nance Corporation.” “Don’t stay too long!” With that, the justice moved on.

The next year Poindexter telephoned again. He knew that Fanelli had married, and he invited both to tea. Once again Fanelli was served a cup of tea and waited. Brandeis came around and said, “I’m sorry, I don’t remember your name.” “It’s Fanelli, Mr. Justice.” “What do you do, Mr. Fanelli?” Fanelli was working for another federal agency by then – I forget which – and he told the justice. “Don’t stay too long!” Brandeis said, and moved on.

A year or two later the Fanellis were so senior that Mary was asked to help pour the tea, a great honor. Joe was determined to break the conversational cycle. It began as before. “I’m sorry, I don’t remember your name,” the justice said. “It’s Fanelli, Mr. Justice.” “Ah yes, Mr. Fanelli. What do you do?” “I’m with the Board of Immigration Appeals, Mr. Justice.” “Don’t stay too long!” Quickly, before Brandeis could move, Fanelli asked, “Why do you say that, Mr. Justice?” “Because, Mr. Fanelli, I believe that every man should get back to his hinterland.” “But Mr. Justice, I come from New York. I don’t have any hinterland.” To which Brandeis replied, “That, sir, is your misfortune.” And moved on.

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But-For Wealth and Power

To the Bag:

I read with interest and pleasure Jacob Stein’s “Laidlaw, Sage, Prosser & Choate” (Winter 2005 issue). And though I don’t use Prosser on Torts in my Torts course here at George Mason, I make abundant use of Laidlaw v Sage, 158 N.Y. 73 (1899) (which, alas, Professor Epstein has not chosen to include in the casebook that my students purchase).
Mr. Stein cites (or rather, has Prosser citing) Laidlaw for the “cause-in-fact” proposition sometimes known as the “but-for” rule – The defendant’s negligent or intentionally tortious conduct is not a cause of the plaintiff’s damage, if the damage would have ensued without it.

I write to inform your readers that, if this was the learned Prosser’s take on Laidlaw, he must have read a different version of the case than did I – for in turgid prose the highest court in the Empire State invokes a couple of reasons why the jury verdict against philanthropist Sage cannot stand. Neither of these reasons has anything to do with cause in fact.

Let us return to the locus delicti. Sage knows that the anarchist Norcross has threatened to explode a bomb unless he is paid off immediately. Laidlaw enters the anteroom of his employer, Sage, just before the bomb is set off. Laidlaw testifies that Sage took him by both hands and guided him to a spot where, presumably, Sage felt shielded by Laidlaw. Sage denied ever touching Laidlaw (though he didn’t deny using him as a shield, or declining to warn him of the danger of explosion). In addition, Laidlaw provided a theory of the explosion according to which the shrapnel took two paths, one of which hit him and injured him severely. He would not have been in this pathway (or in the other one), he alleged, with one expert witness in support, had he not been manipulated there by Sage.

As Mr. Stein indicates, the final disposition of this case was its fourth iteration before the General Division of the Court of Appeals. And what a strange iteration it was. To overturn the jury verdict in favor of Laidlaw, which had been upheld (against an appeal stating there was no evidence of causation) without recorded dissent by the Appellate Division, Gotham’s Supremes had to engage in “interesting” analytical contortions. Their first obstacle was a New York statute that removed jurisdiction from
To the Bag

the high court whenever the intermediate appellate
court had unanimously confirmed that there was
evidence supporting a jury verdict. The court de-
cides that the statute does apply, but that Laidlaw
didn’t prove that the Appellate Division’s opinion
was unanimous (the fact that there was no evidence
of dissent was not proof, apparently). [As I am wont
to tell my students in our Torts class, under this con-
ception of the term they have not proven to me that
they exist and are any more than a bad dream to
me.] Having gleaned jurisdiction, the General Divi-
sion asserted that the evidence of touching and of
the path of destruction, though there, was a mere
“scintilla”, not worthy of the jury’s (and, presumably,
the Appellate Division’s) consideration.

So I think Laidlaw v Sage might be a case about
battery (is guiding your servant to a location bat-
tery), or necessity (is using your servant as a shield
acceptable if your life depends upon doing so?) or
burden of proof (who has the burden to prove, and
(with apologies to President Clinton) what does
prove mean in this sentence, what trajectory the
lethal pellets took and where Laidlaw would have
been had he not been manhandled). Mostly, though,
I think it is a case about the lengths to which a pow-
erful man can go to protect himself and to thwart
justice.

Thank you again, and thanks so much to Mr. Stein,
for a very enjoyable piece.

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