The Doctrine of Plaintiff Foreseeability: A Sympathetic Reconstruction

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Abstract

In these pages, I seek to advance two arguments, a negative and a positive. The negative one is that leading accounts of foreseeability in duty-of-care-analysis fail to make sense of the requirement in question. And affirmatively, I shall argue that the foreseeability requirement reflects a concern for the distinctively social form of interaction between risk-creator and risk-taker, namely, that the former could form a relation of respectful recognition of the latter. This reconstruction of the foreseeability requirement may express the view that its moral center may be a thin form of solidarity between members of a liberal society.
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Key Words: Negligence, Duty of Care, Foreseeability

INTRODUCTION

A duty of care in negligence law depends for its existence on three sets of considerations: that the defendant could reasonably foresee that her conduct risks harm (of a certain kind) to the plaintiff; that the former stands in a relation of sufficient proximity to the latter; and that it is fair, just, and reasonable to impose a duty of care in the circumstances at hand. Against the backdrop of courts’ self-conscious reluctance to elaborate the necessary content of these (or other) considerations in detail, it has been argued time and again that duty analysis is conclusory. These charges, it is important to note, are for the most part leveled at the last two prongs—proximity and considerations of fairness, justice, and reasonableness.

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1 Caparo Industries Plc v Dickman [1990] 2 AC 605, 617. Note that the argument I shall develop in these pages is not limited to English common law. The centerpiece of my argument—the analysis of the foreseeability requirement—applies to other common law jurisdictions, including those (eg, Canada, most American States, Israel) who do not follow the three-part test articulated in Caparo.

2 See eg ibid, at 628 (Lord Roskill) and 618 (Lord Bridge); Alcock v Chief Constable of South Yorkshire [1992] 1 AC 310, 411E (Lord Oliver).

3 Of course, denunciations of the duty element have been made before the Caparo three-stage test (or, for that matter, the two-stage test of Anns v Merton LBC [1978] AC 728, 752). See eg W. W. Buckland, ‘The Duty to Take Care’ (1935) 51 LQR 637, 639; W. L. Prosser, ‘Palsgraf Revisited’ (1953) 52 Mich L Rev 1, 15.

4 eg White v Jones [1995] 2 AC 207, 221 (Nicholls VC).
By contrast, the first prong—foreseeability of harm to the plaintiff—has not been challenged as powerfully and as radically as the other two.\textsuperscript{5} Perhaps this is so because it gives rise to an epistemic, rather than purely normative, inquiry concerning the reasonable possibility of the defendant’s anticipating that her conduct may expose the plaintiff to risk of harm.\textsuperscript{6} Accordingly, its place in duty analysis is, as one commentator observes, a matter ‘of course.’\textsuperscript{7} As I shall argue in the first stage of the argument, however, this perception is anything but obvious.

To be sure, it has been argued before that the requirement of plaintiff foreseeability can be notoriously vague.\textsuperscript{8} This charge is sound as far as it goes. However, it does not go far enough. To begin with, this form of suspicion about foreseeability is uninteresting; certainly, there exist any number of legal concepts that could become manipulable in the hands of a zealous court.\textsuperscript{9}

Moreover, and more dramatically, I shall argue that this form of skepticism about the concept of foreseeability in duty analysis shows itself to be significantly shallow when compared to a far more radical, though much less familiar, form of skepticism about foreseeability—that this requirement may be redundant because it has no point. Whereas the former form takes stock of the limits of foreseeability, the latter suspects the very necessity of applying the test of plaintiff foreseeability to determine whether the defendant owed a duty of due care to the plaintiff. Indeed, the trouble with foreseeability in negligence law does not arise merely from its indeterminacy, but rather from the suspicion that it lacks an adequate rationale to begin with. As I shall seek to show, the most prevailing theoretical accounts of this requirement fail adequately to explain its role in duty analysis.

\textsuperscript{5} Throughout, I shall discuss the doctrine of plaintiff foreseeability only—that is, foreseeability with respect to the apparent zone of danger and, especially, to the apparent existence of persons (or properties) within that zone. I do not discuss its doctrinal cousins, traditionally linked to the element of legal cause, which are the requirements that the manner in which the injury occurred and the type of injury could have been reasonably foreseeable (see also notes 24 & 56 below). My attempt to explore the freestanding value that underlies the doctrine of plaintiff foreseeability can thus cast doubt on the idea that this doctrine reflects, with Hart and Honoré, a ‘technique’ that courts conveniently deploy as an imperfect proxy for assessing foreseeability of harm (which is to say, foreseeability of the type of injury and the manner in which this injury was caused). H. L. A. Hart and A. M. Honoré, \textit{Causation in The Law} (Oxford: Clarendon Press, 2nd ed, 1985), 271-273.
\textsuperscript{6} The epistemic inquiry that arises in connection with the doctrine of plaintiff foreseeability is best illustrated in cases such as \textit{Maguire v Harland & Wolff plc} [2005] EWCA Civ 01.
\textsuperscript{7} W. V. H. Rogers, \textit{Winfield and Jolowicz on Tort} (London: Sweet & Maxwell, 18th ed, 2010), 164.
\textsuperscript{9} For example, determining whether the defendant has acted in conformity with the dictates of the reasonable person or whether the injury is a proximate cause of a negligent conduct are equally open-ended inquiries.
In the second stage of the argument, I shall reconstruct an alternative account of the role of foreseeability, emphasizing the special form of connection that exists between two persons when foreseeability of one by the other obtains. On the proposed account, the foreseeability requirement expresses both instrumental and non-instrumental value: First, discharging reasonable care cannot count as an act of respecting the cared-for unless foreseeability of this cared-for obtains; second, foreseeability of the cared-for may in itself be respectful, since it can transform the risk-creator’s deliberation toward action into a process of accommodating the vulnerability of the cared-for in her decision to proceed vigilantly.

SETTING THE SCENE

I shall begin by explaining why foreseeability may be a prerequisite for a duty of care; for reasons that will become clear in due course, the argument focuses on foreseeability in simple negligence cases resulting in physical injury only. To set the scene, consider the impossibility of a duty purged of any requirement of foreseeability.10 In a recent article, Jonathan Cardi and Michael Green have sought to propose just that, advocating the imposition of a duty of care based on the ‘nature of the act itself—namely, an act that creates some risk of harm.’11 Similarly, David Howarth has asserted that the tort of negligence need not be conditioned upon foreseeability, since ‘[d]efendants could have avoided liability completely [including for unforeseeable states of affair] by acting reasonably in the first place.’12 But these propositions are hopelessly empty if there is no one person potentially falling within the ambit of this risk. Indeed, simply saying that one is driving at 50 KPH provides absolutely no indication about whether thus acting generates risk of some sort and of some (gross or trivial) measure to some other persons; nor can it provide us with any indication about whether thus acting is reasonable or not (however ‘reasonableness’ is defined). An act can be characterized as ‘risky’ and behavior as ‘reasonable’ in virtue of the consequences (say, an accident) we may reasonably expect to flow from thus acting, not the other way around.

