



Palsgraf

THE REST OF THE STORY

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THE PALSGRAF CASE: COURTS, LAW AND SOCIETY IN 1920s NEW YORK
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EAST NEW YORK, BROOKLYN, became a stagnant ghetto in the 1960's, thanks largely to urbanists' determined efforts to "renew" it.¹ But in August 1924 planners had not yet killed it to save it: East New York was a dynamic, rapidly-growing community of fast-rising tenements housing working-class Italians, Jews, Germans, and Russians who had moved in from Brownsville, Bushwick and other nearby crowded localities. Helen Palsgraf did not hail from East New York – she lived in the more homogenously German area of Ridgewood, straddling the Brooklyn-Queens border. August 24, 1924 was one of the worst days in Helen Palsgraf's life. Her tragedy, of course, became the most famous torts case in American history.²

William Manz, the senior research librarian at St. John's University School of

Law, has done a wonderful service with the publication of this sensitive history of the case. Alas, Professor Manz has not uncovered everything we need to know about Helen Palsgraf. Throughout the book, for example, she is portrayed as penniless. Yet we learn that "by 1927" she was separated from her husband Michael, a striving and ambitious tinsmith. Was she separated in 1924? We don't know, though Manz assumes such. Yet the question is crucial: for Helen Palsgraf might have been a virtually penniless single mother at that time – but maybe she was married with kids. How many kids, by the way – Professor Manz dutifully reports that others³ have declared that Mrs. Palsgraf gave birth to fourteen children, but eleven miscarriages and stillbirths are hard to fathom.

Whatever her socioeconomic and mari-

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- 1 Michael Manville, "Look Back in Anger: An urban scholar lets fly," Review of *How East New York Became a Ghetto*, By Walter Thabit, New York Press, Vol. 16, #34, 2006, available online at: www.nypress.com/16/34/books/books.cfm.
- 2 *Palsgraf v Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (Ct. App. 1928).
- 3 R. Perry Sentelle, *The Perils of Palsgraf: At Large and in Georgia*, Georgia St. B.J., Nov. 1991, at 82.

tal status, however, it is clear that Helen Palsgraf and her daughters Elizabeth (15) and Lillian (12) were en route to Rockaway Beach on Sunday, August 24, 1924. (Oldest child William was of working age at the time of the accident, and was presumably gainfully occupied.) The trio had almost certainly taken the elevated Brooklyn-Manhattan Transportation (BMT) train southeast from Ridgewood to East New York's Atlantic Avenue station, descended the stairs down to the street from those tracks, then climbed up another flight of stairs to the slightly less elevated adjacent tracks of the Long Island Railroad (LIRR), purchased tickets, and awaited the arrival of the next train to the beach. A train came, but it was the wrong one – bound for the commercial hub of Jamaica, Queens, and from there to points North. The Palsgrafs did not board, but two or three "Italians"⁴ carrying very large parcels belatedly tried to get on this Jamaica train as it chugged off. The first one made it on easily. The second one had a harder time, and as he jumped aboard he was at the same time most likely pulled by one railroad conductor while being pushed by another. In the process his package was jarred loose and wedged between the moving train and the wall of the pit in which the tracks were laid. Several large explosions (likely six, but maybe twenty-four, as we will see) followed. Panic and pandemonium ap-

parently ensued, resulting in numerous injuries of varying severity (though Professor Manz inexplicably names no other victim, and makes no mention of any other lawsuit). About ten feet away from the explosion, a large penny scale toppled on Mrs. Palsgraf, who suffered contusions in the short term, and what we would today call post-traumatic stress disorder (stuttering, nervous fits) in the long term.

