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CONTRACTOR DUTY TO THIRD PARTIES NOT IN PRIVACY: A QUASI-TORT SOLUTION TO THE VEXING PROBLEM OF VICTIMS OF NONFEASANCE

INTRODUCTION

On a hot summer night in July 1977, several million people in New York City fell victim to a power failure due to the gross negligence of Con Edison.¹ That power failure lasted twenty five hours.² Among the victims was a seventy-seven year old man named Julius Strauss, who was a tenant in a building owned by Belle Realty.³ Con Edison was under contract with Belle Realty to supply electricity to the building and its common areas.⁴ Con Edison was also under contract with Mr. Strauss, and millions of other New Yorkers, to provide electricity to individual apartments and businesses.⁵

As is common, the water pump in Mr. Strauss's building required electricity to operate.⁶ The pump did not work during the power failure, and on the second day of the blackout Mr. Strauss ran out of water.⁷ After being told by a neighbor that there was water in the basement, Mr. Strauss left his apartment and headed down the stairs.⁸ On his way down to the basement Mr. Strauss fell down the darkened stairwell and suffered serious injury.⁹

¹ *Strauss v. Belle Realty Co.*, 65 N.Y.2d 399, 482 N.E.2d 34, 492 N.Y.S.2d 555 (1985). The Court of Appeals acknowledged in its 3-2 majority decision that Con Edison was estopped from relitigating the issue of its gross negligence with regard to this blackout, as that fact was clearly established in *Food Pageant v. Consol. Edison Co.*, 54 N.Y.2d 167, 429 N.E.2d 738, 445 N.Y.S.2d 60 (1981). See also *infra* note 60 and accompanying text.

² *Strauss*, 65 N.Y.2d. at 401, 482 N.E.2d at 35, 492 N.Y.S.2d at 556.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Strauss v. Belle Realty Co.*, 98 A.D.2d 424, 430, 469 N.Y.S.2d 948, 952 (2d Dep't 1983) (Gibbons, J., dissenting).

⁷ *Id.* at 424-25, 469 N.Y.S.2d at 949.

⁸ *Id.* at 430, 469 N.Y.S.2d at 952 (Gibbons, J., dissenting).

⁹ *Id.*

After filing suit against the real estate management company and Con Edison, Mr. Strauss moved for summary judgment on the issue of liability to establish, inter alia, that Con Edison owed him a duty of care.¹⁰ This motion was granted by the trial court.¹¹ The appellate division, however, reversed, and dismissed the complaint against Con Edison,¹² concluding that Mr. Strauss was not in privity of contract with Con Edison when he was walking in the common area of the building, and thus the defendant owed him no cognizable duty of care.¹³ The appellate division cited *H.R. Moch Co. v. Rensselaer Water Co.*¹⁴ as authority for its position, ostensibly, that where there is no privity there can be no duty.¹⁵

Mr. Strauss appealed, and the New York Court of Appeals affirmed the appellate division's holding, though for reasons other than the lack of privity asserted and relied upon below.¹⁶ Judge (now Chief Judge) Kaye, writing for the majority

¹⁰ Mr. Strauss brought suit under both contract and negligence theories. *Id.* at 425, 469 N.Y.S.2d at 949.

¹¹ *Strauss*, 98 A.D.2d at 426, 469 N.Y.S.2d at 949.

¹² *Id.* at 425, 469 N.Y.S.2d at 949.

¹³ *Id.* at 428, 469 N.Y.S.2d at 948. The appellate division's opinion specifically notes that Mr. Strauss's complaint failed to state a cause of action in either contract or negligence. *Id.* at 426-28, 469 N.Y.S.2d at 949-52.

¹⁴ 247 N.Y. 160, 159 N.E. 896 (1928) (holding that a municipality itself owed no duty to supply water to a fire hydrant for the use of a fire company, therefore municipal contractor could not be held liable to plaintiff victim of fire for failure to provide water to put out said fire). The *Moch* facts and reasoning flowing therefrom are not even remotely consonant with the facts of *Strauss*. See *infra* Part II. A.

¹⁵ For the purposes of this Note, the terms "parties in privity" and "privity" refer to the principal parties, parties that are intended beneficiaries of a contract, or foreseeable plaintiffs in a negligence action against a contractor. As discussed *infra*, generally, in New York, where an injured party is not in privity, is not a foreseeable plaintiff, and an injury occurs as a result of nonfeasance, no "legal interest entitled to legal protection" against the contractor's conduct will be found when the action sounds in contract. However, as the dissent at the appellate division level in *Strauss* pointed out, theories of privity are outmoded in the negligence context, and thus are improperly employed when attempting to define the scope of duty for tort purposes. See *Strauss*, 98 A.D.2d at 433, 469 N.Y.S.2d at 954 (Gibbons, J., dissenting). See also *infra* notes 16 & 32 and accompanying text.

¹⁶ Privity has long been dispensed with as a requirement for recovery in an action sounding in negligence. This fact was not lost on the majority, nor on the dissent at the appellate division. As Judge Gibbons noted "there is no reason to resort to theories of privity, [as they] are outmoded in the negligence context see *White v. Guarente*, 43 N.Y.2d 356, 361-62; *Codling v. Paglia*, 32 N.Y.2d 330; *MacPherson v. Buick Motor Co.*, 217 N.Y. 382." *Strauss*, 98 A.D.2d at 433, 469 N.Y.S.2d at 954.

in *Strauss*, specifically, and as I contend in this Note, correctly, rejected the argument that duty in negligence cases is defined by privity.¹⁷ Had she stopped there, no real jurisprudential problem would have grown from this opinion. However, Judge Kaye further reasoned that a finding of foreseeability does not always require that liability in tort be imposed, adding that it is the responsibility of courts "to limit the legal consequences of wrongs to a controllable degree . . . and to protect against crushing exposure to liability."¹⁸ In supporting this conclusion, Judge Kaye stated that such limitations were compelled by "public policy."

The reasoning in *Strauss* has become the rule in New York, where, as I document in this Note, contractors routinely escape liability for acts of negligence toward plaintiffs not in privity, notwithstanding the fact that this requirement for recovery in tort has long since been abandoned in New York.¹⁹ In fact, this Note demonstrates that New York courts are extremely confused in the area of tort liability of contractors, often applying principles of contract law as a test for determining whether or not liability in tort exists.

I propose herein that the proper analysis for determining whether or not a contractor ought to be held liable in tort is entirely separate from the question of whether a duty is owed in contract to an injured party.²⁰ The historical basis for not

¹⁷ *Strauss v. Belle Realty Co.*, 65 N.Y.2d 399, 405-08, 482 N.E.2d 34, 38-40, 492 N.Y.S.2d 555, 559-61 (1985) (Meyer, J., dissenting). Interestingly, the *Strauss* dissent at this level attacks the conclusion of the majority as being based on "nothing more than assumption" and an unsupported prediction of disaster. *Id.* at 405-06, 482 N.E.2d at 38-39, 492 N.Y.S.2d at 559-60. Judge Meyer argued persuasively that the court overreached in its determination that public policy dictated exculpating Con Edison from its responsibility to Mr. Strauss and others. *Id.* This dissent has been largely ignored for thirteen years, and this Note argues along the same lines as Judge Meyer, that, since most defendants in tort cases of this nature that bring about the fear of ruinous losses are themselves public utilities, public corporations, commercial enterprises, and other entities with the power to spread the risk of the loss to the general public at large, the only party in litigation exposed to ruinous loss in litigation of this nature is the plaintiff.

¹⁸ *Id.* at 402, 482 N.E.2d at 36, 492 N.Y.S.2d at 557 (citations omitted).

¹⁹ See *supra* note 16.

²⁰ There is no question that when a party assumes a duty by contract, and then either performs negligently and causes injury or undertakes a task outside the scope of its agreement and thereby causes injury, liability in contract exists as between the contractor and foreseeable plaintiffs. However, when the same contractor fails to perform a duty contracted for, which nonperformance leads to injury of

holding a contractor so liable is two-fold: (1) a suit for the contractor's lack of action derives from an action of trespass on the case in assumpsit, and there can be no liability as such where there is no affirmative act;²¹ and (2) public policy dictates that liability should be carefully circumscribed where assigning liability raises the specter of "ruinous losses" for the contractor-defendant.²² I further argue in this Note that the first part of this historical "test" is flawed because it applies a contract principle to claims sounding in tort, and the second part, which may be called a cost-benefit analysis, should not enter into a court's calculus of liability in this class of cases.²³ Such an analysis will inevitably lead to a conclusion that it is too expensive to pay for injuries regardless of whether they are caused by negligence or intent. Whether or not to bear the burden of that expense is a decision for a contractor to make during bidding, not for a court to make before allowing litigation to proceed. Therefore, I propose in this Note that the proper analysis is that of a "quasi-tort" test,²⁴ which allows for potential tortfeasors to better understand and take into consideration before entering into a contract their potential exposure for misfeasance, malfeasance and nonfeasance. Such an analysis also remedies the current problem that leaves victims of nonfeasance without a viable remedy in tort or contract.

In Part I of this Note I address the duty of contractors to third parties not in privity of contract, giving a brief history of the New York position.²⁵ I then introduce the common law

a third party not in privity or not foreseen, and the complaint sounds in tort, as in the case of Mr. Strauss, the failure to perform often constitutes negligence and that action in tort should be sustainable as between the injured non-contracting party and the negligent contractor.

²¹ Jean Elting Rowe & Theodore Silver, *The Jurisprudence of Action and Inaction in the Law of Tort: Solving the Puzzle of Nonfeasance and Misfeasance from the Fifteenth Through the Twentieth Centuries*, 33 DUQ. L. REV. 807, 812 (1995) [hereinafter Rowe & Silver].

²² See Strauss, 65 N.Y.2d at 405-08, 482 N.E.2d 38-40, 492 N.Y.S.2d 559-61. See also *supra* note 17.

²³ As I demonstrate in this Note, where a contractor and a third party not in privity are involved, and negligence is present, the court often confuses the issue of liability with that of duty, short circuiting a competent analysis of liability by declaring simply that no duty is owed to third parties not in privity.

²⁴ See discussion *infra* in Conclusion, wherein this test is more fully elaborated.

²⁵ The general guideline provided by the *Restatement (Second) of Torts* § 324A

conflict that has resulted from two recent New York Court of Appeals cases, *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*²⁶ and *Palka v. Servicemaster Management Services Corp.*²⁷ This discussion includes a consideration of the fundamental question of what constitutes duty under New York law. In Part II of this Note, I consider what bearing misfeasance, malfeasance, and nonfeasance²⁸ may have on questions of duty

provides in relevant part that a contractor who undertakes by that contract to perform a particular service or task is liable to "third persons" for negligent performance of the task if the hirer had itself owed a duty of care to the injured party. The *Restatement* guideline suggests, for instance, that a contractor engaged by a building's owner or managing agent, to maintain the building's boiler in a safe condition should not escape tort liability to the tenants of that building for negligent performance of that duty simply because the tenants are not in privity of contract with the contractor. Decisions like *Strauss* run counter to this common sense approach, and argue persuasively that New York should, at the very least, adopt the § 324A position.