A way out of this embarrassment is to incorporate some facts about the world. In particular, these facts must concern the expected happenstance of other people nearby

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10 While I do not deny the ex-post role of the duty element as a device for limiting liability (as, for instance, nicely argued in J. Stapleton, ‘Duty of Care: Peripheral Parties and Alternative Opportunities for deterrence’ (1995) 111 LQR 301), the argument in the main text below insists that the duty is, first and foremost, a mandatory reason for action, operating ex-ante, that is, as a guide to conduct.
and their vulnerability to the activity in question. ‘Risk,’ as Chief Justice Cardozo famously observed, ‘imports relation,’\(^{13}\) by which he meant that risk is by definition relational and, by implication, that a duty to moderate one’s risky activity can be intelligible only insofar as a sufficient measure of foreseeability \textit{with respect to} potentially vulnerable others obtains.\(^{14}\)

Against this backdrop, the most natural question that arises in connection to foreseeability’s relational character is that of foreseeability \textit{with respect to whom}. At first glance, however, this question may not seem natural, but rather superficial, at best. For the foreseeability requirement in common law negligence singles out the would-be plaintiff (or the plaintiff class) as its object.\(^{15}\) Indeed, were the plaintiff (or plaintiff class) the only person standing within the zone of foreseeable danger, it would be odd to pose the question of ‘foreseeability to whom.’ That said, it may well be the case that the foreseeable zone of danger be occupied by a person \textit{other than} the would-be plaintiff (or plaintiff class). Moreover, it may well be the case—as case law actually confirms\(^{16}\)—that while the risk-creator can reasonably foresee the presence of this other person within the zone of danger created by her risky act, no such foresight obtains with respect to the would-be plaintiff.

Accordingly, the move from the notion that foreseeability is necessarily relational to the conclusion that this requirement (of foreseeability) picks out the relation between a risk-creator and a would-be plaintiff is \textit{not} analytically entailed. The question of foreseeability-to-whom can, therefore, give rise to at least another answer, which is to say foreseeability to someone \textit{other than} the plaintiff (or plaintiff class).\(^{17}\) But in spite of this, the law (to repeat) single-mindedly focuses on foreseeability with respect to the plaintiff. It is far from obvious, as I shall argue presently, why this is so. Moreover, I shall seek to show that certain leading accounts of the foreseeability requirement in negligence law cannot make good on what may turn out to be a doctrinal puzzle. More specifically, it is not clear \textit{why} plaintiff foreseeability is

\footnotesize{\textsuperscript{13} 	extit{Palsgraf v Long Island R Co}, 162 N.E. 99, 100 (N.Y. 1928).
\textsuperscript{14} By ‘sufficient measure’ I mean to say that the facts about the world reasonably available to the risk-creator provide her with the amount of information necessary to discharge due care in the face of the foreseeable potential victims. For example, one who drives through a remote industrial area containing a number of chemical plants can be reasonably aware of the existence of adults nearby. On the basis of this input, the driver can proceed with due care, which is (for the sake of the argument) 50 KPH. Now suppose that two small children have sneaked into this area and that this event (again, for the sake of the argument) could not have been foreseen by reasonable drivers. The point that this hypothetical case seeks to emphasize is that driving at a speed of 50 KPH becomes too fast to accommodate the possibility of children suddenly and unexpectedly bursting onto the highway. For this reason, the necessity of foreseeability in duty analysis implies the necessity of a sufficient measure of foreseeability. I say more about this issue below.
\textsuperscript{15} 	extit{Brouhill v Young} [1943] AC 92.
\textsuperscript{16} See the next Section below.
\textsuperscript{17} The doctrinal expression of this alternative answer would be a requirement of foreseeability with regard to a person (the plaintiff or otherwise).}
necessary, rather than merely sufficient, for the purpose of satisfying the foreseeable requirement in the duty analysis.

This puzzle is distinctly important and illuminating. It is important because the foreseeable requirement is, along with proximity and considerations of justice and fairness, a necessary element in the duty analysis; it becomes the single most important such element in the core case of negligence—that is, the commission of an act which generates a risk of physical injury (to the person or property) of another. And it is illuminating precisely because the foreseeable requirement has so far received little attention (except, recall, for generic accusations of indeterminacy), certainly immeasurably less than the other two elements of the duty analysis have received.

**PLAINTIFF FORESEEABILITY: A PUZZLING DOCTRINE?**

Although the issue has received some attention in the dicta in Smith v London and South Western Ry Co, the best place to begin is the celebrated case of Palsgraf. It is true that the case features an extraordinary factual situation that does not follow the normal circumstances of most negligence cases involving physical injury or property damage. Nevertheless, its exceptional character is a great asset precisely because it allows a laboratory-like examination of one feature—the defendant's foresight with respect to the plaintiff—in isolation and therefore without the distorting effects characteristic of the ordinary negligence case. It can therefore provide illuminating insights with respect to the basic requirement of foreseeability in cases of physical injury simpliciter.

In Palsgraf, the defendant's employee was acting carelessly by assisting a passenger to board a moving train. This careless act resulted in the dropping of an unmarked package of the passenger. The falling package, filled with fireworks, exploded, causing some scales to strike and injure the plaintiff who stood many feet away from the area of the interaction between the employee and the passenger. The innocent appearance of the package, the court observed, gave no notice that its dislodgement, let alone negligent dislodgement, could risk the person or property of anyone save those in its close vicinity.

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19 (1870) L.R. 6 C.P. 14, 20, 21, 21-22 (per Kelley C.B., Channell B., and Blackburn J., respectively).

20 Palsgraf, n 13 above.

21 *ibid*, at 101: ‘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.’
Against the dissent's broad characterization of duty as that which is owed to the 'world at large,' the court (per Cardozo, C.J.) held that the railroad had no duty of due care toward Mrs. Palsgraf with respect to this incident. And in the absence of a duty relative to Mrs. Palsgraf it must be true that, despite its failure to exercise reasonable care, the railroad incurs no duty to redress her injury (whatever it is). The debate between Justices Cardozo and Andrews features conflicting approaches to the place of foreseeability in the duty-of-care analysis. As I shall argue, contrary to its conventional depiction, this debate does not turn on whether foreseeability should figure in this analysis, tout court. Indeed, like his intellectual antecedents in Smith, Andrews grants that "in an empty world negligence would not exist." Rather, the debate concerns precisely the same question posed a moment ago, namely a question regarding the appropriate conception of foreseeability that is required for a duty to arise in physical injury cases. Whereas Cardozo insists on foreseeability with respect to the plaintiff (or plaintiff class), Andrews's conception renders sufficient the existence of foreseeability to whomever is standing within the zone of danger:

Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm, might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone.

Thus, the most charitably accurate way to articulate the challenge posed by Andrews to Cardozo's insistence on foreseeability with respect to the plaintiff is not that foreseeability does not matter for the purpose of imposing a duty of care on the risk-creator. Instead, the challenge is that it is one thing to say that foresight is a prerequisite for a duty; quite another to refuse to extend this duty (to the boarding

22 ibid, at 103.
23 There are (at least) two other interpretations of Cardozo's opinion. It seems that John Goldberg and Benjamin Zipursky have focused on the breach element, arguing that the fact that Mrs. Palsgraf was not foreseeable implied that the railroad’s employee did not breach the duty he owed her. See J. C.P. Goldberg and B. C. Zipursky, 'The Moral of MacPherson' (1998) 146 U Pa L Rev 1733, 1819-1820, 1821-1824. Another interpretation of the case focuses on the remoteness (or proximate cause) element—it appears to be the most popular approach to Palsgraf among American commentators. It is beyond the scope of this paper to discuss these interpretations. In my view, questions involving the elements of breach and remoteness arise only insofar as the duty exists.
24 To forestall misunderstanding, the decision in Palsgraf does not turn on the distinction between harming the plaintiff's person and damaging her property—that is, foreseeability with respect to the type of injury. For more see note 56 below.
25 Palsgraf, note 13 above, at 102. Compare with the judgment of Blackburn J: ‘what the defendants might reasonably anticipate is ... only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence.’ Smith v London, note 19 above, at 21.
26 Palsgraf, note 13 above, at 103 (italics are mine).
passenger) to other possible victims, including unforeseeable victims. Contemporary tort scholars often run afoul of this basic distinction. They tend to disagree over the question of whether foreseeability is or should be a necessary element of the duty analysis, but their disagreement is off the mark insofar as they argue for (or against) foreseeability tout court, overlooking the peculiar requirement of foreseeability that figures in duty analysis—that which concerns the plaintiff (or plaintiff class) in particular. Once again, foreseeability may be necessary at the get-go stage—to establish the existence of a duty to act cautiously with respect to the person or property of another. But it is an open question whether, once this stage obtains, the scope of the duty’s application is strictly fixed by reference to such foresight. This is because the extension of the duty to the likes of Mrs. Palsgraf requires absolutely nothing from the railroad's employee that is not already contained in the duty he owes those standing within the zone of foreseeable danger.

