



Legal History

Mrs. Palsgraf and the Long Island Railroad: Did Cardozo Get It Wrong?

By C. Evan Stewart

The *Palsgraf* decision is one that has perplexed many if not most all first year law students. Written by legal genius and judicial legend Benjamin Cardozo, and hailed by wizened law professors, it is supposed to impart mystical insights into the complexities of the civil tort law system.

Those law students who “get it” are destined to prosper at the bar; those who do not wait in fear that Professor Kingsfield will call them down in front of the class, hand them a dime, and instruct them to call their fathers and tell them they will be pursuing a more suitable career (e.g., flipping burgers, digging ditches, etc.).

What Happened to Mrs. Palsgraf?

On Sunday morning, August 24, 1924, Mrs. Lena Palsgraf



Judge Benjamin Cardozo, photo courtesy Benjamin N. Cardozo School of Law.

and her daughter stood on the station platform in East New York Station, waiting for the Long Island Railroad to take them to Rockaway Beach. As Mrs. Palsgraf waited for her train, another LIRR train started to pull out of the station. Two men, determined to get on that departing train, ran toward it; the first man jumped safely on. The second man, carrying a newspaper covered package, also jumped on but, because it seemed like he might fall, two LIRR guards – one on the train who pulled him, and one on the station platform who pushed him – came to his rescue.

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Unfortunately, in so pulling and pushing the second man, the guards’ efforts led to the package falling onto the rails below. In the package were fireworks; they immediately exploded. The force of the explosion caused a large “penny” scale on the sta-

tion platform, which Mrs. Palsgraf was standing next to, to fall on her, causing numerous injuries.

Mrs. Palsgraf decided to sue the LIRR, and for that task retained Matthew Wills Wood, a fairly prominent New York solo practitioner whose offices were in the "Cathedral of Commerce" (a/k/a the Woolworth Building). Wood initiated a lawsuit in the fall of 1924, seeking the astronomical sum of \$50,000 in money damages.

Assigned to defend the LIRR was William McNamara, a young attorney in the railroad's in-house legal department. Because of congestion in the Second Judicial District's trial calendar, Mrs. Palsgraf's trial did not get underway until May 25, 1927.

The trial itself was pretty straightforward and simple. Mrs. Palsgraf's testimony was the key event of the trial, and it basically came in unchallenged by McNamara.

Importantly for the later appellate opinions, there was no definitive evidence as to exactly how far she was from the package when it was dropped and then exploded; witnesses' testimony (and lawyers' interpretations thereof) differed – from six or seven feet, "about seven feet," "12 feet," 12-15 feet, 29 feet, approximately 30 feet. Medical experts also testified about the nature and extent of Mrs. Palsgraf's physical and neurological injuries.

After Wood rested, McNamara did as well, renewing un-

successfully his prior motion to dismiss. After summations and the court's instructions, the jury retired for two hours and thirty-five minutes (which included lunch); well-fed, the jury thereupon returned a verdict for Mrs. Palsgraf and awarded her \$6,000 in damages.

The Appeal

The LIRR was viscerally disappointed with the verdict and almost immediately filed an appeal in the Appellate Division, Second Department. Oral argument took place on October 21, 1927, with both Wood and McNamara appearing on behalf of their respective clients. Both sides focused on two key questions: (i) was the LIRR negligent?; and (ii) if the LIRR was, did it proximately cause Mrs. Palsgraf's injuries? Needless to say, each advocate answered those questions differently.

In a decision entered on December 19, 1927, the Second Department upheld the result in the trial court by a three to two vote. The majority was not impressed with the LIRR's stressing that the railroad guards were unaware of the explosives, ruling instead that the jury had found them negligent, that Mrs. Palsgraf's status as a LIRR passenger meant that she was entitled to "the highest degree of care required by [the railroad]," and that the guards' negligence had proximately caused Mrs. Palsgraf's injuries.

The dissent accepted that the guards were negligent; it also

agreed that the guards' negligence caused the package to fall and explode. And while the dissent further agreed that the LIRR's negligence "was a cause" of Mrs. Palsgraf's injuries, the dissent would not connect all of the dots, reasoning that her injuries were "too remote" from the negligence to be actionable.

The LIRR immediately appealed from the Second Department's ruling, and oral argument was conducted in Albany before the New York Court of Appeals on February 24, 1928.

Wood and McNamara again appeared as advocates for their clients. Wood argued that all factual issues had been resolved in favor of Mrs. Palsgraf – indeed, not only had the jury weighed in as such, but so had all *five* of the judges in the Appellate Division; he also argued that proximate cause was a factual issue – per prior Court of Appeals' precedent.

The LIRR's position before the Court of Appeals mirrored that which had been argued to the Second Department: the railroad could not be liable to Mrs. Palsgraf given that the guards had no knowledge of the explosives in the package.

As to the Second Department's view that Mrs. Palsgraf was entitled to the "highest degree of care," the LIRR contended that nothing within the control of the railroad (e.g., the cars, the rails, the roadbed, etc.) had a defect which caused Mrs. Palsgraf's injuries.