One similar package (conceivably belonging to the "third Italian", who disappeared from the scene quite as thoroughly as had his two compatriots) was, amazingly, found intact in the station after the conflagration. This package contained six sizeable "pyrotechnic devices" (the neutral appellation seems appropriate, since one man's fireworks are another man's bombs), each 18 inches long and 4 inches in diameter. Professor Manz's helpful research concludes that these were "four-break Italian-style shells, each consisting of one shell (or break) to cause a loud 'salute' and three additional shells to produce the white, green, and red colors of the Italian flag."⁵ The public still feared anarchist bombings (a huge bomb had exploded at the corner of Wall and Broad Streets four years earlier, killing thirty and injuring over 300; thus the bomb squad was quickly called to the East New York station after the incident at hand). Attribution of responsibility for the explosion to fireworks-crazy Italians

4 The great majority of newspapers covering the story reported that the men carrying the fireworks were Italians. As only one eyewitness to the incident ever testified at trial, and as that eyewitness was not an expert on nationality, one assumes the ethnic I.D. was the result of an alleged proclivity of Italian Americans to explode pyrotechnics. Another possibility, though, was that the explosion had been caused by "Italian" gangsters – members of the Black Hand. As Professor Manz points out, this mob link was suggested by William Prosser in *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 2 n.7, apparently without any evidence to back it up.

5 Professor Manz interviewed Philip Butler, president of "Fireworks by Grucci, Inc." See Manz, p. 163 at n.17. Presumably Mr. Butler described these fireworks only because Professor Manz asked him what an "Italian" would be carrying. As noted elsewhere in this review, the "Italian" was never captured or ethnically authenticated. No Italian holiday was being celebrated at the time of the accident, either. Perhaps "Italians" were in fact fun-loving blasters in the mid-1920's, but Prof. Manz gives us no indication that this was the case.

was presumably part of the press's effort to calm readers' fears. Who did bring the "pyrotechnic devices" to the station that day? We just don't know – where is Oliver Stone when we need him?

The great merit of Professor Manz's summary of the *Palsgraf* case is the interesting (though at times partial, as indicated above) portrait of the parties and principal actors in the case. We do meet the Palsgraf family, though here the portrait is two-dimensional and stunningly incomplete. We are introduced at somewhat greater length to the Long Island Railroad, which suffered from poor PR and an even poorer accident record during the 1920's:

A motorman ran a red signal in 1921, crashing into another LIRR train and injuring fifty;

In July 1924 fifty more were injured, and one woman killed, when a worker prematurely threw a crossover switch and derailed a commuter train. The report to the Interstate Commerce Commission stated that the derailed train was traveling in excess of maximum limits. The employee who threw the switch was convicted of involuntary manslaughter;

In April 1926, after the East New York incident that injured Mrs. Palsgraf but before her trial, fifty more were injured⁶ and one man gruesomely killed when a work train backed into a passenger train in Brooklyn.

Four months later an LIRR train derailed and crashed into a pickle factory, killing seven and injuring twenty-eight. (One dead man, a rich industrialist, suffocated in pickle salt.) A grand jury condemned the railroad for negligent training leading to this disaster.

Two months later, in September 1926, a baggage train struck the rear of a rush hour commuter, injuring four.

We are also introduced to the jurist protagonists and to the expert witness. Plaintiff's lawyer, Matthew Wood, was as far from an ambulance chaser as could be imagined. A wealthy man with an office in the world's tallest building (the Woolworth Building), Wood was a Yale law graduate listed in *Who's Who in the East* and *Who's Who in Law*. He was not primarily a tort lawyer. Why then would he take a relatively small case against LIRR, presumably on contingency? How did Helen Palsgraf know him or even find him, destitute (and therefore unfamiliar with the snotty Woolworth Building) as we are led to believe she was? Did Wood receive and reject settlement offers, before or after the jury verdict, from a railroad that must have been very loathe to get before a jury? We never learn the answers to any of these important questions. As for defense attorneys, the Irish-American in-house and outside counsel for LIRR come across as politically astute operatives (they routinely hired retired judges and prominent politician-lobbyists when needed to influence public proceedings) who were utterly insensitive to Mrs. Palsgraf's injuries. Outside counsel Doc Brennan was a skilled defender of LIRR in personal injury cases. Plaintiff's expert witness, Dr. Graeme Hammond, was a remarkable, Oliver-Wendell-Holmesian character – an aristocrat and scholar with "the appearance of a traditional Southern colonel"⁷, who remained socially active to a very ripe old age and who "was greatly disappointed when Prohibition became the law of the land."

6 Professor Manz does not comment on the odd proclivity of the LIRR to instigate accidents that injure exactly fifty people – perhaps this was a 1920's journalistic convention signifying "many injured"?