²⁶ 76 N.Y.2d 220, 556 N.E.2d 1093, 557 N.Y.S.2d 286 (1990) (holding that there is no liability when a company is hired to inspect and maintain a building and its fixtures, and neglects to inspect a previously existing fire sprinkler system, which neglect combines with the defective system to cause the plaintiffs' property to be damaged).

²⁷ 83 N.Y.2d 579, 634 N.E.2d 189, 611 N.Y.S.2d 817 (1994) (holding that a duty was owed by a contractor retained by a hospital to train, manage, supervise and direct all support service employees, to a nurse employee of that hospital who was injured when a fan fell from its wall mooring while the nurse was tending to a patient. The court distinguished its holding in *Eaves Brooks*, and seemed to fall into the analytical trap of applying contract principles to tort duties, manipulating logic to reach a just conclusion. See *infra* Part III.B.

²⁸ The existence of distinctions between misfeasance, malfeasance, and nonfeasance reach back to the doctrine of assumpsit, wherein a defendant's undertaking or implied promise created a duty. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 92, at 658-63 (5th ed. 1993) [hereinafter PROSSER]. Professor Prosser argued that liability arose from this undertaking or implied promise, and that originally it was an action for trespass on the case, and later one in tort. Prosser went on to say that the extent to which a contractor owes a duty to a third person is entirely contractual, and that "such a claim should not be translatable into a tort action in order to escape some roadblock to recovery on a contract theory," e.g., lack of privity. PROSSER, § 92, at 659. Prosser also points out that breaches may include failure to perform, and the recourse there would be a suit for damages, or, in the extreme case even one for specific performance. This, of course, is a remedy available only to parties in privity. Prosser seems to argue in this section of his treatise that the contract itself is a shield against liability for negligence. Prosser's reasoning does not allow for the reasonable translation of the *Basso* abolition of classes of entrants upon lands to abolition of classifications or degrees of stages of an undertaking, and suggests plainly that recovery in contract should lie where there is misfeasance or malfeasance, but not where there is only inaction or nonfeasance. PROSSER, *supra* § 92, at 661. As for tort liability, Prosser and supporting case law demonstrate that the

and liability in New York, posing the question: Who is answerable to whom when nothing is done? I conclude that the distinctions between misfeasance, malfeasance, and nonfeasance, while real, are moot for determining liability in this context.²⁹ Part II continues with a closer look at *Eaves Brooks*, *Palka*, and other recent New York case law in this area, considering some of the factors used and considered by lower courts and the Court of Appeals in deciding the question of scope of duty, and thus, tort liability to third parties not in privity of contract. Part III contains my analysis of the standard that emerges as a result of the *Palka* decision, and explores policy concerns that arise as a result of that and other recent decisions.

Finally, I conclude that New York should abandon the distinctions between misfeasance, malfeasance, and nonfeasance as a dispositive factor upon the question of duty owed, much as it did away with the distinctions between trespassers, invitees, and licensees for the purpose of determining scope of duty for landowners,³⁰ as those distinctions are, for the pur-

circumscription of tort duty in this area is that of proximate cause. However, the current state of law in New York does not allow for that question to be reached, as a party not in privity will, as a result of the misapplication of contract principles to tort law combined with "public policy considerations" as defined by the Court of Appeals in recent years, suffer summary judgment due to lack of being owed a duty of reasonable care deriving from that lack of privity and the potential cost of finding otherwise.

²⁹ For a more detailed explanation of this principle, see reference *infra* note 30 to *Basso v. Miller*, and its holding regarding the abolition of the distinctions between trespassers, invitees, and licensees, for determining duty owed by a landowner to such people. The issue in *Basso* parallels part of the issue here, i.e., in *Basso* it was determined that even a trespasser is owed a duty of reasonable care under the circumstances, though the actual award of damages may be mitigated by the trespasser's unlawful entry upon the land. Similarly, where a contractor does nothing even though a contract duty is owed, i.e. engages in nonfeasance, and thereby injures a party, liability should attach. The case law states otherwise, as I demonstrate in this note, and as the Court of Appeals did away with the landowner's duty distinctions in *Basso*, so too should it do away with the nonfeasance loophole for contractors.

³⁰ *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976). The *Basso* court overturned on appeal a finding for the defendant that was based upon the plaintiff's status as a trespasser, as opposed to an invitee or licensee. The unanimous court declared that:

[w]hile we have demonstrated our inclination to correlate the duty of care owed a plaintiff with the risk of harm reasonably to be perceived, regardless of status, and concurrently consider[ed] the question of foreseeability, we have not, until today, abandoned the classifications entirely and an-

pose of defining duty, archaic.³¹ I propose in this Note that New York courts should seize upon the opportunity presented by the *Palka* decision, and apply this standard consistently.

I. CONTRACTORS' DUTY TO THIRD PARTIES NOT IN PRIVACY: A BRIEF HISTORY OF THE NEW YORK POSITION

A. Background

In 1928 the New York Court of Appeals held in *Palsgraf v. Long Island R.R. Co.*³² that, absent a duty of care to an injured person, a party could not be held liable in tort to that

nounced our adherence to the single standard of reasonable care under the circumstances where by foreseeability shall be a measure of liability.

Id. at 241, 352 N.E.2d at 872, 386 N.Y.S.2d at 568 (emphasis added) (citation omitted) (footnote omitted).

The Court of Appeals went on to criticize the lower court's charge to the jury, which emphasized different standards of care owed to the three classes of entrants on land. The court pointed out that New York was "not unmindful of the adoption of the single standard of care in several of [its] sister states" with respect to trespassers, invitees, and licensees. *Id.* at 240, 352 N.E.2d at 872, 386 N.Y.S.2d at 567. The court determined that a landowner owed a duty to maintain its property in a reasonably safe condition in view of all circumstances, including a consideration of risk of injury, severity of injury, and the burden of avoiding the risk. *Id.* at 241, 352 N.E.2d at 872, 386 N.Y.S.2d at 568. Most relevant to the argument at hand is the *Basso* principle that the common law distinctions of degree of care owed to different entrants on land ought to be abandoned. I argue in this Note, similarly, that for the question of contractor liability in tort to third parties not in privacy, the common law distinctions between misfeasance, malfeasance, and non-feasance ought to be abandoned in favor of one standard: reasonable care under the circumstances. An essential argument in *Basso* is that it is foreseeable that a trespasser might be injured, just as a licensee or an invitee, therefore those classifications are abolished for the purpose of determining the scope of duty owed to entrants upon land. *Id.* This reasoning does away with the notion that a trespasser gets what a trespasser deserves, and no doubt forces a landowner to either insure against damages for injuries to all entrants on such land, or bear the risk of paying tort damages out of the landowner's own pocket.

³¹ See *supra* note 30 and accompanying text. See also Rowe & Silver, *supra* note 21, at 829.

³² 248 N.Y. 339, 162 N.E. 99 (1928) In *Palsgraf*, a person running to catch one of defendant's trains, already moving from the station, was assisted by an employee of defendant, which assistance caused runner to drop package containing fireworks. The fireworks exploded, causing a chain reaction overturning scales at the other end of the platform, ultimately injuring the plaintiff, Mrs. Palsgraf, who was struck by the weights from the scales. The court held that there was no liability toward Mrs. Palsgraf, as negligence was a matter born in a relationship between parties, and such a relationship can only be established if there is foreseeability.

person.³³ *Palsgraf* marked a fundamental shift from a consideration of duty in light of unforeseeable consequences to a consideration of duty in light of unforeseeable injury to a plaintiff.³⁴ The policy underlying such a shift seems obvious. That is, there is a strong economic incentive in relieving potential defendants of a common law duty to all persons and things within or without defendant's contemplation of consequences. Indeed, the argument continues, the line of duty must be drawn somewhere, for without circumscription of duty, there would be no limit to common law liability.

If that is to be the argument for the rule that no duty is owed to an unforeseeable plaintiff, the next logical inquiry, assuming we can agree on a definition of duty,³⁵ is how to determine whether a specific injury to a plaintiff is foreseeable. New York's answer tends to equate "probability" with the concept of "reasonable foreseeability," which is itself an amalgamation of ideas advanced by Professor Prosser in his treatise on

³³ *Id.*

³⁴ For an interesting analysis of duty owed to those not in a particular zone of danger, see Thomas T. Uhl, *Bystander Emotional Distress: Missing An Opportunity To Strengthen The Ties That Bind*, 61 BROOK. L. REV. 1399 (1995). While Uhl has a different take on the holding in *Strauss*, as well as some other cases discussed in this Note, his analysis of the problems with foreseeability is cogent and serves as good background material to be read in conjunction with this Note.

³⁵ The concept of "duty" is itself a difficult one to pin down. For Professor Prosser's take on the concept as "legal shorthand" for one's having a legal interest entitled to legal protection, see *supra* note 28 and accompanying text. Another commentator has defined duty in negligence law "in terms of a broad *general duty* of reasonable care with *exceptions*, rather than as a series of specific duties which vary according to the facts of the case." EDWARD J. KIONKA, *TORTS IN A NUTSHELL* 90 (2d ed. 1992) (emphasis added). Notwithstanding his error of defining a word in terms of itself, to his credit Kionka acknowledges that "[c]onfusion often results from the loose use of the term 'duty' as a substitute for a proper analysis of some other element of the negligence equation," though his illustration is deficient in explaining what those "other elements" are. *Id.* Additionally, while the New York Court of Appeals has said that duty is "often" a question of law for the courts to decide, see *infra* notes 52 & 53 and accompanying text, Kionka implies that it is always a question of law for a court and never a question of fact for a jury. *Id.* at 91.

Torts³⁶ and the common law from *Palsgraf*, *Pulka v. Edelman*³⁷ and other cases in that line.³⁸ Not only is this a leap of logic, it is a fatal one.

Another purported framework of analysis for determining whether a duty is owed has more to do with how much owing that duty will cost than whether a particular plaintiff is reasonably foreseeable. From a classical law and economics perspective the answer to that question includes a consideration of who can best bear the burden of the risk of negligence.³⁹ Such an analysis, however, also begs the essential question of foreseeability. Lastly, the New York Courts of Appeals continues to apply an analysis that employs the age old distinctions between misfeasance, malfeasance and nonfeasance⁴⁰ as a

³⁶ PROSSER, *supra* note 28, § 43, at 282.

³⁷ 40 N.Y.2d 781, 358 N.E.2d 1019, 390 N.Y.S.2d 393 (1976) (determining that the *Palsgraf* principle that the risk to be perceived defines the duty to be obeyed "is applicable to determine the scope of duty only after it has been determined that there is a duty").