Indeed, this unforeseeable person (Mrs. Palsgraf) makes no practical difference with respect to the questions of whether the employee must exercise due care when assisting the boarding passenger and, if so, what the precise content of this duty might be, cast in terms of the degree of care owed by the employee to the passenger. All the materials needed in order to answer these questions are exhausted once they are considered with respect to the interaction between the employee and the boarding passenger. To accord them further influence (vis-à-vis the unforeseeable victim) would be to count them twice over, thereby giving them excessive effect. (Another way to put the matter, now switching to economic analysis, is to observe that taking additional precautions to ameliorate the risk of harm to the likes of Mrs. Palsgraf is tantamount to taking cost-unjustified precautions, since the costs required to meet the bar of due care with respect to the boarding passenger are necessary and sufficient to meet this bar with respect to Mrs. Palsgraf). Thus, for the purpose of imposing a duty of care on the employee, foreseeability with respect to the boarding passenger may render the requirement to establish foreseeability with respect to Mrs. Palsgraf redundant.

Now, it may be thought that this conclusion is limited to the idiosyncratic factual pattern of Palsgraf or to other cases of freak accident, more broadly. But this

27 Once again, a similar view appears in Smith v. London, note 19 above, at 21-22 (per Channel B. and Blackburn J., respectively).


30 On the economic interpretation of the Learned Hand formula, cost-justified precautions are assessed by reference to the question, ‘[w]hat additional care inputs should the defendant have used to avoid this accident, given his existing level of care?’ As I argue in the main text above, the answer in Palsgraf is none. The quoted question comes from W. M. Landes and R. A. Posner, The Economic Structure of Tort Law (Cambridge, Mass.: Harvard University Press, 1987), 87.
suspicion is misplaced. As I mentioned above, the unique situation of *Palsgraf* is an asset, rather than a liability, because it renders more explicit a puzzling feature—the foreseeability requirement—whose presence permeates the duty of care *in general*. As such, the factual setting of *Palsgraf* merely helps to render more vivid a conceptual point about the doctrine of plaintiff foreseeability.

To see this, consider two factual settings that depart substantially from the fact pattern of *Palsgraf*: First, the plaintiff is the only foreseeable potential victim; and second, foreseeability with respect to a third person does not provide the defendant with sufficient information so as to discharge reasonable care successfully toward the plaintiff. I shall take each in turn, showing that the puzzle surrounding the doctrine of plaintiff foreseeability need not be the peculiar outgrowth of *Palsgraf*’s extraordinary situation.

First, my analysis so far has sought to show that foreseeability of the plaintiff is not necessary, though it is sufficient, to ensure that a risk-creator is in a suitable position to act in ways that moderate any unreasonable imposition of risk of harm on the person or property of the plaintiff. This point holds even in the limiting case where the plaintiff is the only foreseeable person to exist in the case at hand. Indeed, the necessity of establishing foreseeability in this case need not be a response to the importance of being aware of the plaintiff *qua* plaintiff, but simply to the importance of furnishing the risk-creator with all the information germane to the task of moderating her risky activity. The presence of the plaintiff within the zone of foreseeable danger provides this information not of necessity, but as it happens. A case like *Palsgraf* merely helps in clarifying this point by showing that foreseeability with respect to the plaintiff is not, after all, necessarily required in order for the risk-creator to conduct himself vigilantly.

Second, there can be cases where foreseeability with respect to one person underdetermines the case of another who is the unforeseeable plaintiff. More precisely, the amount of precautions necessary to meet the standard of reasonable care toward the foreseeable person is not sufficient for the purpose of discharging due care with respect to the unforeseeable one. The child-free industrial area mentioned above falls within this factual setting. Foreseeability with respect to those reasonably anticipated to use the road in a remote area where there are chemical plants suggests

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31 And this puzzling feature, recall, is that while foreseeability with respect to the plaintiff may well be sufficient, it is not clear why it should also be deemed necessary for the purpose of establishing a duty of care.

32 In principle, the second factual setting can evolve into a *Palsgraf*-like factual setting. For it can always be the case that there exists another person (or class of persons) *other than* the foreseeable person and the unforeseeable plaintiff whose foreseeability is sufficient to comply with the standard of care appropriate to keep the unforeseeable plaintiff reasonably safe. Consider *Palsgraf* once more. Even if foreseeability with respect to the passengers already sitting on the moving train does not contribute to the employee’s ability to discharge due care toward Mrs. Palsgraf, there may be another person—here, the boarding passenger—whose foreseeability is sufficient for the purpose of protecting the person of the unforeseeable Mrs. Palsgraf.

33 See note 14 above.
that drivers must adjust their driving plans to the point of 50 KPH to reflect this possibility. But by traveling at this otherwise appropriate speed, drivers would probably hit unforeseeable small children rushing suddenly and unexpectedly onto the highway.

There are (at least) two different doctrinal ways to approach this case: duty and breach analysis. According to the first, no duty of care toward the children-plaintiffs can exist in the absence of foreseeability. In particular, foreseeability with respect to adults is not enough to meet the requirement of foreseeability as a necessary condition for the existence of a duty to act cautiously in connection with the safety of the unforeseeable children. That is, the problem posed by the lacking foreseeability in this case is not so much that the presence of the children is unforeseeable, but rather that foreseeability with respect to the adults fails to provide the risk-creator with sufficient input in order to be responsive to children bursting onto the highway. In other words, a ‘no duty’ judgment in this case does not reflect the notion that foreseeability with respect to the children is necessary for a duty to arise, but rather that foreseeability with respect to adults has proven unhelpful for the purpose of exercising due care toward the children-plaintiffs. As argued at the outset, the insistence on a sufficient measure of foreseeability with respect to someone (the plaintiff or otherwise) reflects the idea that otherwise it is simply unintelligible to say that one's activity generates risk of harm that is relevant to the safety of the unforeseeable plaintiff. Nothing in this way of approaching the case need turn on the proposition that foreseeability with respect to the (children) plaintiffs is necessary. All that this case reveals is that plaintiff foreseeability can be sufficient just as much as a sufficient measure of foreseeability with respect to other persons (in this case, adults) can be.

According to the second doctrinal route, the class of potential victims is defined broadly to capture every sub-group of pedestrians, adults and children alike. Foreseeability with respect to members of one sub-group (adults) is sufficient for the purpose of establishing a duty of care toward both sub-groups. And the lack of foreseeability with respect to the children’s sub-group could weigh in only at the stage of analyzing the breach element. That is, the fact that drivers could not anticipate the presence of children may lead courts to find that drivers were not in violation of the duty to drive carefully by speeding up to 50 KPH. Strictly speaking, it may be thought that this approach supports the conclusion that foreseeability with respect to the (children) plaintiffs is necessary, rather than merely sufficient. But this conclusion can be reached only because, and only insofar as, the definition of the plaintiff class bunches the class of children into the class of adults. However, it does not solve the puzzle that arises in and around the doctrine of plaintiff foreseeability. On the contrary, establishing foreseeability with respect to the children is not

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34 Other doctrinal ways, such as legal or proximate cause and assumption of risk, may also be relevant (depending, in the case of the latter, on the age of the children). They are of less importance, however, for the purpose of showing that Palsgraf merely exemplifies a conceptual point about the doctrine of plaintiff foreseeability, more generally.
necessary; in fact, foreseeability with respect to the class of adults stands in for the requirement to establish foreseeability with respect to the children. Thus, the duty of care owed by drivers to children in the case at hand does not reflect, and so does not turn on, the necessary existence of foreseeability with respect to the plaintiff. Here, too, the conceptual point that Palsgraf helpfully illustrates remains intact—that is, foreseeability with respect to the plaintiff (the class of children) need not be necessary for the purpose of duty analysis.