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Cardozo's Opinion

On May 29, 1928, the New York Court of Appeals handed down its decision: by a four to three vote, the Court overturned Mrs. Palsgraf's two lower court victories. Chief Judge Cardozo wrote the opinion on behalf of the majority. Cardozo's opinion is famous for a number of opaque aphorisms:

- "Negligence is not actionable unless it involved the invasion of a legally protected interest, the violation of a right."
- "One who jostles one's neighbor in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground. The wrongdoer as to them is the man who carries the bomb, not the one who explodes it without suspicion of the danger. Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform."
- "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."
- "[W]rong is defined in terms of the natural or probable, at least when unintentional."

- "Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security. But bodily security is protected, not against all forms of interference or aggression, but only against some."

- "If the harm was not willful, [a plaintiff] must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended. Affront to personality is still the keynote of the wrong."

Beyond the above-cited snippets of legal wisdom/jargon, what is the reasoning behind Cardozo's holding that Mrs. Palsgraf did not have an actionable claim? To this first-year law student (plus 35 years), the opinion seems to have three bases.

The first is that Mrs. Palsgraf only possessed a derivative claim with respect to the LIRR guards' negligence – the civil wrong was done to the package holder and only he would have had a direct claim vis-à-vis the guard's conduct. In such circumstances, the law should only give rights and remedies to those with direct claims.

The second is that where a negligent act is unintentional, a

plaintiff must show that the act had possibilities of danger "so many and apparent." Given that the LIRR guards had no way of knowing what was in the package, their unintended negligence was not so inherently dangerous as to meet the standard articulated by Cardozo.

The third prong of Cardozo's opinion is perhaps the most problematic. Out of nowhere, without citation, and without any related text following thereafter, Cardozo pronounced: "The law of causation, remote or proximate, is thus foreign to the case before us." Why did he pen those words, especially after writing only a few paragraphs earlier that inquiry must be made into whether a wrong is "probable"?

One answer might lie in his frequently repeated factual determination – made *de novo* – that Mrs. Palsgraf was "far away" from the negligent act. The more basic reason for Cardozo's declaration that proximate cause had nothing to do with the case is that, at an October 1927 meeting of the American Law Institute, the great judge had articulated a new theory that there should be no tort duty to an unforeseeable plaintiff. Thus, *Palsgraf* was perfectly timed for Cardozo to establish that theory, one that by definition had to be "foreign" to the doctrine of proximate cause.

The Andrews Dissent

Judge William Andrews did not agree with Cardozo, and wrote a dissent for which he got

two judges on the Court of Appeals to agree with him.

Andrews took direct aim at Cardozo's new theory, arguing that the Chief Judge's relationship-oriented duty was "too narrow a conception." Instead, he wrote that the appropriate duty of care is that "[e]very one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others."

Intent, foreseeability, danger zones, etc. should be irrelevant in considering whether Mrs. Palsgraf had an actionable tort claim (to illustrate these points, Andrews used several scenarios in which a negligent driver caused multiple injuries). What was relevant, contended Andrews – citing precedent and "common sense" – was that (i) "[h]er claim is for a breach of duty to herself" (i.e., it was not a derivative claim), and (ii) her injuries were indisputably caused by the negligent act.

As to the limiting factors on proximate causation, Andrews identified them as "remoteness in time and space." And since in this case, "[t]here was no remoteness in time, little in space," Mrs. Palsgraf's jury verdict should have been upheld.

So Who is Right?

In my book, Andrews (and the majority of judges who passed on this case) got it right. The LIRR guards were in fact negligent and Mrs. Palsgraf's injuries were obviously caused by the exploding package, not-

withstanding the circuitous circumstances by which the scale ultimately fell on her. Tort law today, moreover, does not seem overly concerned with the foreseeability of plaintiffs (see RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES 6 (April 5, 1999)); loss causation, for example, is a much more important (and litigated) issue.

But even if one sides with Cardozo, it has been posited that the *Palsgraf* holding has had "no precedential importance" because of "its freakish facts." Of course, those "freakish facts" are premised on the assumption (as opposed to record evidence) that Mrs. Palsgraf was virtually in the next county when the fireworks exploded. Clearly, that was not the case; but this key evidentiary gap (and the poor lawyering in failing to nail down that issue) allowed Cardozo to pioneer his new theory that still challenges 1Ls everywhere.

Postscript

For those wanting more on the *Palsgraf* case and its place in history, William Manz has written a splendid book entitled *The Palsgraf Case: Courts, Law, and Society in 1920s New York* (2005). For scholarly considerations of the decision, see W. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953); R. Epstein, *Two Fallacies in the Law of Joint Torts*, 73 GEO. L. J. 1377 (1985); G. Calabresi & J. Cooper, *New Directions in Tort Law*, 30 VALPARAISO L.

REV. 859 (1996); E. Weinrib, *The Passing of Palsgraf*, 54 VAND. L. REV. 803 (2001). For excellent biographies of Cardozo, see A. Kaufman, *Cardozo* (1998); R. Polenber, *The World of Benjamin Cardozo* (1997); R. Posner, *Cardozo: A Study in Reputation* (1990). ♦