³⁸ These cases include a district court opinion by Judge Learned Hand, *The Mars*, 9 F.2d 183, 183 (S.D.N.Y. 1914) (negligence case in Admiralty, wherein Judge Hand opines that a determination of liability turns on the "reasonable and proximate results of the wrongful act" of the defendant. This case is cited with approval in *Palka*).

³⁹ This concept is related to Judge Hand's formula for determining whether an actor's injury causing conduct was negligent. Hand opined that "if the probability be called P; the injury L; and the burden B; liability depends upon whether B is less than L multiplied by P: i.e., whether $B < PL$." *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). Where the cost of taking adequate precautions for preventing harm exceeds the potential economic loss multiplied by the probability of an occurrence, it is fiscally imprudent to take such precautions. This "cost" type of analysis does not apply, though, when speaking of contractor liability in tort to third parties not in privity, as the threshold test for liability is, by definition, not met. Holding contractors liable in tort for injuries to third parties not in privity of contract may increase the cost of insurance for contractors. However, if one agrees with Judge (then Professor) Posner's analysis that "[w]hen the cost of accidents is less than the cost of prevention, a rational profit maximizing enterprise will pay tort judgments to the accident victims rather than incur the larger cost of avoiding liability," Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972), then rational contractors will factor the cost of insurance into their bids for jobs, and the problem will be solved one way or another. Either the contractor will choose to take the risk of paying a judgment in favor of a plaintiff not in privity who is injured by a contractor's negligence, or a contractor will insure against such risk.

⁴⁰ Misfeasance is commonly defined as the improper performance of an act that one may lawfully do; malfeasance is defined as performing an act that one has no legal right to perform; nonfeasance is defined as the non-performance of an act that one is obliged to perform. BLACK'S LAW DICTIONARY 1054 (6th ed. 1990), posits that the distinction between these three concepts is "of great importance in

threshold test of duty. Even though this is perhaps a proper place to begin when liability in contract is at issue, it is inapposite when liability in tort is the question.⁴¹ If privity is outmoded in the negligence context, then an alleged tortfeasor's misfeasance, malfeasance and nonfeasance should also cease to enter the court's consideration of duty owed, as those are concepts found in a contract relationship rather than the relationship that might give rise to a tort claim.⁴²

In a related and unfortunate analysis, New York courts often declare that even where a contract duty is owed to a party, if it is not acted upon, no liability will be imposed as between the contractor and an injured third party not in privity. As a result, New York has some interesting and conflicting case law, as different interests are considered by the courts in answering the question of to whom a duty is owed when a contract exists, an injury is caused, the injured party is not in privity with the tortfeasor, and the party owing the duty of care to the injured party has taken no affirmative action.⁴³

1. Contractor Duty in Contract to Third Parties Not in Privity

The New York Court of Appeals has addressed the issue of duty and liability many times since *Palsgraf*. In a 1990 decision, *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*,⁴⁴ the court unanimously held in a decision authored by then-Chief Judge Wachtler that a company that installed sprinklers, and the company under contract to inspect those sprinklers, owed no duty of care to a building tenant building because the tenant was not in privity of contract with either party.⁴⁵ That

determining an agent's liability to third persons." For a comprehensive discussion of the history of these distinctions, see PROSSER, *supra* note 28, § 92, at 658-63; see also ROWE & SILVER, *supra* note 21.

⁴¹ See *supra* note 28.

⁴² This is not to say that a court or a jury could not find a contractor liable in tort. The point of making this distinction here is simply to acknowledge that the duty analysis in contract and tort should begin with different questions regarding the relationship of the parties involved.

⁴³ See *infra* note 44 and accompanying text.

⁴⁴ 76 N.Y.2d 220, 556 N.E.2d 1093, 557 N.Y.S.2d 286 (1990).

⁴⁵ In *Eaves Brooks*, a company that was hired to "service and maintain" building fixtures neglected to inspect a defective sprinkler system, which was a proxi-

holding explicates a root principle in the area of liability⁴⁶ as it pertains to contractors: Lack of privity is dispositive when the issue is one of liability in contract to third parties. This is so because there is, by definition, no duty owed to a plaintiff who is neither a party to a contract nor an intended third party beneficiary who is a victim of a contractor's nonfeasance, unless such a duty is specifically undertaken by a defendant.

The question for determining the scope of duty at this point seems to be one of liability in contract, but it is actually one of liability in tort. Ultimately, the question must be phrased in terms of what standard of care a contractor owes to parties with whom it may come into contact.⁴⁷

The court's erroneous analysis was extended to the question of liability in tort as well. Judge Wachtler, after all, further reasoned in *Eaves Brooks* that imposing tort liability on defendants for damages to third parties not in privity would, in essence, force them "to insure against a risk the amount of which they may not know and cannot control. . . . The result would be higher insurance premiums passed along through higher rates."⁴⁸ By including this tort liability dicta in its affirmation of the lower court's grant of summary judgment to the defendants, the test in *Eaves Brooks* for imposing tort liability, or for determining if a duty was owed, became a two step test. The first step is a consideration of the privity question.⁴⁹ If privity is found, the second step is an inquiry into whether misfeasance, malfeasance, or nonfeasance had oc-

mate cause of damage to plaintiff-tenant's inventory. *Id.* at 226, 556 N.E.2d at 1096, 557 N.Y.S.2d at 289.

⁴⁶ The liability spoken of here is liability in contract, though as noted throughout this Note, New York courts generally, and erroneously, carry this principle over to a tort claim analysis.

⁴⁷ The Court of Appeals drew a distinction in *Eaves Brooks* between standards of care owed for personal injuries and standards of care owed for property damages, but such a distinction is suspect. *Id.* at 227, 556 N.E.2d at 1096, 557 N.Y.S.2d at 289.

⁴⁸ *Eaves Brooks*, 76 N.Y.2d at 227, 556 N.E.2d at 1096, 557 N.Y.S.2d at 289 (1990). Chief Judge Kaye concurred in this unanimous opinion, and that position is characteristic of the tenor and concern of the Kaye court for containing and restraining damage awards to plaintiffs.

⁴⁹ As noted in *Eaves Brooks*, the privity question is moot when the cause of action sounds in negligence.

curred.⁵⁰ This seems indistinguishable from a contract duty analysis, and as such, the test is inherently suspect.

While the *Eaves Brooks* holding seems to express a clear position regarding contractor liability in tort to third parties not in privity,⁵¹ it leaves a little room for discretion. Such discretion is apparent in a recent case where Judge Bellacosa offered a different rationale for holding a contractor liable under circumstances similar to *Eaves Brooks*. In the 1994 Court of Appeals case *Palka v. Servicemaster Management Services Corporation*,⁵² the court addressed the question of duty by reasoning that "unlike foreseeability and causation . . . [duty is] usually a legal, policy-laden declaration reserved for Judges to make prior to submitting anything to fact-finding or jury consideration."⁵³ While that statement appears facially sound, those "policy-laden declarations" turn wholly on economic considerations, often resulting in summary judgment in favor of defendants.⁵⁴

⁵⁰ The mention of economic considerations at this point ought to be remembered when reading Part III.B of this Note, as it plays an important role in the calculus of the court's "policy-laden decisions."

⁵¹ That position was that a contractor would not stand liable in contract or tort to a third party not in privity when the gravamen of a claim involved nonfeasance. It is easy to see how a court can arrive at this position, since the question of duty in such a case is posed in the language of contract, and thus the question dictates the answer.

⁵² 83 N.Y.2d 579, 634 N.E.2d 189, 611 N.Y.S.2d 817 (1994). Servicemaster was a contractor retained by Ellis Hospital to "train, manage, and direct" services in the hospital. Servicemaster was paid in excess of ninety thousand dollars a month for its services. *Id.* at 582, 634 N.E.2d at 191, 611 N.Y.S.2d at 819. The court noted in its holding that "*under the facts of this case*" a contractor may be held liable in tort (emphasis added). This limiting language appears as a matter of course when the court does not want to upset precedent, and does not want its holding to be applied too easily to similar cases. In essence, the court carved out another exception to the duty/privity rule, and cautioned against trying to use its ruling in favor of future plaintiffs not named Palka and not working at Ellis Hospital who were not injured by wall fans falling from their mounts.

⁵³ *Id.* at 585, 634 N.E.2d at 192, 611 N.Y.S.2d at 820 (1994) (citing *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220, 556 N.E.2d 1093, 557 N.Y.S.2d 286 (1990), which determined that, as a matter of law, "defendant neither owed a cognizable duty to plaintiff, nor assumed a duty to act *in this instance*" (emphasis added)). Chief Judge Kaye joined in the 5-0 opinion of the court, with Judges Titone and Levine taking no part.

⁵⁴ New York common law claims to hold that most contractors owe a duty of care to foreseeable third parties. However, even where an accident is foreseeable, if the defendant could, in fact, have foreseen the accident but had no power to control the conduct of the negligent actor, the defendant will not be held liable for

Consider the following situation: A landowner hires a contractor to perform a task, the contractor negligently fails to do so or negligently fails to perform some aspect of that task, and a tenant, guest, or passerby is injured as a result of that negligence. Should the contractor be held liable in tort to such third party?⁵⁵ *Strauss* and *Eaves Brooks* seem to answer "no," and *Palka*, "yes." This leaves the state of the law in this area in serious disarray. Even before *Palka*, New York case law was inconsistent as to whether or not contractors owed a duty of care to all comers when undertaking a task and negligently performing it (misfeasance), or when undertaking an action beyond the scope of its contracted for duties and obligations (malfeasance), thus causing harm to a third party. In fact, where a contractor took no action, i.e., had "committed" nonfeasance,⁵⁶ most commentators contend, and New York case law supports, that no action in tort or contract would lie against said contractor by an injured third party.

A typical contractual duty to perform a task brings with it a duty to take reasonable care in the exercise of such performance, though only to parties in privity and foreseeable third parties.⁵⁷ This reasoning creates an infinite regress, in which the inquiry into foreseeability defines the duty owed, and vice-versa.⁵⁸ However, certain contracts may be held to be void as

the consequences of that foreseeable accident. *Pulka v. Edelman*, 40 N.Y.2d 781, 358 N.E.2d 1019, 390 N.Y.S.2d 393 (holding that a garage owner is not liable for the consequences of a foreseeable accident where the owner had no ability to control the actor causing the accident). While the *Pulka* line of cases deals with parties not in a contractor/contractee relationship, this concept has worked its way into that line of cases, as well.

⁵⁵ This is essentially the fact pattern of *Strauss*, though with one not so slight difference. The defendant in *Strauss*, Con Edison, was found to be "grossly negligent" rather than merely "negligent." *Strauss*, 65 N.Y.2d at 405, 482 N.E.2d at 38, 492 N.Y.S.2d at 559.

⁵⁶ The oxymoronic nature of the phrase "committing nonfeasance" is noteworthy, and adds to the argument for abandoning the distinctions between misfeasance, malfeasance, and nonfeasance, as currently used by the New York courts in the complex equation for determining liability.