Thus, the puzzle surrounding the doctrine of plaintiff foreseeability outlives Palsgraf. It presents a general difficulty that arises because the necessity of foreseeability is not the same as the necessity of plaintiff foreseeability. And in spite of this discrepancy, common law negligence in many jurisdictions insists on the latter.\(^{35}\) Palsgraf, once again, merely helps in elucidating this general point with unusual precision. I shall now seek to show that certain leading accounts of the foreseeability requirement in negligence law fail to explain away this puzzle.\(^{36}\) That is, they fail to explain why plaintiff foreseeability is necessary, rather than merely sufficient, for the purpose of satisfying the foreseeability requirement in the duty analysis.

**FORESEEABILITY IN THEORY**

To make this showing, I shall draw on theoretical accounts of the foreseeability requirement in order to investigate whether foreseeability with respect to the plaintiff could, nonetheless, make sense. Here, too, I shall argue that, for the same reason mentioned above, foreseeability with respect to the plaintiff is certainly sufficient, but that it need not be necessary for the purpose of determining whether the risk-creator owes a duty of care to the plaintiff.

Another way to put the point is to say that whatever it is that makes our rights and duties in private law relational, rather than general, need not turn on foreseeability

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35 The foreseeability requirement is not unanimously embraced throughout the common law world. See eg *Gritzner v. Michael R.*, 611 N.W.2d 906 (Wis. 2000).

36 Perhaps, however, the entire attempt to dissolve the so-called puzzle is misguided, because the foreseeability requirement demands reasonable, rather than actual, foresight. Applied to persons who suffer from insufficient caring skill, the requirement turns out to be a form of strict liability in disguise. Accordingly, it may be thought that requiring persons with insufficient caring skill to discharge due care expresses a move toward a conception of responsibility for the outcomes of their acts, rather than for their conduct (as famously argued with respect to the standard of reasonable care in T. Honoré, ‘Responsibility and Luck: The Moral Basis of Strict Liability’ reprinted in *Responsibility and Fault* (Oxford and Portland, Or.: Hart Publishing, 1999), 14). I have criticized the moral plausibility of this conception of responsibility elsewhere. Very briefly, there exists an immense gap in the theory of this conception of responsibility: It does not follow from the fact that many aspects of our lives are evaluated by reference to our achievements or failures that this view should be extended to a moral evaluation of our practical affairs. See A. Dorfman, ‘Can Tort Law Be Moral?’ (2010) 23 *Ratio Juris* 205, 218-220; A. Dorfman, ‘Reasonable Care: Equality as Objectivity’ (2012) 31 L & Phil 369, 380 n30.
being relational too. Thus, a duty of care which is owed to a particular plaintiff (or plaintiff class) is not inconsistent with foreseeability being established with respect to someone other than the plaintiff (as Andrews would have it). Accordingly, there could be other doctrinal elements (especially the proximity element) that may be invoked in order to sustain the relational character of the duty of care; but the foreseeability requirement is not essential for that purpose. This conclusion is important, because it demonstrates that any attempt to claim that the relational character of private law rights and duties analytically entails the plaintiff foreseeability requirement in duty analysis is bound to fail. That is, the resort to the relational character of private law rights and duties merely restates the difficulty of explaining why plaintiff foreseeability is necessary, rather than merely sufficient, for the purpose of satisfying the foreseeability requirement in the duty analysis. Or such is implied, I shall argue, by the leading theoretical accounts of foreseeability.

I do not seek to explore every theoretical account ever offered in the service of vindicating the role of foreseeability in determining whether a duty of due care should arise; nor do I discuss the early scholarly attempts to analyze the doctrine of plaintiff foreseeability. Instead, I shall consider two articulated accounts of foreseeability to provide a sense of the doctrinal puzzle in question: foreseeability as a check on one’s own effective agency; and foreseeability as a check on one’s rightful means. In both cases, foreseeability is deployed in the service of connecting the tortfeasor with a certain principle (such as responsible agency) that the imposition of a duty of care seeks to sustain, rather than with the plaintiff tout court. I shall argue that they both fail to dissolve the puzzle of the foreseeability requirement, since the only way to make sense of the law's peculiar preference for foreseeability with respect to the plaintiff must elaborate—as I propose in the next stage of the argument—the

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37 This might be the case in the respective arguments developed in R. Stevens, Torts and Rights (Oxford: Oxford University Press, 2007), 95 and E. J. Weinrib, The Idea of Private Law (Cambridge, Mass.: Harvard University Press, 1995), 160; E. J. Weinrib, ‘The Passing of Palsgraf?’ (2001) 54 Vand L Rev 803, 808; E. J. Weinrib, ‘The Disintegration of Duty’ in M. Stuart Madden (ed), Exploring Tort Law (Cambridge: Cambridge University Press, 2005) 143, 152, 164, 186. A more charitable reading of these respective arguments could proceed under the assumption that both presuppose (but do not fully develop) a normative theory of the relation between right- and duty-holder that underlies the requirement of foreseeability in particular. In fact, I take up this task below. Before that, I take stock of what is probably the most powerful Kantian (and, to this extent, Weinribian) account of the doctrine of plaintiff foreseeability as developed by Arthur Ripstein.

38 I shall leave to another occasion the economic explanation of the foreseeability requirement. I do that because lawyer economists almost never discuss foreseeability in connection with the duty element of the prima-facie case of negligence, mainly because they are reluctant in general to acknowledge the existence of a legal duty—a mandatory reason for action irreducible to cost-benefit analysis—and of a duty of care, in particular. For an economic treatment of foreseeability in connection with the case of Palsgraf, see Landes and Posner, note 30 above, at 247.

distinctive connection between the tortfeasor and the plaintiff that the duty of care presumably seeks to engender.

**Foreseeability and Effective Agency**

The idea that moral responsibility depends, in part, on epistemic considerations pertaining to the agent's ability to anticipate the state of the world in which she acts is a familiar theme. Indeed, it figures in the writings of prominent jurists, and it also pervades contemporary moral philosophy. It has been further developed in Stephen Perry's account of tort law as, most importantly, an embodiment of a moral duty of repair, grounded in the idea of outcome-responsibility. As such, this account does not specify the necessary and sufficient conditions for the imposition of a duty of due care and for its content (by which I mean the level of care needing to be discharged). However, because it seeks to determine the necessary conditions upon which a duty of repair may arise, it must constrain the considerations upon which a duty of due care arises in the first place.