7 Manz, p. 47 (citing S.J. Woolf, *Hammond Tells What Makes an Athlete* at 80, N.Y. Times, Mar. 13, 1938, at 138).

Professor Manz's most valuable contribution, I think, is the detailed insight into the character of the thirteen judges who heard Mrs. Palsgraf's case (seven of whom rendered decisions favorable to Mrs. Palsgraf). The influence of political machinations in the nomination and subsequent election of the Supreme (trial) Court justice, the five (intermediate) Appellate Division judges and the seven members of the Court of Appeals is fleshed out smoothly and in just the right amount of detail. The significant cases each jurist had decided prior and subsequent to *Palsgraf*, and (to the chagrin of "critical" analysts) the obvious absence of class bias by all thirteen of them appears evident. Remarkably, and refreshingly, all of these folks "called 'em like they saw 'em" in tort suits, sometimes for plaintiffs and sometimes for defendants. Trial judge Burt Jay Humphrey arguably emerges as the most likeable of the bunch, in my opinion. A plain man who was wont to continue milking his cow at home while listening to a lawyer's emergency motion, Humphrey the lawyer had fought hard (and in vain, post-*Plessy*) for a black woman seeking to send her child to the local (white) elementary school. After political connections got him appointed judge, Judge Humphrey's hardest task in *Palsgraf* was deciding whether Mr. Wood had produced any evidence of negligence on the part of LIRR employees. The judge conceded afterwards that his decision – that the jury should be allowed to decide whether pulling and pushing (instead of, presumably, restraining, or at least declining to assist) a man trying to board a moving train was negligence – was a "close" one. So it found, of course – and no surprise there. Railroad lawyers knew and know that if they don't get a tort case taken from a jury they will lose it. LIRR was condemned to pay \$6000 to Mrs. Palsgraf.

Judge Humphrey's cautious decision to let the case get to a jury, despite LIRR's claim that its conductors did nothing wrong, was an admirable one, and I think the only lawful one possible. It reveals a respect for the Common Law and for a jury system that, like it or not, is the way we deal with most tort cases in America. Reading about Humphrey's travails reminded me of Judge Kozinski's decision in *Andrews v United Airlines*.⁸ In *Andrews*, an airline passenger had been hit by an object that fell from an overhead bin upon opening said bin after arrival at the gate. Plaintiff's theory was that the airline was negligent for not having installed nets to prevent baggage that (as we have all heard dozens of times) "may have shifted during flight" from falling. Judge Kozinski was plainly of the personal view that no nets were needed, but opined (with perhaps uncharacteristic restraint) that most jurors have flown on airplanes and can understand the costs and benefits of placing netting in the overhead bin. Similarly, of course, Palsgraf jurors knew railroads, and were clearly well equipped to deal with Mr. Wood's claim that the conductors were negligent to push-and-pull the sprinting "Italian."

Therein lies the most enduring mystery of *Palsgraf* – a mystery that, quite frustratingly, Professor Manz does not elucidate. For having lost at trial, LIRR could prevail on appeal only if it showed that Mrs. Palsgraf had not met her *burden of production* – i.e., that *no* evidence of negligence, or *no* evidence of causation, or *no* evidence of damages to Mrs. Palsgraf, had been produced. The trial judge having decided, in a "close" case, that there was evidence of negligence for the jury to consider, it seemed impossible to prevail on that front without activism of the kind that even Judge Kozinski disdains; thus the railroad apparently didn't try to frame

8 *Andrews v United Airlines*, 24 F.3d 39 (9th Cir. 1994).

its appeal around the negligence issue. Nor could LIRR persuasively claim that no evidence of damage had been produced: the dashing Dr. Hammond closed that avenue by persuasively tracing the cause of Mrs. Palsgraf's nervous disorders. So LIRR's only arguable claim on appeal was that there had been no *causation* as a matter of law. The classic argument would be that an intervening cause (the negligence of the stubbornly unidentified "Italian", running for a train while carrying substantial explosives) severed LIRR's alleged negligence from Mrs. Palsgraf's injury. Two of the five judges in the Appellate Division would have granted the defendant's appeal on this ground, which however had one singular drawback: the Italian's negligence *preceded* the LIRR employees' impugned behavior, a highly unusual "intervening" causal event.