⁵⁷ RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981). While the duty referred to by this section to a common law duty of care, the comments accompanying § 73 indicate that it is necessary to define the scope of the legal duty prior to attempting to apply the section's principles to a given case. This type of requirement seems designed to limit liability and scope of duty to one of traditional reasonable care.

⁵⁸ See *supra* notes 31-36 and accompanying text.

against public policy, undermining that basic principle of contractor liability in contract.⁵⁹

2. Contractor Liability In Tort: What Constitutes Duty?

Prosser observed in what is perhaps the most popular and authoritative treatise on tort law that:

[t]he statement that there is or is not a duty begs the essential question—whether the plaintiff's legal interests are entitled to legal protection against the defendant's conduct. It is therefore not surprising to find that the problem of duty is as broad as the whole law of negligence, and that no universal test for it ever has been formulated. It is a shorthand statement of a conclusion, rather than an aid to analysis itself.⁶⁰

Assuming this is true, any inquiry into whether a duty is owed to a party must address the question of entitlement to protection against harm. This inquiry is a challenging one, and it becomes even more so in the area of contractor liability in tort: Is an unforeseen⁶¹ injured third party entitled to legal protection against a contractor's "conduct" when that conduct is non-feasance? This typical phrasing of the question further perpetuates the logical fallacy of the test for determining whether liability might be imposed upon a party.⁶²

⁵⁹ The Restatement (Second) of Contracts § 178 (1981) offers a guideline for determining when terms of a contract ought to be unenforceable as against public policy. The section calls for a balancing of the interests between the public and the parties to the contract, pointing out that sometimes "the contravention of public policy is so grave, as when an agreement involves a serious crime or tort, that unenforceability is plain." *Id.* § 178 cmt. b. However, the comment goes on, "[e]nforcement will be denied only if the factors that argue against enforcement clearly outweigh the law's traditional interest in protecting the expectations of the parties its abhorrence of any unjust enrichment, and any public interest in the enforcement of the particular term." *Id.* According to the Restatement, the court must consider the strength of the policy, the connection with the term, and certain other factors, including "any interest that the public or third parties may have in enforcement of the term in question. Such an interest may be particularly evident where the policy involved is designed to protect third parties." *Id.* § 178, cmts. b, c, d, and e.

⁶⁰ PROSSER, *supra* note 28, § 53, at 357-58.

⁶¹ Arguably, if one is injured due to a condition created or ignored by a contractor with a duty to foreseeable plaintiffs, there is also negligence in the contractor's failure to foresee the potential danger to that injured party.

⁶² See *supra* notes 31-36 and accompanying text. See also *infra* note 70 and accompanying text.

The Second Restatement of Torts § 324A deals with tort liability to third persons for the negligent performance of an undertaking. Both the Second Restatement of Torts and the Second Restatement of Contracts seem to be in agreement that public policy favors voiding exculpatory clauses when a duty is owed to a party to a contract or some foreseeable plaintiff, and such duty is then negligently performed.⁶³ However, neither the Second Restatement of Contracts nor New York common law affords a contract remedy to third parties not in privity. Furthermore, neither source suggests that a cause of action exists where there is "mere inaction," i.e., "nonfeasance," toward a third party.⁶⁴ Thus, it might seem reasonable to conclude at this point, as noted above,⁶⁵ that whether a duty is owed and the nature of that duty owed become the threshold questions for determining if liability exists and thus a valid cause of action exists.⁶⁶ This, though, still ignores Professor Prosser's caution about duty.⁶⁷

The common law of contracts in New York is consistent in the area of contractor liability to third parties not in privity, that is, none exists.⁶⁸ It remains, however, consistently at odds with itself in the area of contractor liability in tort to those same parties.⁶⁹ In New York, a determination that neg-

⁶³ Some exculpatory clauses have been made statutorily void. *See, e.g.*, N.Y. GEN. OBLIG. LAW § 5-322 (McKinney 1989), pertaining to caterers and catering establishment; § 5-325, which pertains to garages and parking lots; and § 5-326, applying to pools, gymnasiums, places of public amusement or recreation. *See also* U.C.C. § 7-202 (McKinney 1989), which applies to warehousemen; and § 7-309, which deals with common carriers.

⁶⁴ *See* Introduction, *supra*, and note 28 and accompanying text for the "traditional rule" as construed in New York.

⁶⁵ *See supra* Part I.A.1.

⁶⁶ As every law student is taught in a basic torts class, for tort liability to exist there must be a duty owed, a duty breached, cause in fact, and the breach of duty must be a proximate cause of damages. But this, too, ignores Prosser's admonition about duty and liability. *See supra* notes 28 and 60.

⁶⁷ *See supra* notes 28 and 60 and accompanying text.

⁶⁸ Professor David Siegel described privity colorfully, albeit in the context of issue preclusion cases, as a "loose-limbed . . . doctrine that has wiggled in and out of" case law in New York. DAVID B. SIEGEL, NEW YORK PRACTICE § 461 (2d. ed. 1991). So, too, has the doctrine made its way in and out of negligence cases involving contractors and their liability in tort to persons not party to a particular contract.

⁶⁹ *See, e.g.*, *Johnson v. Robert Bruce McLane Associates*, 201 A.D.2d 436, 603 N.Y.S.2d 165 (1st Dep't 1994) (security contractor); *Koeppel v. City of New York*, 200 A.D.2d 477, 606 N.Y.S.2d 231 (1st Dep't 1994) (engineers hired to inspect

ligence does or does not exist answers the question of whether or not a duty has been breached. As noted above, this is logically implausible. According to the New York Court of Appeals, this determination "is a matter of policy, rather than [one of] foreseeability."⁷⁰ While it is difficult to argue with the court's logic when so stated, the court continues to employ an analysis that considers foreseeability in determining scope of duty.

B. *The "Traditional Rule" in New York, and its Exceptions*

Under the traditional New York common law rule, where a contractor was hired by a landowner to perform some task or provide some service, and then negligently performed the task or service, an answer to the question of whether the contractor could be held liable to third persons for such negligence depended on whether the wrong amounted to malfeasance, misfeasance or nonfeasance.⁷¹ This so-called "traditional rule" of

sidewalk); *Raffa v. Louis Stilloe Roofing & Siding Inc.*, 182 A.D.2d 901, 581 N.Y.S.2d 888 (3d Dep't 1992) (contractor hired to repair roof); *Bourk v. Nat'l Cleaning*, 174 A.D.2d 827, 570 N.Y.S.2d 755 (3d Dep't 1991) (snow removal services); *Francois v. City of New York*, 161 A.D.2d 319, 555 N.Y.S.2d 86 (1st Dep't 1990) (*Eaves* rule extended to public contractor hired to repair roadway. Court held, contrary to New York's customary public contract rule in which contractors *always* owed affirmative duty of care to third persons, that the rule of *Eaves* applied in this context.).

⁷⁰ *Sukljian v. Charles Ross & Son Co.*, 69 N.Y.2d 89, 503 N.E.2d 1358, 511 N.Y.S.2d 821 (1986). See also *D'Amico v. Christie*, 71 N.Y.2d 76, 518 N.E.2d 896, 524 N.Y.S.2d 1 (1987) (holding that a determination that an event was foreseeable does not mean that defendant had a duty to prevent it).

Prosser, in summarizing the general trend of liability in tort in the area commonly known as vicarious liability, points out that the "general rule" has become that an employer will be held liable for the negligence of an independent contractor with a narrow exception in a limited group of cases. See generally PROSSER, *supra* note 28 at ch. 12. These cases are limited to those in which an employer is not in a position to select a responsible contractor or where the risk of harm to others from the enterprise is considered slight. This, of course, is an open-ended qualified approach to risk assessment, and while some would like to make it a question of law, the phrasing of the assertion, and the common law surrounding the question, indicate that it is one of fact for a jury to consider. PROSSER, *supra* note 28, § 71, at 509. In other words, a duty of care toward a stranger will pass through the employee to the employer. However, this general rule is, in fact, not so clear once one attempts to determine if a particular claim arises as a result of a contractor's misfeasance, malfeasance, or nonfeasance.

⁷¹ See *infra* discussion of *Melodee Lane Lingerie Co. v. American Dist. Tel. Co.*, 18 N.Y.2d 41, 218 N.E.2d 544, 271 N.Y.S.2d 670 (1966), wherein it was held that a contractor would be liable to third persons for misfeasance in the performance of

*Melodee Lane Lingerie Co. v. American District Telephone Co.*⁷² held that contractors generally would stand liable to third persons for malfeasance and misfeasance. However, the *Melodee Lane* rule employed a contract analysis to determine tort liability, and thus dictated that contractors would not be held liable for "mere" nonfeasance.⁷³ Despite this rule, and perhaps in recognition of its logical flaw, New York law carved out numerous exceptions.

These exceptions may be characterized in at least four different ways,⁷⁴ and each of the four categories consists of subsets with numerous potential fact specific variations. The classical exception of no liability for "mere" nonfeasance, the so-called "public contracts" exceptions, pertains to highway

its contractual duties and for malfeasance (though the court uses this term in its discussion of contractual duties, malfeasance in fact occurs when a contractor negligently performs some sort of task *outside* the scope of the duties contracted for), but not for "mere" nonfeasance.

⁷² 18 N.Y.2d 47, 218 N.E.2d 544, 271 N.Y.S.2d 670 (1966).

⁷³ As already noted, contractors could never be held liable in tort for negligence under such an analysis.

