nance Corporation." "Don't stay too long!" With that, the justice moved on.

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

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

Anthony Lewis
Cambridge, MA

But-For Wealth and Power

To the *Bag*:

I read with interest and pleasure Jacob Stein's "Laidlaw, Sage, Prosser & Choate" (Winter 2005 issue). And though I don't use *Prosser on Torts* in my Torts course here at George Mason, I make abundant use of *Laidlaw v Sage*, 158 N.Y. 73 (1899) (which, alas, Professor Epstein has not chosen to include in the casebook that my students purchase).

Mr. Stein cites (or rather, has Prossser citing) *Laidlaw* for the "cause-in-fact" proposition sometimes known as the "but-for" rule – The defendant's negligent or intentionally tortious conduct is not a cause of the plaintiff's damage, if the damage would have ensued without it.

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

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

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

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

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

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

Michael I. Krauss
George Mason University School of Law