Among these constraints is foreseeability—that is, foreseeability becomes a necessary element in the imposition of a duty of due care (because it is a necessary element in demarcating the class of candidates for incurring a duty of repair for a given loss). In short, this account of tort law means that moral responsibility for repairing a loss can arise only when an injury is an outcome for which the defendant is responsible through faulty conduct. And the attribution of outcome responsibility turns, in part, on foreseeability: the epistemic considerations pertaining to the defendant's (actual or constructive) knowledge of the normal causal regularities that commence with her action and culminate in the plaintiff's injury. Simply put,

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40 I have borrowed the term ‘effective agency’ from J. L. Coleman, *The Practice of Principle* (Oxford: Oxford University Press, 2001), 50.
44 While the theory of outcome responsibility developed by Perry did not address the duty directly, certain proponents of this account have subsequently done so, arguing that the foreseeability requirement reflects similar concerns for effective agency at the duty level. See eg Witting, note 28, at 36. There is a reason to believe that Perry may endorse this view. See Perry, note 18, at 111-112 & n 102.
46 Perry, note 43 above, at 499 (arguing that ‘among those persons who have a normatively significant connection with a given loss, it is morally preferable that it be borne by whoever acted faultily in producing it’).
47 *ibid*, at 505 (‘the existence of fault depends itself on epistemic considerations, in the form of belief in or actual or constructive knowledge of causal regularities, and this gives rise to a natural continuity between fault and proximity-as-foreseeability’).
foreseeability comes down to a measurement of the agent's control over the chain of events that, again, begins with her conduct and eventuates in an injury to another person. 48 A person can justifiably incur a duty to redress a loss he (among other possible agents) caused only insofar as he had control over his course of action such that he could have avoided the faulty aspect of this course.

It therefore seems that the precise role foreseeability plays in this account of the morality of tort law is that of serving as a guarantee for effective agency. Only persons who can control their activity and avoid, to some extent, its consequences can be said, as Perry puts it, to be making a difference in bringing about a certain state of affairs in the world and, accordingly, can be the proper object of judgment of responsibility for this state. 49 On this account, foresight insures (among other things) against imposing a duty of due care on a person whose agency made no difference in bringing the bad consequences to the victims—that is, foresight secures that the duty of due care will be predicated on control over one's practical affairs and the effects they ensue. Simply put, foresight is fundamentally about connecting the potential tortfeasor with her agency, not so much with the particular plaintiff. 50

But when the group of victims features, as in the case of Palsgraf, both foreseeable and unforeseeable potential victims, foreseeability, understood as a check on effective agency, may not be necessary in considering the imposition of a duty of due care to the unforeseeable victims. Indeed, the concern for ineffective agency, which informs Perry’s theory of torts, loses momentum under these circumstances, because awareness as to the presence of Mrs. Palsgraf adds nothing to the practical powers of the railroad employee qua agent. These powers of control and avoidability are put to full use, so to speak, once the employee has foresight of the possible harm to the boarding passenger. Nor need it affect his practical deliberation toward action: all the (epistemological) input the employee must have in order to pursue his course of action in a manner that reduces the risk of physical injury, to the passenger and to Mrs. Palsgraf, too, can be fixed by foreseeability with respect to the passenger. This foreseeability, in other words, exhausts the extent to which his agency can be effectively manifested in the world. 51

48 Perry, note 18 above, at 111; Perry, note 43 above, at 505 (‘If action generally produced outcomes that conformed to no specifiable regularities, so that we could never or almost never predict what the result of an action would be, then we would have no sense that agency was in any way meaningful, either for ourselves or with respect to its “effects” on others; there would be no sense of making a difference’).

49 It can be argued that foreseeability is not just a precondition for considering the outcome responsibility of an agent, but also a sufficient condition for matching between the agent and an outcome. I doubt that this is Perry’s own view. In any case, the point I pursue at present does not turn on whether foreseeability is a necessary or a necessary and sufficient condition. All that I am interested in is the significance of the foreseeability of the plaintiff’s injury in the process of imposing a duty of due care.

50 See Witting, note 28 above, at 36: ‘The focus is upon one person——the defendant.’

51 The argument in the main text above applies to a recent development of the effective agency thesis of the foreseeability requirement. Peter Benson has argued for the necessity of plaintiff foreseeability in
Foreseeability and Rightful Means

The next explanation of the foreseeability requirement proceeds from a theoretical account of torts as an institutional elaboration of the principle of equal freedom. The baseline against which to measure the equal exercise of freedom is fixed by social primary goods or rightful means. Negligence law is called for to preserve this baseline, first, by imposing duties to prevent cases in which individuals make excessive employment of primary goods at the expense of others' capacity to employ their given primary goods; and second, by imposing a duty to repair the deprivation of the victim's primary goods when unlawfully destroyed by the tortfeasor. Negligence law provides this service by holding persons who risk harm to others responsible for this risk, especially if materialized in an injury. Thus, tort law revolves around the idea that one is responsible for the risks of one’s activity—and therefore for the injuries one may cause in the appropriate way—when one excessively—and therefore

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52 A. Ripstein, Equality, Responsibility, and the Law (Cambridge: Cambridge University Press, 1999). Ripstein has since then further elaborated on the foreseeability requirement as part of a reciprocal conception of responsibility (which is then contrasted with the agency conception of responsibility). See A. Ripstein, ‘Justice and Responsibility’ (2004) 17 Can J L & Juris 361, 374-377. In the torts part of the latter essay, Ripstein emphasizes the intimate connection between foreseeability and the scope of liability (which is to say, remoteness of damage). Ripstein also mentions the duty’s foreseeability requirement, saying that ‘you can’t have a duty to avoid injuring people in ways that you can’t take account of in your actions.’ ibid, at 374. While Ripstein is surely right to note this, he does not explain why foreseeability with respect to the plaintiff is necessary, rather than merely sufficient, in order to for a duty to arise. It seems that this missing piece of explanation is to be found in his Equality, Responsibility, and the Law and, as I shall explain in a later footnote, in his more recent work on Kant’s theory of political legitimation.

53 Primary goods are, in short, all purpose means. John Rawls defined them as ‘things which it is supposed a rational man wants whatever else he wants.’ These goods consist of ‘rights and liberties, opportunities and powers, income and wealth [and self-respect].’ J. Rawls, A Theory of Justice (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971), 92. More recently, Ripstein has moved from a Rawlsian idea of social primary goods to the Kantian notion of allowable or rightful means to exercise one’s freedom to set and pursue ends based on natural right to one’s person and property. See A. Ripstein, Force and Freedom: Kant’s Legal and Political Theory (Cambridge, Mass.: Harvard University Press, 2009). Although this move is significant in many respects, it is of less importance to the account of foreseeability under discussion. In particular, the argument concerning the place of foreseeability in mediating between an actor and equally distributed primary goods can be cast in terms of mediating between an actor and her permissible means.

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http://law.bepress.com/taulwps/art162
faultily—exploits primary goods at the expense of the ability of other persons to employ their assigned goods.\textsuperscript{54} Failure to take appropriate care is an instance of this faulty conduct and it, therefore, justifies the imposition of a remedial duty. By contrast, discharging appropriate care vindicates an interaction predicated upon fair terms—each party to the interaction (the potential tortfeasor and potential victim) exercises their freedom, equally.