⁷⁴ Classically, there are only four such exceptions where a contractor would stand liable even for nonfeasance. As set forth in *Seaver v. Ransom*, 224 N.Y. 233, 237-38, 120 N.E. 639, 640-41 (1918), these exceptions are as follows: (1) instances in which there is a "pecuniary obligation running from the promisee to the beneficiary," (2) "cases where the contract is made for the benefit of the wife," (3) cases "where, at the request of a party to the contract, the promise runs directly to the beneficiary," and (4) "the public contract cases (citations omitted) where the municipality seeks to protect its inhabitants by covenants for their benefit." *Id.* But apart from these traditional exceptions, other *sui generis* exceptions gradually became ingrained in the case law. One such exception involved elevator contractors, who have been held to owe a legal duty to tenants and invitees. *Beinhocker v. Barnes Dev. Corp.*, 296 N.Y. 925, 73 N.E.2d 41 (1947); *Rogers v. Dorchester Assocs.*, 32 N.Y.2d 553, 559, 300 N.E.2d 403, 405-6, 347 N.Y.S.2d 22, 26 (1973); *Zannotta v. Haughton Elevator Co.*, 175 A.D.2d 449, 572 N.Y.S.2d 500, 501 (1991); *Weeden v. Armor Elevator Co.*, 97 A.D.2d 197, 468 N.Y.S.2d 870, 904-905 (2d Dep't 1983); *Spooner v. National Elevator Inspection Services*, N.Y.L.J., June 7, 1994, at 22 (Sup. Ct., N.Y. County) (though the distinctions between invitees, licensees, and trespassers were abolished for the purpose of determining liability in *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976)). Another exception involved auto repairs (i.e., defendant A hires Service Station to fix A's brakes. Service Station negligently fails to do so. A ends in collision with B, and B sues Service Station). *Swensson v. New York, Albany Deps. Co.*, 309 N.Y. 497, 131 N.E.2d 902 (1956); *Egan v. Bradley*, 117 A.D.2d 777, 499 N.Y.S.2d 424 (2d Dep't 1986); *Jackson v. Melvey*, 56 A.D.2d 836, 392 N.Y.S.2d 490 (3rd Dep't 1977); *Depelteau v. Ford Motor Co.*, 28 A.D.2d 178, 282 N.Y.S.2d 490 (3rd Dep't 1967). These fact patterns, and some others, constituted instances in which a contractual undertaking was deemed to give rise to an affirmative tort duty to "third persons" not in privity.

contractors and the like. The theory is that unlike the ordinary contractor hired to paint a hallway, a contractor that undertakes work in a public way such as a sidewalk or a street *automatically* foresees that negligent performance, i.e., misfeasance, is likely to cause injury. Accordingly, such a public contractor stands liable to third persons even for "mere" nonfeasance if it is foreseeable that *not* performing is likely to cause injury. This "classical exception" seems entirely reasonable, and if it is accepted then there is no good argument, other than the potential cost of insuring against risk, not to make this exception the rule. And that is no argument at all.⁷⁵

This has been the "exception" to the "rule" for more than a century, dating back to *Little v. Banks*.⁷⁶ There, the defendant contracted with the state to deliver public volumes of the law reports and was deemed liable to third persons for its negligent failure to do so. The New York Court of Appeals noted that, while contractors were not generally liable for nonfeasance, the rule would be otherwise on the facts before it. The court observed:

[c]ontractors with the State, who assume, for a consideration received from the sovereign power, by covenant, express or implied, to do certain things, are liable, in case of neglect to perform such covenant, to a private action at the suit of the party injured by such neglect, and such contract inures to the benefit of the individual who is interested in its performance.⁷⁷

Due to this and other exceptions that have been carved out of the rule, no true rule remains. Indeed, the rule now resembles a Thanksgiving Day turkey that has been carved at for two days after all the guests have left. We, while not left with a bare carcass, are left with the dilemma of determining how to assess contractor liability in tort to third parties not in privity. Before reaching that analysis, though, a brief consideration of the history of the development of the concepts of misfeasance, malfeasance and nonfeasance in New York case law is necessary.

⁷⁵ For two articulate expositions of why this is no rule at all, see Judge Meyer's dissent in *Strauss*, 65 N.Y.2d at 406, 482 N.E.2d at 38, 492 N.Y.S.2d at 559, and Judge Gibbons's dissent in *Strauss*, 98 A.D.2d at 429, 469 N.Y.S.2d at 952.

⁷⁶ 85 N.Y. 258 (1881).

⁷⁷ *Id.* at 263.

II. DUTY AND LIABILITY: THE CONFUSION IN CONTRACT AND TORT LAW IN NEW YORK

A. *Misfeasance, Malfeasance and Nonfeasance*

The line between misfeasance and malfeasance has blurred substantially over the years.⁷⁸ Additionally, nonfeasance has sometimes been characterized as rising to a level consistent with misfeasance.⁷⁹ As a consequence, the determination of when a contractor may be held liable in tort to third parties not in privity has become unnecessarily more complex.⁸⁰ In the seventy years since *H.R. Moch v. Rensselaer Water Co.*,⁸¹ the rule has been that a duty to the third party general public will be imputed to a contractor in cases of misfeasance and malfeasance, but not for "mere" nonfeasance.⁸²

As a result, the basis for establishing tort liability in New York for ordinary contractors became logically and factually independent of any obligation arising from an unfulfilled promise. It seems that there can be no doubt after reading Judge Cardozo's opinion in *Moch* that he believed that in order for tort liability to exist, an action of some sort would have to exist as well.

⁷⁸ See generally PROSSER, *supra* note 28, § 92, at 658-66.

⁷⁹ See, e.g., *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220, 556 N.E.2d 1093, 557 N.Y.S.2d 286 (1990), *Melodee Lane Lingerie Co. v. American Dist. Tel. Co.*, 18 N.Y.2d 57, 218 N.E.2d 661, 271 N.Y.S.2d 937 (1966).

⁸⁰ The general rule in New York surrounding the question of duty in the face of nonfeasance may also claim roots in *H.R. Moch v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928). This is difficult to square with the court's own precedent set ten years earlier in the *Ransom* case.

⁸¹ In *Moch*, a contractor was held not to be liable to a third party not in privity when the third party's building burned to the ground as a result of the water company's nonfeasance. *Id.*

⁸² See *H.R. Moch v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928) (Municipality itself owed no duty to supply water, therefore municipal contractor could not be held liable to plaintiff victim of fire for failure to provide water to put out said fire.) The general rule derived from *Moch* was eloquently explained by Judge Cardozo: "the hand once set to a task may not always be withdrawn with impunity, though liability *would* fail if it had never been applied at all." *Id.* at 167, 159 N.E. at 898. This is, no doubt, a very clear expression of where Judge Cardozo thought to draw the duty line, as his use of the imperative indicates.

1. Nonfeasance: Who is Answerable to Whom When "Nothing" is Done?

Various attempts to solve this problem have emerged over the past few years, but there is still no coherent statement of New York law in this area. Generally, under current New York common law, contractors stand liable in contract for conduct that causes injury to foreseeable plaintiffs, including third parties not in privity.⁸³ This rule seems quite logical, having been derived from the 1966 New York Court of Appeals case *Melodee Lane Lingerie Co. v. American District Telephone Co.*,⁸⁴ and left little doubt, until very recently, that a contractor would stand liable to third persons for misfeasance or malfeasance. It was equally clear that a contractor would *not* stand liable for nonfeasance, or "mere inaction."⁸⁵ Indeed, for liability to be assigned to a contractor where a third party not in privity had been injured, conduct would have to occur, or, in the convoluted reasoning of *Melodee Lane*, must not have occurred, so that it rose to the level of some "affirmative" act that might be deemed "defective maintenance."⁸⁶ Such linguistic manipulation designed to avoid liability creates a deplorable condition, is socially disruptive, and is just the type of language Judge Wachtler cautioned against in his decision in *Palka*.⁸⁷

Oddly, as noted in Part II of this Note, if one accepts the *Palka* court's "policy-laden" calculus of how to discern whether a duty is owed, and duty is a question of law with "mere" nonfeasance or the failure to perform a contracted for duty not amounting to liability to third parties not in privity, then it

⁸³ See *Melodee Lane Lingerie Co. v. American Dist. Tel. Co.*, 18 N.Y.2d 57, 218 N.E.2d 661, 271 N.Y.S.2d 937 (1966). This still begs the essential question of who or what is a foreseeable plaintiff or injury. It also confuses tort liability analysis with contract duty analysis.

⁸⁴ 18 N.Y.2d 57, 218 N.E.2d 661, 271 N.Y.S.2d 937 (1966) (wherein a company under contract to provide a fire alarm system was held liable to a tenant not a party to the contract, for failure to report an alarm. The court held that the failure of the defendant rose to the level of "affirmative defective maintenance," rather than mere inaction.)

⁸⁵ *Id.*

⁸⁶ *Id.* at 65, 218 N.E.2d at 665, 271 N.Y.S.2d at 943. But see *Strauss*, 65 N.Y.2d at 401, 482 N.E.2d at 35, 492 N.Y.S.2d at 556.

⁸⁷ See *infra* Part II.C.

becomes altogether too easy to "discern away" duty.⁸⁸ Furthermore, foreseeability becomes logically moot in such an analysis.

B. *The Eaves Brooks Decision, Nonfeasance and Scope of Duty*

There has been confusion, as well as dissatisfaction with respect to the general rule of nonliability in contract in the area of nonfeasance. Case law demonstrates that the distinction between misfeasance and nonfeasance is often misconstrued or contrived,⁸⁹ as is the distinction between misfeasance and malfeasance.⁹⁰

The *Eaves Brooks* court explained that its affirmance rested "not on the distinction between misfeasance and nonfeasance relied upon by [the second department] to determine whether a contractual duty could give rise to tort liability to a third party, but rather on a weighing of the policy considerations applicable generally to the question whether a tort duty should be so extended."⁹¹ The *Eaves Brooks* court used those

⁸⁸ Even the court's *Melodee Lane* decision had to manipulate the concept of duty to arrive at a proper decision by declaring inaction or nonfeasance to have risen to a level of something called "affirmative defective maintenance." See also *supra* notes 83 and 84 and accompanying text.

⁸⁹ See *supra* discussion at Part II.A.

⁹⁰ See discussion *supra*. The question of contractor tort liability based on nonfeasance, though, seemed to have been settled by the New York Court of Appeals in *Moch*, and reaffirmed many times over the years up to and including the decision in *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220, 556 N.E.2d 1093, 557 N.Y.S.2d 286 (1990) (company hired to service and maintain building and fixtures neglects to inspect fire sprinkler system, which defective system causes plaintiff property damage).

In 1990, when the Court of Appeals decided *Eaves Brooks*, the New York cases involving contractor liability to parties not in privity seemed to consistently hold contractors liable in tort for malfeasance and misfeasance, but not for nonfeasance. *Eaves Brooks* did not expressly do away with the "public contracts" exceptions to this rule, or other common law exceptions in New York, e.g., elevator contractors, but some lower courts read it that way. Additionally, *Eaves Brooks* involved a claim for property damage rather than personal injury, and courts applied *Eaves Brooks* inconsistently where damages included personal injuries.

However, the New York Court in *Eaves Brooks* rejected its own long-standing test for contractor liability, wherein the relevant question for determining liability in contract was whether a contractor's inaction amounted to misfeasance rather than nonfeasance.

⁹¹ *Eaves Brooks*, 76 N.Y.2d at 223, 556 N.E.2d at 1094, 557 N.Y.S.2d at 287. This explanation seems to imply that there was, at the very least, a duty owed to the third party by some entity. But the question remains, by whom. However, perversely, the decision concluded that no duty was owed at all.

"policy considerations" to engineer a holding which articulated that the alleged nonfeasance of those defendants, when performing their contractual obligations, did not breach any duty of care owed to plaintiff. The court never directly addressed the possibility that the inaction or nonfeasance in the case at bar rose to the level of gross negligence.⁹² By not addressing that issue, the question of whether misfeasance, malfeasance or nonfeasance had occurred was rendered moot for the purpose of assessing the defendant's liability in tort to a third party not in privity of contract.