The brief submitted to the Court of Appeals by LIRR's attorneys was virtually identical to that used before the Appellate Division. It focused almost entirely on proximate causation. Its only significant addition was one paragraph addressing the plaintiff's claim (relied on obliquely by the majority in the Appellate Division) that as a paying passenger of a common carrier Mrs. Palsgraf was entitled to the highest degree of care, such that even the slightest negligence would entitle her to judgment.⁹ On this point the railroad meekly countered that Mrs. Pals-

graf had not been "injured by any defect in the cars, roadway, or other appliances of the defendant." (This was a weak argument to be sure, since plaintiff had never alleged that the negligence lay in any of those areas.)

Mr. Wood, quite properly, centered his new brief on the indisputable fact that the Court of Appeals had no jurisdiction over any factual disputes, and that the characterization of the LIRR employees' conduct was clearly a factual question – already decided by the jury and ratified by five Appellate Division judges (all five had stipulated to the railroad's negligence; the dissent relied only on proximate causation, as noted above). On the causation issue, Mr. Wood noted that New York, unlike other states such as Pennsylvania¹⁰, held that proximate cause was a question of fact, not of law: therefore this too had been decided for good at trial.¹¹ Mr. Wood added to his Court of Appeals brief an excellent hypothetical that had been suggested by one of the Appellate Division judges, refuting the LIRR claim that it could not be negligent because it had no knowledge of the content of the "Italian's" large parcel. In the hypothetical, a driver whose car negligently struck a pedestrian with a bottle in his pocket would be liable for injuries caused by the broken glass, despite ignorance of the bottle's presence. This was the coup de grace: LIRR's fate seemed sealed.

Then the waters parted: at New York's

9 Manz, p. 94.

10 See, e.g., *McDonald v Marriott Corp.*, 388 Pa. Super. 121, 125, 564 A.2d 1296, 1298 (1989): "Proximate cause is a question of law to be determined by the court before the issue of actual cause may be put to the jury."

11 Manz p. 94. In his Appellate Division brief, Wood had cited *Saugerties Bank v Delaware @ Hudson Co.*, 141 N.E. 904, 905 (N.Y. 1923), where Chief Judge Hiscock wrote, "ordinarily it is to be determined as a question of fact whether there has been such a connection between cause and effect as to make the former proximate." Before the Court of Appeals, Wood added another citation from *Boyce v Greeley Square Hotel*, 126 N.E. 647, 650 (N.Y. 1920), where Judge Collin wrote, "It is a rule in actions for negligence that it must generally be left to the jury to determine under the evidence the natural, proximate and fairly to be apprehended consequences of the negligence. It is likewise a rule that in actions for acts tortious in character it must be generally left to the jury to determine under the evidence the direct consequences of the acts."

highest court, Judge Cardozo commanded a 4–3 LIRR majority, reaching the same conclusion as the dissent in the Appellate Division but without recourse to any “antecedent intervening cause” weirdness. “[T]he law of causation, remote or proximate, is ... foreign to the case before us” (thus, those pesky state precedents reserving causation questions to the jury need not be addressed), wrote Judge Cardozo.¹² Rather, notwithstanding the fact that no argument to this effect was ever offered by LIRR, Cardozo held that the railroad was not liable to Mrs. Palsgraf because it was not negligent *to her*. This also nicely disposed of Mr. Wood’s bottle hypo – the punctured pedestrian was the primo victim in that instance.

Professor Manz does an excellent job deconstructing the rhetoric of Judge Cardozo’s decision.¹³ Manz persuasively claims that the determinative event of *Palsgraf* was not the trial, or its procedural posture, or any legal argument offered by LIRR. Rather, what decided this case was Judge Cardozo’s attendance at an American Law Institute discussion of the Restatement of Torts held on October 23, 1927, about six weeks before the Appellate Division decided *Palsgraf*. At that meeting, Cardozo supposedly debated Professors Warren Seavey, Leon Green and Francis Bohlen over the following hypotheti-