Now, the possibility of determining whether a person has violated the duty of care’s restriction on allowable means depends, in part, on epistemic considerations. This is because the capacity of a person to moderate her conduct in light of the equal claims of others to employ their respective primary goods presupposes (reasonable) foresight of this very situation.\textsuperscript{55} Accordingly, only if the class of potential victim and the kind of injury may be reasonably foreseen can a duty to take appropriate care arise.\textsuperscript{56} Foresight, then, is a precondition of a duty of due care, providing the necessary background beliefs against which an agent can moderate her conduct in the face of others.\textsuperscript{57}

As with the account of foreseeability that emphasizes effective agency, Ripstein’s account can make sense of the necessity of foreseeability. However, once again, it is one thing to establish that foresight is necessary; quite another to say that it must be uniquely satisfied with respect to the plaintiff (or plaintiff class). Indeed, the latter requirement may be sufficient, but the argument from equal freedom does not explain why it is also necessary. Consider \textit{Palsgraf} once again. The foreseeable passenger provides the railroad’s employee with the requisite epistemic basis on which he could conduct his practical affairs in conformity with the general scheme of fairly distributed primary goods. Any encroachment on the unforeseeable person’s goods (or on her capacity to exploit them freely) is already implicated, and indeed completely subsumed, in the activity of the employee as it relates to the foreseeable person. Discharging due care toward the boarding passenger secures the person of

\textsuperscript{54} Ripstein, \textit{Equality, Responsibility, and the Law}, note 52, at ch. 3.
\textsuperscript{55} ibid, at 104-108.
\textsuperscript{56} Ripstein actually argues that his account of risk ownership captures the no-duty holding in \textit{Palsgraf}. See ibid, at 66-70, esp. 66-67. But it does not. Ripstein observes that the defendant’s shortcoming (namely, pushing a passenger into a moving train) is the failure ‘to show appropriate care for his parcel.’ ibid, at 66. Accordingly, he concludes, failing to discharge care with respect to this risk, risk to property damage, does not bear on Mrs. Palsgraf’s interest in bodily integrity. However, this conclusion remains a dictum in Cardozo’s opinion. See \textit{Palsgraf}, note 13, at 101 (‘There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act... We do not go into the question now. The consequences to be followed must first be rooted in a wrong’). \textit{Palsgraf}, therefore, does not turn on this distinction between property and bodily security. Instead, it turns on the fact that the plaintiff was standing outside the foreseeable zone of danger (to either property or person) created by the defendant’s carelessness. And Cardozo clearly observes that even if the risk created by the defendant was risk of injury of the same type inflicted on Mrs. Palsgraf, it would make no difference with respect to the reasoning or the outcome reached by the court. See ibid, at 100 (‘a like result would follow if the interests were the same. Even then, the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty’).

\textsuperscript{57} Ripstein, \textit{Equality, Responsibility, and the Law}, note 52 above, at 106.
Mrs. Palsgraf, while a failure to discharge such care toward the former translates immediately, as in *Palsgraf*, to endangering the latter. Thus, foresight of the plaintiff, rather than foresight of a potential victim, is not necessarily required by this account of tort law as a domain that constrains the exploitation of primary goods on equal or reciprocal grounds. To the contrary, it may even hinder the full realization of the underlying principle in whose service tort law (according to Ripstein) operates: equal freedom. This is so insofar as the risk-creator, being fully aware of the demand to moderate her activity here and now, fails to take appropriate care of other persons' primary goods.

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The two theoretical accounts just discussed—foreseeability as an epistemic check on one's own effective agency or rightful means—make perfectly good sense in explaining why foreseeability is generally a prerequisite for duty. However, the foreseeability requirement in negligence law takes a particularly demanding approach—mere foreseeability (with respect to someone) does not suffice. Indeed, foreseeability of the particular victim (or victim class) is necessary for a duty to arise even when extending the duty to unforeseeable victims of negligence is harmless, perhaps even beneficial, because while it makes no difference to the kind of conduct demanded from the risk-creator, it may foster desired goals such as fairness with respect to an unforeseeable but innocent victim of negligent conduct. At any rate, the two accounts just mentioned fail to render this peculiar requirement sufficiently precise.

It is important to note the source of this failure; that is, to show that this failing is no mere coincidence. A more successful account of the foreseeability requirement could, then, be sought. As I have asserted above, while the two theories just considered proceed from substantively divergent theoretical approaches to tort law, they both seek to connect the tortfeasor with a certain principle that the imposition of a duty of care is sought to sustain, rather than with the plaintiff tout court. Thus, the first account emphasizes the connection between the tortfeasor and her agency whereas the second emphasizes that which exists between the tortfeasor and rightful means. In that, and here I arrive at the source of the trouble, they are of a piece in (implicitly or explicitly) holding that the plaintiff as such is a mere medium through which these respective connections of agent-agency or agent-means may be made. In that case foreseeability with respect to the plaintiff is deployed instrumentally, that is, in the service of functions (such as ensuring effective agency) that are not intimately related to the vulnerability of the plaintiff.\(^58\) This shortcoming returns me to the point registered above—the key to divining the foreseeability requirement in negligence law, as I seek to show presently, must begin from the distinctive form of respectful interaction that a duty of care may (arguably) engender between risk-creator and risk-

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\(^58\) I do not claim, however, that the overall theory of torts developed, separately, by Perry and Ripstein is instrumental (whatever this means). The argument in the main text above focuses on foreseeability in duty analysis only.
taker and which the foreseeability requirement is but an expression thereof. The argument going forward, therefore, bears the burden of making sense of the foreseeability requirement in duty analysis, realizing—as the preceding argument demonstrated—that failing to do so implies the repudiation of this requirement.

**MAKING SENSE OF PLAINTIFF FORESEEABILITY**

The first step in making sense of the foreseeability requirement lies in solving the mystery of explaining why this requirement insists on the plaintiff being foreseeable for the sake of her being foreseeable. In other words, the question is whether the foreseeability requirement is intelligible, quite apart from its effects on the ability of the risk-creator to meet the demand of exercising reasonable care (whatever that is) successfully. On the account I shall develop, the requirement can be cast into sharp relief by elaborating the existence and content of an idea of respect for persons that captures the moral center of the requirement. In particular, the argument going forward seeks to render vivid the two senses in which the foreseeability requirement makes possible the connection between discharging care and respecting the cared-for: First, the requirement figures as an enabling device, by which I mean that foresight is a threshold condition for the duty of care to become in the first instance a norm of respecting others; and second, the requirement is in itself a form of respecting others, in virtue of the relation that it can engender between the risk-creator and the foreseeable risk-taker. I take each in turn.

Before I commence, it is important to note that I do not argue that, upon assessing the 'duty' element, courts do or should consider the motives or actual intentions of the defendant—that is, whether or not her action expresses genuine respect for and recognition of the plaintiff. Rather, my argument is that the duty of care, by virtue of being a duty, purports to provide potential defendants with reasons for action, namely, to proceed by taking others seriously in the precise sense explained below.

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59 As indicted in the title of this Section, the ambition of the argument going forward is to make sense of the doctrine of plaintiff foreseeability. For reasons that I discuss below, this argument does not seek to defend the necessary place of the duty of care (or of the tort of negligence, more generally) in the law. Doing so requires, among other things, an account of the moral underpinning of the two other elements of the duty: proximity and a set of considerations of fairness, justness, and reasonableness.

60 Thus, my account is critical or normative, rather than descriptive or psychological. I do not argue that people who comply with the duty of care in fact orient themselves toward others out of goodwill—it is possible that some are disposed to be vigilant of another out of a purely instrumental motivation (such as fear of liability) or non-instrumental motivation (such as respect for the rule of law) or both. But even given the conceptual separation between the act of and motivation for exercising care toward others, displaying it implicates the care-discharger in acquiring a pro-social attitude. That is, an implicit or explicit willingness to recognize another as meriting accommodation simply by virtue of his being a person. The good of respectful recognition of others cannot, of course, produce the needed motivation for respectful recognition to arise; instead, this good purports to give us a reason for acting as respecting persons ought to do. For more on the idea that a duty, and a duty of care in particular, addresses persons by providing them with reasons for action, rather than merely economic incentives, see J. Raz, ‘Responsibility and the Negligence Standard’ (2010) 30 OJLS 1, 9.
**Plaintiff Foreseeability as an Enabling Device**

To begin with, a person who adjusts her risky course of action so as to allow another to pursue his activity (reasonably) safely may, by so doing, display concern for the latter. On this view, discharging reasonable care can express respect for the person put in danger by the conduct that calls for vigilance. But no such respect can feature if the presence of a person within the relevant zone of danger is not reasonably anticipated. More specifically, it is a transcendental condition of the possibility of respecting another person by way of discharging due care that this other (or the class to which this other belongs) is foreseeable. To this extent, the foreseeability requirement is an enabling device without which the connection between a duty to exercise due care and respect for the plaintiff is impossible to begin with.

