holding that foreseeability is for the court. In eleven jurisdictions, the question remains closely divided or unaddressed. In addition, recall that four jurisdictions leave plaintiff-foreseeability to the jury as part of proximate cause.⁹¹ Thus, a complete tally of the judge-jury issue is 24-16 in favor of leaving plaintiff-foreseeability to the jury.

For those of us who live with torts, this discovery presents a confounding paradox. The paradox stems from the fact that courts are apparently guided by four simultaneous, yet

(“the question of reasonable foreseeability, like the question of breach of duty, is for a jury’s determination rather than summary adjudication by the court.”); (“[A] defendant employer has a duty to exercise ordinary care not to hire or retain an employee the employer knew or should have known posed a risk of harm to others where it is reasonably foreseeable from the employee’s tendencies or propensities that the employee could cause the type of harm sustained by the plaintiff.” . . . This question is susceptible to resolution as a matter of law “only where the evidence is plain, palpable and undisputable.”)

Maine: Maine courts don’t really talk about cases in terms of foreseeable plaintiff. The only case I could find close to being on point was: *Schultz v. Gould Academy*, 332 A.2d 368, 370 (Me. 1975) (“Whether the harm that befell plaintiff was within ‘the range of reasonable apprehension’ was a question of fact for the jury.”)

West Virginia: *Strahin v. Cleavenger*, 603 S.E.2d 197, 207 (W.Va. 2004) (“when the facts about foreseeability as an element of duty are disputed and reasonable persons may draw different conclusions from them, two questions arise—one of law for the judge and one of fact for the jury. . . . a court’s overall purpose in its consideration of foreseeability in conjunction with the duty owed is to discern in general terms whether the type of conduct at issue is sufficiently likely to result in the kind of harm experienced based on the evidence presented. If the court determines that disputed facts related to foreseeability, viewed in the light most favorable to the plaintiff, are sufficient to support foreseeability, resolution of the disputed facts is a jury question. The jury has the more specific job of considering the likelihood or foreseeability of the injury sustained under the particular facts of the case in order to decide whether the defendant was negligent in that his or her conduct fell within the scope of the duty defined by the court.”); *Aikens v. Debow*, 541 S.E.2d 576, 580-83 (W.Va. 2000) overturning prior cases which held that duty-foreseeability was to be decided by jury and instead holding that it is for court to decide); *Mallet v. Pickens*, 522 S.E.2d 436, 446-47 (W.Va. 1999) (“We are quick to recognize, however, that foreseeability is not all that the trier of fact must consider when deciding if a given defendant owed a duty to a given plaintiff”); *Ratlief v. Yokum*, 280 S.E.2d 584 (W.Va. 1981) (“while foreseeability, a critical determinant of duty, is usually not a jury issue, in close cases a jury may be asked whether a particular risk of injury was foreseeable.”).

⁸⁹ **Idaho:** *Sharp v. W.H. Moore, Inc.*, 796 P.2d 506, 509 (Idaho 1990) (stating, in the context of judging the existence of a duty: “Whether the duty attaches is largely a question for the trier of fact as to the foreseeability of the risk.”). Other courts echo this holding. On the other hand, many courts state that duty is a question for the court, list risk-foreseeability as a factor in deciding duty, then seemingly decide it without deference to the jury. *See, e.g., Zimmerman v. Brinton*, Not Reported in P.3d, 2002 WL 32098104, at *4-5 (Idaho Dist. 2002) (“The existence of a duty is a question of law for the trial court to determine.” “It cannot be said that it is foreseeable that Mr. Brinton’s warnings during the moving of an object on his property would result in harm.”).

⁹⁰ I could find no case addressing the question in South Carolina or Vermont.

⁹¹ *See supra* note 49.

contradictory intuitions. The first intuition is that duty decisions are properly made by the court as policy-based judgments of broad effect. The second is that duty is inextricably informed by foreseeability—that, as a moral or psychological matter, the foreseeability that one’s actions might create risk to others is what sparks the felt obligation to take care; and that, conversely, one cannot owe an obligation with regard to risks that one cannot foresee. The problem arises when these first two intuitions are combined with a third and fourth—intuitions that foreseeability in a given case can vary with even the slightest change in the facts, and that narrow judgments of fact or law applied to fact are best left to juries.

Courts that leave duty-foreseeability to the jury are trying to serve all of these intuitions. The result, however, is a doctrinal hash that does violence to the rule of law. I have documented elsewhere my criticisms of duty-foreseeability.⁹² Thus, it will be no surprise that in my view, the second intuition—that duty is inextricably informed by foreseeability—is both faulty and the most disposable of the four. The concept of duty is not commensurate with our moral, psychological, or colloquial understandings of the term—even if it is informed, in part, by such understandings. Duty calls for a decision as to whether, assuming the defendant acted unreasonably and was a proximate cause of the plaintiff’s injury, the court should impose on the defendant a *legal* obligation to have acted reasonably in the first place. By asking the question thus, courts may live comfortably with three of the intuitions listed above and better preserve the integrity of their decisions.

IV. Conclusion

So, who has won the *Palsgraf* debate? As promised, the answer is complicated. On the theoretical substance of duty, neither the vision of Cardozo nor of Andrews dominates today’s courts. Instead, courts embrace Prosser’s aphorism that “[d]uty’ is simply an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.”⁹³ Relationality plays only a bit part in courts’ descriptions of duty’s essence, and only in some jurisdictions. On the proper doctrinal home for plaintiff-foreseeability, Cardozo has undoubtedly prevailed. A clear majority of jurisdictions state that duty is the proper home for plaintiff-foreseeability, although Cardozo’s vision of foreseeability as a categorical determination has not been widely adopted. Nevertheless, Andrews may have found a back door to victory. Arguably the most important consequence of the *Palsgraf* decision, resolution of the judge/jury question, appears to lean in Andrews’ direction. A majority of courts prefer to leave foreseeability—even as a part of duty—to the jury.

Perhaps the most enduring lesson from this investigation is that courts are anything but clear or consistent in resolving these duty issues. In fact, the disarray is rather overwhelming. My hope is that this examination of the case law will aid courts in weeding out some of the noise and misdirection, regardless of the substance of their duty framework.

⁹² See generally Cardi, *supra*, notes 17 & 54.

⁹³ See *supra* note 18.