cal: a negligent driver barely misses pedestrian A, but does strike a box that happens to contain dynamite, which explodes and causes debris to strike a window-washer working ten stories above the street, who falls onto the hapless A. Interestingly, Cardozo apparently expressed the opinion that the negligent driver would be liable to A.¹⁴ (Crucially, no mention is made whether the driver would also be liable to the windshield washer – but I think it would be senseless not to so hold.) The 1927 minutes also indicate that Cardozo disagreed with Judge Learned Hand and Professors Bohlen and Edward Thurston about a second hypothetical: here our negligent driver runs over a box that in fact contains explosives, which explode, wrecking a nearby house. No liability except to the owner of the box, opined Cardozo.¹⁵ This, as Professor Kaufman points out, is close to the *Palsgraf* scenario. Close, but no cigar, except maybe an exploding cigar. For with the aid of maps, drawings, and eyewitness testimony, Manz shows that Mrs. Palsgraf was much closer to the pushing/pulling “incident” than Cardozo portrayed. In fact she was likely about ten feet away, the closest human being to the accident, other than the “Italian” and the conductors. Manz also shows that, despite Cardozo’s insinuation that the “Italian’s” package “fell upon the rails”¹⁶ and was thus

12 *Palsgraf v Long Island R.R. Co.*, 162 N.E. 99, 101 (N.Y. 1928).

13 His task was of course facilitated by, and he freely acknowledged use of, Andrew Kaufman’s definitive biography, *Cardozo* (Harvard, 1998), and Judge Richard Posner’s *Cardozo: A Study in Reputation* (Chicago, 1990), among other works.

14 Professor Kaufman believes that this discussion took place only four years later, at the ALI meeting on Feb. 20–21, 1931. See Manz, p. 96, citing Kaufman, *Cardozo*, 654 n.14. Professor Manz’s sole authority for his claim is a typewritten memo given by Professor Seavey to Professor Robert Keeton in 1956 or 1957, bearing the hand-written (in the 50’s, presumably) date of “around 1926–27?” (Question mark in original). See Manz, p. 158, n.5, citing Keeton, *A Palsgraf Anecdote*, 56 Tex. L. Rev. 513, 514 (1978).

15 American Law Institute, Torts Conference Minutes 39–43 (Oct. 23, 1927), reprinted in Kaufman, *Cardozo*, 291.

16 Note that this rendition of the facts had *nowhere* been reported in the trial testimony. Nor did Cardozo’s claim that Mrs. Palsgraf was “distant”, “far away”, or “far removed” from the *situs* of the explosion have any basis in the trial record. Professor Manz does a service hammering home this point.

run over just like the box in his ALI scenario, in fact the fireworks got wedged between the moving train and the wall of the pit in which the tracks were laid. Any number of packages, not merely firecrackers or bombs, could have exploded when exposed to such tremendous motive force. Worst of all, Judge Cardozo never explicitly characterized the efforts of the conductors to push/pull the "Italian" as negligent, even though the jury so found and the trial judge corroborated. Instead, mimicking the railroad's trial court brief, Cardozo stated that the passenger with the bundle appeared to be in danger of falling. (Thus, the trainmen were rescuing him, saving him gallantly.) Point of order!! This question had already been decided. Judge Cardozo is not the factfinder. Both sides argued the case before the Court of Appeals solely as a proximate cause issue (and on this account Mrs. Palsgraf must surely win, for reasons discussed above). But Judge Cardozo was not about to let pleadings and judicial restraint stand in the way of a path-breaking ruling.

Today, the *Restatement (Second) of Torts* appears to ratify Judge Cardozo's ruling:

If the actor's conduct creates a recognizable risk of harm only to a particular class of person, the fact that it causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not render the actor liable to the persons so injured.¹⁷

But does this do the trick? I think not.

Imagine that the "Italian" himself (not his package) had fallen between the car and the pit wall due to the negligent push/pull. (Remember, the push/pull *was* negligent, Cardozo's flouting of the jury notwithstanding.) What if the train then derailed as it passed over the hapless "Italian"? What if the derailment injured nearby passengers, including Mrs. Palsgraf? Would she have been held, as a matter of law, to be a member of "a different class?" Not a chance, sez me – the "class" would surely have included at least the paying passengers.