Thus, foreseeability with respect to the plaintiff is necessary, rather than merely sufficient, because in its absence, the exercise of due care cannot possibly be characterized as an act of respecting this plaintiff.

**The Non-instrumental Value of Plaintiff Foreseeability**

Although it makes substantial progress in comparison to the leading accounts of foreseeability discussed above, the argument does not capture yet a far deeper sense in which the foreseeability requirement features an idea of respect for persons. Indeed, there is nothing in the argument from enabling device that casts the foreseeability requirement, rather than the duty of care, in moral terms of respect. Foreseeability is merely enlisted in the service of an account of the morality of the duty of care grounded in the ideal of respect for others. Thus, even if certain elements of the duty of care (such as the proximity element) may plausibly establish the intimate connection between duty and respect, the foreseeability requirement conceived of as an enabling device certainly is not one of them. In other words, on the enabling device theory, the doctrine of plaintiff foreseeability merely provides the substrate upon which the exercise of due care can express respect for the cared-for in the first place.

That said, I shall argue that a more precise analysis of the foreseeability requirement can reveal the intrinsically valuable idea it expresses, which is to say respect for persons, including even in the purest—viz., non-instrumental—sense. The reason is that the requirement in question does no more, but no less, than seeing to it that the cared-for could figure in the deliberation made by the risk-creator in connection with determining the precautions that must anyway be taken as a matter of duty of care. Or so I shall argue.

Consider *Palsgraf* by way of illustration. In addressing this requirement, the court does not seek to ascertain whether foreseeability of the plaintiff can make a difference by influencing the conduct of the railroad’s employee—this is, recall, because it does

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not do anything. Instead, the inquiry purports to ascertain whether the railroad’s employee could have been cognizant of the possibility that his act of assisting the boarding passenger, if carelessly done, put the person of the plaintiff at risk of harm. Indeed, the foreseeability requirement features an epistemic inquiry that reflects a somewhat symbolic concern about whether the risk-creator could have the plaintiff in contemplation as he goes about acting the way he did. This question carries symbolic overtones because, once again, having the plaintiff in contemplation does no practical work (and certainly none of the sort considered by the accounts of foreseeability, such as effective agency, discussed above).

Against the backdrop of this illustration, I can now return to the notion, asserted above, that the foreseeability requirement expresses an idea of respect for persons in its purest sense. This is so because it requires that the would-be plaintiff—the cared-for—could figure in the deliberation of the risk-creator toward action even when thus figuring need not affect the outcome of the deliberation, namely, the appropriate amount of precautions taken in compliance with the duty of care. By taking him into account in this manner, the risk-creator engages the cared-for by according him the consideration he deserves qua person, simply in virtue of being a person (rather than as being a medium through which conditions of effective agency or fairness could be sustained). Thus, having the cared-for in one’s head at the time one acts might not improve one's compliance with the pre-existing duty of care, but it still is an act of embracing the cared-for as a free-standing person whose mere presence in a position of vulnerability demands the deliberational effort of being mindful of him, too. And this effort is, at bottom, an expression of respect precisely because it cannot be explained nor justified by reference to the (instrumental) value it produces to the deliberating agent (such as ensuring her effective agency or knowledge of rightful means). Its relation to respect stands out when taken for what it literally means—once again, that the risk-creator has the plaintiff in contemplation when directing her mind to the activity in which she engages in. Accordingly, the foreseeability requirement gives doctrinal voice to the question of whether this mental state of affairs could obtain.

On the proposed account, therefore, the foreseeability requirement can be cast into sharp relief by emphasizing the connection it may establish between the duty of care and a relation of respect between risk-creator and -taker. This connection can be elaborated on the basis of foreseeability's extrinsic and intrinsic goods: First, discharging reasonable care cannot count as an act of respecting the cared-for unless foreseeability of this cared-for obtains; second, foreseeability of the cared-for may

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62 Whether the employee could have responded properly to the risk of harm his activity projects on the plaintiff implies a qualitatively different inquiry; namely, whether foreseeability of harm to the person or property of the boarding passenger—or, for that matter, any other person—suffices.

63 As I explained above, taking in this case additional precautions to ameliorate the risk of harm to the (unforeseeable) plaintiff is tantamount to taking cost-unjustified precautions. See text accompanying note 30.

64 Foreseeability is thus a necessary, rather than a sufficient, condition for the exercise of due care to display respect for the plaintiff.
in itself be respectful, since it transforms the risk-creator's deliberation into a mental process of accommodating the vulnerability of the cared-for in her decision to proceed vigilantly.

That said, the preceding argument is incomplete in three increasingly concrete ways. At the highest level of abstraction, there arises the suspicion that my emphasis on respectful recognition opens up an awesome gap between the foreseeability requirement and respect. This is so because the former can be met successfully by establishing the foreseeability of any one person, rather than the actual plaintiff, who is considered to be a member of the plaintiff class. Respect, it may be suspected, operates on a far less impersonal basis than that. At a more concrete level of analysis, the argument is incomplete because it does not (and, as I shall explain below, cannot) specify the conception of respect that underwrites the account of the foreseeability requirement developed in these pages. And most concretely, since my argument self-consciously neglects the two other prongs of the duty analysis,65 it remains an open question whether the duty of care is ultimately consistent with, let alone champion of, an idea of respect for persons (whatever that is).

As will be made clear in due course, I shall focus on the most abstract suspicion, leaving the other two for another occasion. Accordingly, the current argument necessarily remains incomplete, though not in any troubling way. For the incompleteness can be set right by elaborating the respect-based grounds of the proximity requirement of the duty analysis.66

FORESEEABILITY AND IMPERSONAL RESPECT

As I have noted from the outset, the foreseeability requirement sets out a rather weak epistemic demand—that is, it does not insist on the foreseeability of the actual plaintiff as an identified individual. Rather, the requirement in question addresses the question of whether the plaintiff falls within the class of person whose existence inside the zone of danger is reasonably anticipated.67 Accordingly, a possible objection to the proposed account stems from the alleged gap between an idea of respect and the foreseeability requirement, properly conceived. This gap, it may be thought, plagues the proposed account because respecting others by engaging them in deliberation toward action cannot apply without implicit or explicit identification of a specific person as the actual object of the deliberation.

The trouble with this objection, however, is that it confuses epistemological concerns with moral ones. As I argue elsewhere, the morality of respect for persons as such does not turn on the actual identity—face and name—of the person who is the

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65 These two being proximity and a cluster of considerations pertaining to justice, fairness, and reasonableness.
66 As I intend to do in future work.
67 See eg Farrugia v Great Western Ry Co [1947] 2 All ER 565, 567.
object of the respect. To see that, consider a clear case of (dis)respect; that is, intentional conduct. An intentional wrong such as a serious instance of assault and battery may not only be harmful to the victim, but, as Rousseau powerfully observes, also a source of 'contempt for [this] person, often more unbearable than the harm itself.' This observation strikes an intuitive cord. Indeed, intentionally choosing to engage in immoral conduct clearly involves disrespect for the victim, because the wrong in question is in part of singling out, and thus identifying, the victim as the object of misconduct. The objection to the proposed account mentioned a moment ago seems to deny that the foreseeability requirement, and negligence liability more generally, involve the disrespectful characteristic of the morally wrong conduct of identifying or singling out a particular victim as an object for mistreatment.