However, the *Eaves Brooks* court did note that "even inaction may give rise to tort liability where no duty to act would otherwise exist, if, for example, performance of contractual obligations has induced detrimental reliance," and thus inaction might rise to the level of "positively or actively . . . working an injury."⁹³ The court quickly dismissed that possibility from the case then at bar, though, indicating that strong policy concerns dictated a preclusion of recovery upon the particular facts of *Eaves Brooks*. It would not be a stretch to conclude that these are the same concerns regarding limiting liability to a "circumscribed class" of "foreseeable" plaintiffs expressed by Judge Kaye in *Strauss*.⁹⁴

Specifically, the *Eaves Brooks* court decided that it had a responsibility to define the "orbit of duty, 'to limit the legal consequences of wrongs to a controllable degree.'"⁹⁵ While it is not stated anywhere in the court's opinion, part of this limit

⁹² It is a well accepted principle in torts that even inaction may sometimes rise to the level of gross negligence, and further, that such gross negligence may sometimes rise to the level of "intentional" action.

⁹³ *Eaves Brooks*, 76 N.Y.2d at 226, 556 N.E.2d at 1096, 557 N.Y.S.2d at 289 (quoting *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 167, 159 N.E. 896, 898 (1928)). This explanation resembles a quasi-contractual duty analysis, and it seems to leave the door open for a "quasi-tort duty" based on individual findings specific to facts of a certain case, as the court may find just. Compare *Lawrence v. Fox*, 20 N.Y. 268 (1859).

⁹⁴ *Strauss v. Belle Realty Co.*, 65 N.Y.2d 399, 482 N.E.2d 34, 492 N.Y.S.2d 555 (1985). Chief Judge Kaye joined in the unanimous opinion of the court in *Eaves Brooks*.

⁹⁵ *Eaves Brooks*, 76 N.Y.2d at 226, 556 N.E.2d at 1096, 557 N.Y.S.2d at 289 (quoting its decision in *Strauss v. Belle Realty Co.*, 65 N.Y.2d 399, 402, 482 N.E.2d 34, 36, 492 N.Y.S. 555, 557 (1985) (citation omitted)). The desire to "limit . . . legal consequences of wrongs to a controllable degree" may reasonably be read as a decision motivated purely by economic considerations.

tended to be read as one dealing with injury to property rather than personal injury.⁹⁶ Indeed, some of the cases decided between and after *Eaves Brooks* and *Palka*, drew a clear and clean distinction between personal injury and property damage.⁹⁷

While this seems to be a logical distinction, it is one without relevance. Curiously, less than one month before its opinion in *Eaves Brooks*, the Court of Appeals stated in *Hall v. United Parcel Services of America, Inc.*,⁹⁸ that "if plaintiff had sustained physical injury . . . rather than the less tangible reputational injury he sustained, there would be no question of his right to maintain a cause of action against the examiner, notwithstanding the absence of a relationship of privity."⁹⁹ At that point in time the court seemed to be confused about how to determine whether liability would exist; while *Eaves Brooks* weighed public policy to determine if liability in tort existed, it still applied a contract liability analysis that spoke of privity and nonfeasance.

C. *The Palka Decision and its Reading of Scope of Duty*

While *Eaves Brooks* was being applied by New York's lower courts idiosyncratically where there was a question of tort liability of contractors to third parties not in privity,¹⁰⁰ *Palka v. Servicemaster Management Services Corporation*¹⁰¹ was making its way through the system. It was in *Palka* that

⁹⁶ See, e.g., *Tate v. Clancy-Cullen Storage Co., Inc.*, 178 A.D.2d 292, 577 N.Y.S.2d 377 (1st Dep't 1991) (holding that a liability limitation clause in a contract applied only to furnishing of alarm systems and not to personal injury).

⁹⁷ *Id.*

⁹⁸ 76 N.Y.2d 27, 555 N.E.2d 273, 556 N.Y.S.2d 21, (1990) (wherein lower court's dismissal of plaintiffs' actions for defamation, intentional infliction of [severe] emotional distress and negligent administration of an examination was sustained).

⁹⁹ *Id.*

¹⁰⁰ See, e.g., *Flynn v. Niagara University*, 198 A.D.2d 262, 603 N.Y.S.2d 874 (2d Dep't 1993) (liability may obtain in action brought against security company by third party not in privity when security guards took affirmative action to stop snowball fight); *Guarcello v. Rouse Si Shopping Center, Inc.*, 204 A.D.2d 685, 612 N.Y.S.2d 239 (2d Dep't 1994) (holding no liability for tenant or landlord to third party patron where tenant did not explicitly assume any duty to prevent foreseeable harm to patron, who was assaulted by other youths directly outside tenant's premises).

¹⁰¹ 83 N.Y.2d 579, 634 N.E.2d 189, 611 N.Y.S.2d 817 (1994).

the Court of Appeals announced that it never intended *Eaves Brooks* to apply to personal injury actions. The court wrote that *Eaves Brooks* had involved property damage, and that, as a result, the holding "did not automatically carry over to personal injury claims where other public policies, factors and analytical considerations are in play."¹⁰² In addition, the court stated that the question of whether liability could be imposed for "mere" inaction on the part of a contractor would have to be resolved on a case-by-case basis.¹⁰³ Thus, *Palka* presented a prime opportunity for the court to define a rule, rather than to continue to carve out exceptions to the existing rule.

In *Palka*, a nurse working at Ellis Hospital was helping a patient when a wall fan fell from its mooring, injuring the nurse. She sued Servicemaster for its "negligent or failed performance of the contractual obligations to Ellis Hospital."¹⁰⁴ Two years prior to the accident, Ellis Hospital had contracted out its management services to Servicemaster. The scope of the contract included a duty to "train, manage, and direct" services, specifically including the hospital's maintenance department.¹⁰⁵

In an interesting twist of logic, the court managed to distinguish its own controlling precedent and find in favor of the plaintiff on tort theory rather than contract theory. Judge Bellacosa, writing for a unanimous court, explained that "precedents and principles point the way to [a] determination of whether Servicemaster's duty extends to plaintiff."¹⁰⁶ Additionally, it was adduced at trial that: (1) Servicemaster denied maintenance of the fan was within the scope of its contract; (2)

¹⁰² *Id.* at 587, 634 N.E.2d at 194, 611 N.Y.S.2d at 822.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 582, 634 N.E.2d at 191, 611 N.Y.S.2d at 818.

¹⁰⁵ *Id.*

¹⁰⁶ *Palka*, 83 N.Y.2d at 587, 634 N.E.2d at 193, 611 N.Y.S.2d at 821. This is, once again, an analysis that seems to begin with an inquiry into the duty of a contractor to a third party not in privity, and proceeds to lump together "negligent or failed performance"—misfeasance and nonfeasance—to arrive at an answer to the question of liability in tort. The court's reasoning in *Palka* as a whole is muddy. The opinion discusses tort and contract duties at length, and rather than deciding if Servicemaster's liability was in contract or tort, it cited *Strauss* for the proposition that "the nexus for a tort relationship between the defendant's contractual obligation and the injured noncontracting plaintiff's reliance and injury must be direct and demonstrable, not incidental or merely collateral." *Id.*

it never undertook to repair or maintain the fan that fell; and, (3) there was no contract provision requiring a "general inspection program" including the fan in issue or any other fan in the hospital.¹⁰⁷ Following the precedent of the court to that date, it would appear that since the plaintiff was not in privity with the contractor and the contractor had no duty to the hospital to maintain the fan, and because the plaintiff was not injured as a result of any affirmative act of defendant, no liability should attach. There was also an indemnification clause in the contract between Servicemaster and the hospital, holding Ellis harmless for any acts or omissions of Servicemaster. Thus, plaintiff could have been left without any remedy beyond worker's compensation.

Palka seems like the classic fact pattern crying out for the application of the rule of *Eaves Brooks*, *Moch*, *Strauss* line of cases holding that contractors are not liable to third parties not in privity, especially for "mere nonfeasance."¹⁰⁸ Indeed, the *Palka* court acknowledged that "Servicemaster's responsibility to Ellis Hospital to inspect and repair . . . does not automatically make it liable in tort for this noncontracting plaintiff's injuries."¹⁰⁹

The court began its analysis with the proposition that before liability may attach, a duty must be owed. This, of course, ignores Professor Prosser's admonition that an inquiry into duty at this point begs the question of whether or not the plaintiff possesses a legal interest that is entitled to legal protection. Fortunately for *Palka*, the court found its way through the mine field of precedent and arrived at the conclusion that she was, indeed, entitled to legal protection.¹¹⁰ The court rea-

¹⁰⁷ *Id.* at 584, 634 N.E.2d at 191, 611 N.Y.S.2d at 819.

¹⁰⁸ See *Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928). See also *Strauss v. Belle Realty Co.*, 65 N.Y.2d 399, 482 N.E.2d 34, 492 N.Y.S.2d 555 (1985).

¹⁰⁹ *Palka*, 83 N.Y.2d at 584, 634 N.E.2d at 192, 611 N.Y.S.2d at 820.

¹¹⁰ The court first pronounced that Servicemaster "assumed a duty to act," and this gave Nurse Palka a legal interest that entitled her to legal protection. *Id.* at 583, 634 N.E.2d at 191, 611 N.Y.S.2d at 819. It then held that Nurse Palka proved that Servicemaster's duty extended to her because "she proved not only that Servicemaster undertook to provide a service to Ellis Hospital and did so negligently, but also that its conduct . . . placed Nurse Palka in an unreasonably risky setting greater than that, had Servicemaster never ventured into its hospital servicing role at all." *Id.* at 587. Curiously though, plaintiff's injuries were the result of the contractor's failure to act at all. The court's analysis seems to indi-

soned quite cogently that duty is "not something derived or discerned from an algebraic formula. Rather it coalesces from vectored forces including logic, science, weighty competing socioeconomic policies," and other factors including assumption of responsibility and an injured person's reasonable expectation of the care owed.¹¹¹

In short, the *Palka* court found a way to reach a just decision. Why the court could not do so in the case of Mr. Strauss remains unclear when looking at the positions of the parties involved. In holding Servicemaster liable in *Palka*, the court both cites with approval and distinguishes *Strauss*, *Moch*, *Eaves Brooks*, and similar cases with slight of the judicial hand. In what sounds like a finding of liability in tort rather than contract, the court writes that here "the functions to be performed by Servicemaster were not directed to a faceless or unlimited universe of persons. Rather [they were directed toward] a known and identifiable group" This moves the court into the territory it proclaimed it wanted to avoid in *Strauss*, for *Palka*, if properly applied, opens the door that Judge Kaye was so concerned with keeping closed in *Strauss*.¹¹²

III. POLICY WITHOUT A COMPASS

A. *Palka as the New Standard for Determining Liability in Tort to Third Parties Not in Privity*

It seems obvious that injustice may arise when no liability attaches for a contractor's nonfeasance that injures a third party not in privity.¹¹³ Before the court's pronouncement in

cate that this failure to act rises to the level of "affirmative defective maintenance." Ultimately this holding has elements of quasi-contract, contract, and tort liability, and it is unclear on what theory the court really bases its decision.