Judge Andrews offers a fascinating, almost melancholic, three-judge dissent.¹⁸ It contains the germ of a theory of proximate causation in its suggestion that, when two rivulets' waters mix thoroughly in the mighty river there is, as a matter of law, no longer a proximate origin for each river drop. But until that thorough mixing (that is, while one tributary's brown water is visible in the clear main stream) it is a matter of practical reason (i.e., for the jury) what is the proximate cause of each drop. In *Palsgraf*, instantaneous occurrence and short distance (though even Judge Andrews exaggerated the distance between Mrs. Palsgraf and the conductors;¹⁹ but his guess was much closer to the evidence than was Cardozo's wild overstatement) make the "mixing" far less thorough. Judge Andrews then offered his own hypothetical, proposed by an unnamed "distinguished and helpful writer on the law of torts".²⁰ A chauffeur

17 Restatement (Second) of Torts, 281 cmt. C (1979).

18 Manz, pp. 84–85, gives an informative sketch of Judge Andrews, who grew up in a large mansion in Syracuse, went off to a military boarding school, and received his higher education from Harvard (B.A.) and Columbia (LL.B.). But a wordsmith Judge Andrews was not. Am I the only reader who feels that Andrews knew that Cardozo was pulling a verbal fast one on the court, and tried to say so in his own genteel way?

19 *Palsgraf v Long Island R.R. Co.*, 162 N.E. 99, 105 (Andrews, J., dissenting).

20 *Palsgraf v Long Island R.R. Co.*, 162 N.E. 99, 104 (Andrews, J., dissenting). Keeton, *A Palsgraf Anecdote*, p. 516, suggests that the author of the hypothetical was Francis Bohlen, one of Cardozo's debating adversaries.

negligently collides with another car filled with dynamite, causing an explosion, killing A on a nearby sidewalk, and injuring B and C who are sitting at windows – B in the building across the street, C one block away. The noise also startles D, a nursemaid ten blocks away, who drops her baby. A can recover, Andrews suggested, while C and the baby cannot. As for B, this is for the jury, it was opined. Mrs. Palsgraf was clearly A, or at the very least B, allowing the case to get to the jury, as Judge Humphrey had done.²¹ In any case New York law has since been interpreted to hold that A, B, and C (everyone but the baby) may recover in such instances.²²

The procedural posture of *Palsgraf* and the arguments preserved on appeal all increase the persuasiveness of the *Andrews* dissent. The unprecedented Cardozo opinion, based on a legal position advocated by neither party and phrased so as to avoid established precedents on proximate causation, has apparently never been relied on in any subsequent railroad case.²³ Indeed, as

Professor Manz correctly suggests, the one earlier case that was supportive of Cardozo's opinion is the oft-discredited *Ryan v N.Y. Central R.R.*, which held that a negligently set fire creates liability only for the first building set ablaze.²⁴

Are the mysteries of *Palsgraf* resolved by this literate and entertaining book? Not by a long shot. We need to know why the railroad didn't settle this case, risking a higher jury verdict as it did; why all the others injured in the East New York pandemonium either settled or declined to sue; and why a prestigious lawyer who did not specialize in torts took an obscure, low-value case from a supposedly penniless woman he did not know, in circumstances where no burning social issue was at stake. Everyone involved in the case has since expired (including the Long Island Railroad – it was declared bankrupt in 1965 and was taken over by the state). Mr. Wood practiced law until the end, always in the Woolworth Building, passing at the ripe age of 96 in 1972. With him, perhaps, is gone forever the rest of the *Palsgraf* story. *GPB*

21 I should add that I believe Andrews is wrong about C.

22 *In re Petition of Kinsmen Transit*, 338 F.2d 708, 723–725 (Friendly, J.).

23 Manz, p. 122. Mentioned on that page is one case, *Marengi v New York Transit Authority*, 542 N.Y.S.2d 542, *aff'd* 545 N.E.2d 627 (N.Y. 1989). In *Marengi*, a rampaging passenger barreled over the plaintiff subsequent to the railroad's allegedly negligent act, so this case is a straightforward one of intervening cause.

24 *Ryan v N.Y. Central R.R.*, 35 N.Y. 210 (1866). This case is arguably only supported today in New York and Pennsylvania, and has been roundly criticized.