But this objection fails and with it the suspicion that the foreseeability of the plaintiff class cannot be grounded in respect for the plaintiff. This is because engaging in unreasonable risk imposition does pick out an object: the specific class of persons falling within the ambit of the risk imposed. In other words, those persons who form the plaintiff class are, one by one, the logical object of a careless act on the part of the risk-creator. To the extent that unreasonable risk creation is morally wrong, the risk-creator displays disrespect to those standing within the zone of foreseeable danger by failing to moderate her conduct appropriately. The fact that the actual identity of each and every person belonging to the plaintiff class may not be available to the risk-creator in advance does not render the connection between foreseeability and respect redundant. More broadly, the morality of respect for persons as such necessarily takes consideration of actual identity to be purely contingent. Thus, respect for persons as such requires the acknowledgement that, for any given act which is reasonably known to be risky, there is someone, whoever she is, who may be affected; that she is a person; and that she commands respectful recognition simply by virtue of being a person. The foreseeability requirement demands no more, but no less, than that.

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69 J. J. Rousseau, Discourse on the Origin and Foundations of Inequality among Men, reprinted in V. Gourevitch (ed & tr), The Discourses and Other Early Political Writings (Cambridge: Cambridge University Press, 1997), 166.
70 Note that my argument does not deny that intentional wrongdoing occupies a higher rung on the moral ladder, as it were. Rather, the argument in the main text takes stock of the suspicion that negligence (and the foreseeability requirement in particular) need not involve disrespect for others at all.
71 This assumption is the target of the third suspicion mentioned in the main text above.
72 In many cases, the dependency of respect on the actual identity of the respected person is also inconsistent with an ideal of respect for persons as such. This is clearest in norms of respect that apply among persons who happen to be members of the same clan.
FROM FORESEEABILITY TO PROXIMITY

Even given that the foreseeability requirement may plausibly both be understood and justified (only) by reference to some idea of respect for persons as such, it is not clear precisely what idea that is. In particular, respect for persons may be seen as a concept that picks out the normative question of how—in what ways—free and equal persons should attend to one another. The argument I have developed is incomplete in part because it does not specify which conception—viz., which theory—of this concept underwrites the foreseeability requirement. The most important implication of this shortfall is that the object of the respect displayed by the risk-creator for the risk-taker remains mysterious. (Merely saying that the legal rights of others fix the requisite respect (whatever that is) begs the question, for rights are conclusions of a prior argument concerning, among other things, the conception of respect that is at stake).

In the familiar parlance of tort theory, it is not clear whether the foreseeability requirement expresses concern for the well-being or interest of the cared-for or, alternatively, for this person’s formal freedom, by which I mean the rational capacity to set and pursue self-determined ends without being constrained by the choice of another. It is of course possible that neither interest nor formal freedom informs the true object of respect in and around the foreseeability requirement. Perhaps respect’s object is the point of view of the risk-taker, in which case the risk-creator accommodates in her own course of action the ends pursued by the risk-taker. Be that as it may, the foreseeability requirement does not provide sufficient normative materials, as it were, with which to infer its underlying conception of respect. Indeed, a requirement that sees to it that the risk-creator could incorporate the vulnerability of another person into her deliberation concerning care-discharging may be of a piece with the importance of this person’s well-being, formal freedom, or point of view. To this extent, the proposed account of the foreseeability requirement remains incomplete.

To be sure, the fact that my account cannot yield any definite conception of respect does not prove that it bears no connection to the concept of respect for persons. Rather than a liability, the account’s compatibility with a variety of different conceptions of respect may, in fact, be an asset. It suggests that the foreseeability requirement lies at the moral center of the concept of respect—that the most familiar conceptions of this concept hold in common the notion that respect for persons can be had only insofar as these others figure (in the appropriate way) in the respecting person’s deliberation toward action. On this view, the foreseeability requirement

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73 I borrow the concept/conception distinction from Rawls, note 53 above, at 5.
75 The measure of accommodation called for by the duty of care is not absolute, but rather reasonable.
76 Recall that including a person in one’s deliberation does not yet form an argument concerning the motives that move one to deliberate about and, ultimately, discharge due care toward this other person.
features *basic* respect so that even (intentionally) divergent conceptions of respect appear (extensionally) equivalent when applied in this context.

This result pushes the argument toward its next natural stage; that is, the second prong of the duty analysis—the proximity requirement. At this stage, it would be possible to identify which conception of respect grounds the duty of care. Indeed, whereas the foreseeability requirement is sufficiently thin to render otherwise competing conceptions of respect extensionally equivalent, the proximity requirement bears the heavy burden of selecting, among all the cases satisfying the former requirement, those categories of cases in which defendant and plaintiff stand in 'proximity' to each other (whatever that means). To illustrate, plaintiff foreseeability obtains straightforwardly in many cases of negligent infliction of pure economic loss, which is to say a financial loss without antecedent harm to the plaintiff's person or property. Nevertheless, common law generally, though not absolutely, denies the existence of a duty of care in these cases, in part because the perfectly foreseeable victim does not stand in a relation of proximity to the injurer. Thus, if anything, the precise connection between the duty of care and respect for persons could be cast into sharp relief by looking beyond the foreseeability requirement toward that of proximity (and, perhaps, also to the third requirement pertaining to considerations of fairness, justice, and reasonableness). This attempt to develop an account of the proximity requirement merits a separate, comprehensive study of its own; and as I shall then seek to demonstrate, the key to a successful reconstruction of the requirement in question is the demands put forward by a conception of respect that emphasizes the moral importance of respecting persons as such by recognizing their distinctive points of view as independent constraints on one's own conduct.

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77 It may also be the case that different conceptions of respect underwrite different areas of the duty of care.


79 See eg *Isligton LBC v University College London Hospital NHS Trust* [2005] EWCA Civ 596. In the famous pure economic loss case of *Robins Dry Dock & Repair Co v Flint*, 275 US 303, 309 (1927) Holmes J. emphasizes the (lack of) juridical proximity between defendant and plaintiff, saying that 'justice does not permit that the [defendant-wrongdoer] be charged with the full value of the loss of use unless there is some one who has a claim to it as against the petitioner [plaintiff-victim].’ There may be other reasons apart from proximity that commend a similar conclusion of no-duty, especially considerations of policy and principle that occupy the third prong of duty inquiry (compare with *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd* [1986] AC 1, 25D). As I shall argue in future work, however, the proximity requirement plays and should continue playing a far more substantial role in explaining the rule against recovery for pure economic loss.

80 Thus, attempts to reduce the proximity test into foreseeability might fail in the face of 'no-duty' cases such as those pertaining to pure economic loss and negligent infliction of emotional distress where plaintiff foreseeability typically obtains. See A. Beever, *Rediscovering the Law of Negligence* (Oxford and Portland, Or.: Hart Publishing, 2007), 184 (arguing that 'if proximity is not identified with reasonable foreseeability, then ... proximity is meaningless').

81 I have elaborated on this conception in Dorfman, note 61 above, at 124-139.
CONCLUSION

In these pages I have sought to identify and solve the seemingly mysterious doctrine of plaintiff foreseeability. The mystery arises from common law's insistence on foreseeability with respect to the plaintiff, rather than to anyone whose presence (in time, place, etc.) provides sufficiently adequate input to enable the defendant to exercise due care toward the plaintiff (the unforeseeable plaintiff included). The proposed account emphasizes the crucial role of the foreseeability requirement in engendering respectful recognition of a risk-taker by a risk-creator. Foreseeability of the plaintiff is, first, instrumental, though essential, to turning an act of discharging due care into a display of respect for another person; and second, it expresses a freestanding ideal of taking other persons seriously—respecting them in particular—by addressing their vulnerability in one's deliberation toward discharging due care.