¹¹¹ *Id.* at 585, 634 N.E.2d at 192, 611 N.Y.S.2d at 820.

¹¹² Chief Judge Kaye concurred with the opinion of the court in *Palka*. It seems that the *Palka* court adopted sub silentio, if not downright furtively, the position of Judge Meyer's dissent in *Strauss*. This lack of acknowledgment of the *Strauss* dissent might have been executed with deference to Chief Judge Kaye, who authored the *Strauss* majority decision.

¹¹³ In addition to the cases already cited, see e.g., *Strauss v. Belle Realty Co.*, 65 N.Y.2d 399, 482 N.E.2d 34, 492 N.Y.S.2d 555 (1985), there are many more clear examples of the type of injustice that can occur when no liability attaches to

Palka that the defendant impliedly promised to maintain the fan that injured Nurse Palka and then failed to do so, failure to act on a promise did not, in and of itself, create tort liability.¹¹⁴ Indeed, as noted above, the rule before *Palka* seemed to be that when a contractor simply did nothing, and that inaction resulted in real injuries to a party not in privity, that party would be unable to recover damages in contract or tort. The injured party was deemed not to be owed a duty of care by the actual tortfeasor, even though the tortfeasor owed a contractual duty of care to the principal, and the principal owed a common law duty to the injured third party.

B. Beyond *Palka*: Trepidation in Approaching the Slippery Slope

On the one hand, past Court of Appeals decisions state that public contractors owe an affirmative duty to the public even though ordinary contractors do not, and such view is wholly consistent with the recent, "policy-laden" decision making process of *Palka*. On the other hand, the lower courts in New York, without citing or distinguishing the old line of pub-

nonfeasance. See, e.g., *McGowan v. J.H. Winchester & Co.*, 78 F. Supp. 507 (S.D.N.Y. 1948). This 1948 shipping case involved the injury of a third party due to the negligence of a crew member. Applying New York law, the United States District Court for the Southern District of New York quoted the New York Court of Appeals case *Caldarola v. Moore-McCormack Lines*, 295 N.Y. 463, 68 N.E.2d 444, 61 N.Y.S.2d 164 (1946), for the proposition that defendant agents are answerable in negligence to principal employers, but not to third parties where nonfeasance has caused injury.

In *Caldarola* the court found that no duty was owed to plaintiff by the tortfeasor since the plaintiff and the tortfeasor were not in privity. Specifically, a longshoreman plaintiff injured by a boom that a jury found to be defective contended that even though defendants were not in control of the ship at the time plaintiff was injured, the duty to maintain the ship and keep it in good repair that was owed by the operator of the ship to the defendant/owner shipping line extended to plaintiff. The court inferred that the key question in determining liability was control of the ship, and as the defendants had assigned control to an operator, in this case the United States, this was a case of nonfeasance and thus no liability as between the injured third party and the operator obtained due to lack of privity. No privity, no affirmative act, no duty, no recovery. When a contractor is guilty of nonfeasance, New York common law today resembles *Caldarola's* agency treatment of tort liability.

¹¹⁴ As Professor Prosser points out, "[t]here is no tort liability for nonfeasance, i.e., for failing to do what one has promised to do in the absence of a duty to act apart from the promise made." PROSSER, *supra* note 28, § 92, at 657.

lic contractor cases, repeatedly assert that no affirmative duty is owed. In so holding, these courts have ironically held public contractors to a lesser standard than would apply under *Palka*.

This is not the only problem that has resulted from the lower courts in New York reading the *Palka* standard differently, or ignoring it entirely, in recent years. *Ellis v. Peter*,¹¹⁵ for instance, is a case in which the appellate division ignored the direction of *Palka*, dismissing a cause of action brought by a wife who contracted tuberculosis from her husband while he was under defendant's care. The wife alleged that the physician breached a statutory duty to warn those living with a tuberculosis patient of the danger of coming down with the disease.¹¹⁶ The court's rationale seemed to be focused on holding down costs by limiting the scope of potential plaintiffs in cases of this nature.¹¹⁷

While the appellate court expressed a common fear, its conclusion is simply wrong.¹¹⁸ The only rationale offered for its decision is that allowing for liability in this case might open the proverbial floodgates of litigation.¹¹⁹ While the plaintiff in *Ellis* may have had an action in negligence if she could prove that the failure to warn was a proximate cause of her injury—and clearly it was—her action would have failed because

¹¹⁵ 211 A.D.2d 353, 627 N.Y.S.2d 707 (2d Dep't 1995).

¹¹⁶ The trial court sustained the plaintiff's motion to strike the physician's affirmative defenses, which asserted that, since no physician/patient relationship existed between the wife and the defendant, no cause of action was stated by the wife. Defendant cross moved at trial to dismiss the wife's cause of action, and the trial court denied the motion. The second department reversed the trial court's ruling, holding that since no physician patient relationship existed between the wife and her husband's doctor, the doctor therefore had no affirmative duty to warn her of her husband's infectious disease and the risk that she might contract it, and that the doctor had no statutory duty to so warn her.

¹¹⁷ In its analysis, the *Ellis* court cited *Palka* for the proposition that "[i]t is well settled that before a defendant may be held liable for negligence, it must be shown that the defendant breached a duty of reasonable care to the plaintiff." *Ellis*, 211 A.D.2d at 355, 627 N.Y.S.2d at 709. The appellate court reasoned that sustaining the lower court's ruling extending the duty of care to the patient's wife would lead it down a very slippery slope whereupon it "perceive[d] no demarcation of the point where that duty would end." *Id.* And thus, it may become financially burdensome for medical care providers and insurance companies.

¹¹⁸ Liability on this fact pattern exists in a number of states, and financial ruin for insurance companies has not occurred, nor is it even a remote threat. See *supra* note 75, and *infra* note 119 and accompanying text.

¹¹⁹ This is Judge Kaye's expression. See *supra* note 22.

there was no duty on the part of the physician to warn the nonpatient spouse.

The court noted that under facts similar to those before it in *Ellis*, "many foreign jurisdictions would accord the wife a cause of action in common law negligence against the defendant."¹²⁰ However, "the common law of New York State does not impose such a duty" and the court declined to adopt the positions taken in the foreign cases cited in its decision.¹²¹

In rejecting the Second Restatement Torts § 324A standard for analyzing the issue, as well as the foreign precedent presented to it in support of plaintiff's position, the court's 3-1 majority opinion relied on *Madden v. Creative Services*,¹²² a case involving violation of attorney client privilege.¹²³ In *Madden*, the Court of Appeals held that New York did not recognize such a claim in tort, though criminal sanctions would still apply.¹²⁴ Relying on precedents with such disparate facts is an improper way to protect certain interests from imprudent risk management schemes and assessments.

The *Ellis* court continued to express fear of finding that a duty was owed by the physician to the patient's wife, quoting *Madden* and explaining that:

[t]ort liability depends on balancing competing interests: "the question remains who is legally bound to protect [a plaintiff's rights] at

¹²⁰ *Ellis*, 211 A.D.2d at 356, 627 N.Y.S.2d at 710 (citing *Bradshaw v. Daniel*, 854 S.W.2d 865 (Tenn. 1993); *DiMarco v. Lynch Homes-Chester County Inc.*, 559 A.2d 530 (Pa. Super. Ct. 1989), *aff'd*, 583 A.2d 422 (Pa. 1990); *Shepard v. Redford Community Hosp.*, 390 N.W.2d 239 (Mich. 1986); *Bradley Center, Inc. v. Wezner*, 287 S.E.2d 716 (Ga. 1982); *McIntosh v. Milano*, 403 A.2d 500 (N.J. Super. Ct. 1979)).

¹²¹ *Ellis*, 211 A.D.2d at 356-57, 627 N.Y.S.2d at 710-711. The court also declined to adopt the *Restatement (Second) of Torts* § 324A position.

¹²² 84 N.Y.2d 738, 646 N.E.2d 780, 622 N.Y.S.2d 478 (1995).

¹²³ Specifically, plaintiff sued for breach of attorney client privilege based upon a break in to attorney's offices and subsequent copying of his files. The question of whether an intruder's violation of such a privilege gave rise to a tort action was certified to the United States Court of Appeals for the Second Circuit. *Madden v. Creative Services, Inc.*, 24 F.3d 394 (1994).

¹²⁴ *Madden v. Creative Services, Inc.*, 84 N.Y.2d 738, 746, 646 N.E.2d 780, 784, 622 N.Y.S.2d 478, 482 (1995). Chief Judge Kaye stated "a new cause of action will have foreseeable and unforeseeable consequences, most especially the potential for vast, uncircumscribed liability." See also *supra* comment at note 95. Judge Kaye's pronouncement seems to express a fear of returning to the pre-Palsgraf days of analysis in light of foreseeable consequences rather than foreseeable plaintiffs. See *supra* notes 30, 32, and 35 and accompanying text.

the risk of liability . . . [T]o identify an interest in deserving protection does not suffice to collect damages from anyone who causes injury to that interest" Not every deplorable act . . . is redressable in damages.¹²⁵

The notion that not every act that causes injury is redressable in damages is quite reasonable. However, precedent notes that even nonfeasance may rise to the level of an "affirmative act,"¹²⁶ and thus would be redressable in damages. Similarly, the notion that an act is deplorable implies two things: (1) that an act was taken, so there is no question of misfeasance, or nonfeasance; and (2) that such act was egregious and by definition worthy of reproach or blame. Using the court's own reasoning that some instances of nonfeasance rise to the level of an affirmative act, a case may be made that deplorable acts also rise to a level at which they are redressable in damages.¹²⁷

The *Ellis* court's majority opinion is, to date, the best expression of the outrageous condition created by the economic fear of finding liability in a case where an injury results from nonfeasance. Indeed, it approaches the magnum opus fear of liability expressed by the *Strauss* court's majority.¹²⁸

¹²⁵ *Ellis*, 211 A.D.2d at 357, 627 N.Y.S.2d at 710 (quoting *Madden*, 84 N.Y.2d at 746, 646 N.E.2d at 784, 622 N.Y.S.2d at 482).

¹²⁶ See *supra* note 64 and accompanying text.

¹²⁷ To extricate itself from this problem of precedent, the majority then declare that, since the "defendant owed no cognizable duty to the wife, . . . he could not be held liable for the wife's condition, regardless of whether his alleged malpractice may be perceived as negligently impacting upon her." Again, no privity, no duty, no recovery.

¹²⁸ In a recent holding consistent with *Ellis*, *Torres v. Colin Office Serv. Inc.*, 231 A.D.2d 510, 647 N.Y.S.2d 232 (2d Dep't 1996), the second department reversed on the law the trial court's denial of summary judgment to defendant contractor, holding that a janitorial service that contracted to maintain certain premises, which maintenance included cleaning the floors, was not liable to a person who worked in that building who slipped and fell on a puddle resulting from heavy rain and a leak in the ceiling of the building.

The *Torres* court reasoned that the defendant had only limited contractual duties to clean the floor on which [plaintiff] fell. The contract did not specifically state that the defendant was obligated to mop up water accumulation as a result of a longstanding leak in the ceiling . . . [and] although defendant had cleaned away accumulated water on many occasions, it only did so after it was directed to take such action.

Id. This is a very generous reading of circumstances so as to create what seems to be, though the court does not label it thus, nonfeasance. The *Torres* court fur-

In another recent appellate division case, *Torres v. Colin Office Services, Inc.*,¹²⁹ the second department cites *Eaves Brooks* for the proposition that where defendant had no affirmative obligation to prevent a condition, and had no actual notice of, nor any order to remedy the dangerous condition, there is no contractor liability. In so holding, the *Torres* court ignored the more recent rule in *Palka*, and thus offered a prime example of how the confused state of New York law today may leave an injured party without an adequate remedy.¹³⁰

ther held that the repair of the ceiling was the responsibility of the building's managing agent, and that the leak and resulting puddle were longstanding conditions that defendant knew of, but had no duty to prevent or remedy. It is clear from the court's opinion that the managing agent had a duty to repair the leak, and that the contractor had cleaned the floor on numerous occasions prior to the one prompting this action, but the plaintiff had no sustainable cause of action. This is a prime example of the "Peter" principle that "every deplorable act is not redressable in damages." See *supra* note 61 and accompanying text.

¹²⁹ 231 A.D.2d 510, 647 N.Y.S.2d 232 (2d Dep't 1996).

¹³⁰ It may be argued by some that the terms of the contract in *Palka* make that case distinguishable from *Torres*. Specifically, Servicemaster was being paid a very large sum of money to perform its duties. However, according to the opinion of the court, there was always a question as to whether the fan was within the scope of Servicemaster's contract. What the *Palka* court did find was that Nurse Palka and all others who entered the hospital were entitled to hold a reasonable expectation that somebody was responsible for maintaining that fan. This, of course, has nothing to do with the amount of money Servicemaster was paid by Ellis Hospital, and by the same token, Mr. Torres could have been entitled to hold a reasonable expectation that somebody was responsible for mopping up the water from the floor. While the court held that the building's managing agent was responsible for the repair of the ceiling, it also wrote that the cleaning contractor had mopped the water from the floor on numerous occasions. It would not illogical to assume that Mr. Torres relied on that history.

While the second department does not recognize a contractor's liability in tort under the *Torres* facts, in *Flynn v. Niagara University*, 198 A.D.2d 262, 603 N.Y.S.2d 874 (1993), the same court recognized that liability would obtain where a contractor had assumed a duty toward a third party by taking an affirmative action and then negligently performing. However, in *Guarcello v. Rouse Si Shopping Center, Inc.*, 204 A.D.2d 685, 612 N.Y.S.2d 239 (1994), a case decided a few months after *Flynn*, the same court held that where a tenant in a shopping mall hired a security company such tenant did not assume "any duty of care to prevent foreseeable harm to [a] child who was allegedly assaulted" by others loitering in the mall outside the particular tenant's premises, though the court did hold that the tenant may have owed obligations to the landlord, and other issues of material fact existed precluding summary judgment for the landlord, specifically, what duty the landlord owed to protect the plaintiff from acts of third parties. *Id.* at 685, 612 N.Y.S.2d at 239.

The Court of Appeals opinion in *Milliken & Co. v. Consolidated Edison Company of New York, Inc.*¹³¹ cites a line of cases including *Eaves Brooks* as a way of discussing the proposition from *Strauss*, reiterated in *Eaves Brooks*, that "determining the scope of the duty and the consequent sphere of potential liability is fundamentally a policy question, with the objective being to 'fix[] the [entity's] orbit of duty' so as to 'limit the legal consequences of wrongs to a controllable degree.'" ¹³² This, essentially, states that if a finding of liability will cost too much money, or will in some way have the potential to ruin an entity that is vital to public interests, such as a public utility or a municipal corporation, the scope of duty will be carefully circumscribed.

The *Milliken* court acknowledged, but attempted to distinguish, the *Palka* rule. The unanimous decision of the court makes clear its policy: "Applying our benchmarks [as outlined in *Palka*¹³³], we have as a general policy and approach declined to leapfrog duties, over directly judicially related parties, to noncontractually related [parties]."¹³⁴ The court is quite candid about its reasons for this holding. Reaching back to *Strauss v. Belle Realty Co.*,¹³⁵ the court explains that it needed to "contain liability to manageable levels,"¹³⁶ i.e., not allow costs to run too high. This was accomplished in *Strauss* by containing plaintiffs to a more than nebulous "narrowly defined class."¹³⁷

C. *The Restatement Solution*

The Second Restatement of Torts, in sound, linear logic, indicates that the threshold question of whether a duty is owed to a third party must first be answered before examining the

¹³¹ 84 N.Y.2d 469, 644 N.E.2d 686, 619 N.Y.S.2d 686 (1994).

¹³² *Id.* at 477, 619 N.Y.S.2d at 688 (citations omitted).

¹³³ That is, that "the existence and scope of an alleged tortfeasor's duty . . . is [usually] a legal, policy-laden determination dependent on consideration of different forces, including logic, science, competing socioeconomic policies, and contractual assumptions of responsibility." *Milliken*, 84 N.Y.2d at 477, 644 N.E.2d 686, N.Y.S.2d at 689.

¹³⁴ *Milliken*, 84 N.Y.2d at 477, 644 N.E.2d at 690, 619 N.Y.S.2d at 689.

¹³⁵ 65 N.Y.2d 399, 482 N.E.2d 34, 492 N.Y.S.2d 555 (1985).

¹³⁶ *Id.* at 404, 482 N.E.2d at 37, 492 N.Y.S. at 558.

¹³⁷ *Id.*

question of breach of that duty. Keeping in mind that this seems to ignore Professor Prosser's warning that this approach begs the essential question,¹³⁸ indeed, it turns this question on its head, a competent analysis must begin where the state of the law is, not where it ought to be. In New York, when an injury is sustained by a third party not in privity with a contractor, the question of duty owed is currently framed by the court's holding in *Palka* as a pure question of law for the courts to determine.¹³⁹ Unfortunately for injured plaintiffs, it may well be logically impossible to define a duty as existing under those terms, as, *Palka* notwithstanding, where there is no privity of contract, New York law still seems to stand for the proposition that no liability can attach between the contractor and the party not in privity. If this is so, a person who is injured at the hands of a contractor who has not undertaken a duty toward that person is left with a very real injury, but no remedy in either contract or tort, because there is no legal duty owed to that person. In such cases the contract definition of duty defines the tort liability as nonexistent.

The current New York common law duty analysis for the purposes of holding a contractor liable in tort to a party not in privity begins and ends with the questions of privity and whether misfeasance, malfeasance, or nonfeasance has occurred. If a party is in privity, it may be held that a duty is owed and liability attaches if the type of negligence alleged is misfeasance or malfeasance. However, liability will not attach where the alleged negligence arises as nonfeasance. If a party is not in privity, there is by definition no duty owed in contract, and prior to *Palka*, there was no way to find liability in tort.

CONCLUSION

Palka has given New York courts the chance to seize upon precedent and formulate an equitable rule for contractor liability in tort to third parties not in privity of contract. Yet New

¹³⁸ See *supra* note 60.

¹³⁹ *Palka*, 83 N.Y.2d 579, 634 N.E.2d 189, 611 N.Y.S.2d 817 ("unlike foreseeability and causation . . . [duty is] usually a legal, policy-laden declaration reserved for Judges to make prior to submitting anything to fact-finding or jury consideration.")

York jurisprudence purports to have long since done away with the need for privity to hold a contractor liable in tort, and while the language in *Palka* hints at that, no clear test has been posited for holding a contractor liable in tort to parties not in privity.

As convoluted as it is in some places, the *Palka* language is ripe for use in formulating a test for contractor liability in tort that is close to a quasi-contract test. This "quasi-tort" test may be explained as follows: (1) where a contractor owes a duty in contract to a party in privity, that duty will extend to a party not in privity if such party is injured by the negligence of the contractor in either performing or not performing a contracted for task; (2) if a contractor bargains to perform some task, that contractor assumes a duty of reasonable care to all comers; (3) if a person is injured due to reliance upon the contractor's duty of care to the contracting party, the contractor stands liable to the injured party notwithstanding a lack of privity. If this test is reminiscent of a quasi-contract test, that is because the quasi-contract analysis translates perfectly to the problem at hand. If courts want to apply a contract analysis to a situations involving tort liability, then let them apply this equitable "quasi-tort" doctrine. *Palka* seems to tacitly endorse this position, and that is where New York should stand.

As a result of the continuation of an unnecessary distinction between misfeasance and nonfeasance, injured victims of contractors are exposed to a potentially devastating paradox, wherein a very real injury may not be compensable under current law because the contractor neither owes them a duty in contract or in tort. As it stands, for example, a busy building owner who contracts a job to a skilled contractor may not be liable to the plaintiff if said owner hired an expert to perform a certain task and acted reasonably and responsibly in so doing. Meanwhile, the contractor, even if negligent, retains the valid argument that it owed no duty to the third person who is not in privity, and therefore would not be held liable in tort unless it committed an affirmative act to worsen existing conditions, i.e., committed malfeasance or misfeasance, but not for simply doing nothing to prevent an injury, i.e., nonfeasance.¹⁴⁰

¹⁴⁰ In *Palka v. Servicemaster Management Services Corp.*, 83 N.Y.2d 579, 587,

The logic of this scenario leads to a disturbing result. Even though the owner would have been liable in tort had it retained control over the project and then performed poorly, prior to 1990 a potential situation could have existed where a contractor who was negligent owed no duty to an injured party and the party that owed the duty was not, in fact, negligent. Indeed, until 1990, there existed under New York common law situations where there was a duty owed and there was negligence, but potentially no defendant with legal responsibility.¹⁴¹ New York now has the precedent to cure this problem. All that remains necessary is for the legislature to codify the rule or for the courts to adopt the equitable doctrine of quasi-tort, and to consistently apply this most rational doctrine.

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634 N.E.2d 189, 193, 611 N.Y.S.2d 817, 821 (1994), the court pronounced that "[t]he nexus for a tort relationship between the defendant's contractual obligation and the injured non-contracting plaintiff's reliance and injury must be direct and demonstrable, not incidental or merely collateral" (citations omitted).

¹⁴¹ As of 1990, when *Eaves Brooks* was decided, New York held that such an owner would not be held liable in tort for the negligence of the independent contractor unless he expressly agreed to be so liable—and that was not likely to occur.

