Cardozo's Statement of Facts in Palsgraf, Revisited

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Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed uneasy as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.

Many lawyers and law students would immediately recognize this passage as Justice Benjamin Cardozo's opening statement of facts in Palsgraf v. The Long Island Railroad Co.1

According to one casebook, it is "probably the best known case in torts,"2 with its analysis of the duty, or lack of it, that a negligent party owes to an unforeseeable plaintiff.

This passage has also served as a pedagogical tool for some teachers of legal writing. They sometimes praise this short, plain statement as the model for lawyers to emulate. However, they may neglect to point out that Cardozo's wordsmithing deserves praise only because it contributes to making his particular argument persuasive. In support of a different argument, this statement could be found wanting. Making this statement a universal exemplar ignores a central principle of appellate advocacy: the statement of facts is not an indifferent appendage to an argument; it is an integral part of the argument. Each argument requires writing a statement of facts in a style tailored to that argument.

True, Cardozo's statement is concise and spare, providing only the facts necessary to permit an informed judicial decision. However, it is ideal only because Cardozo planned to find for the defendant. In this case, Cardozo found against Mrs. Palsgraf, a single parent with three children and an annual income of $416.3 He found for the Long Island Railroad, a business with $114 million in assets and net annual income of more than $4 million.4 Its parent company, the Pennsylvania Railroad Company, had assets of $1.7 billion and a net annual income of $48 million.5

No wonder Cardozo referred to the parties not by name, but as "plaintiff" and "defendant" and set forth the facts in austere language. As a judge, he realized his duty to craft an opinion that would persuade judges and lawyers that he had decided the case correctly. For his decision, he could muster no arguments on the equities. As an advocate, he best served his interest by framing the issue as an interesting, but abstract legal puzzle. Consequently, Cardozo's statement of facts has no more vitality than the illustration in the Restatement of the Law—Torts that it spawned:

A, a passenger of the X and Y Railway Company is attempting to board a train while encumbered with a number of obviously fragile parcels. B, a trainman of the company, in assisting A, does so in such a manner as to make it probable that A will drop one or more of the parcels. A drops a parcel which contains fireworks, although nothing in its appearance indicates this. The fireworks explode, injuring A's eyes. The railway company is not liable to A.6

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4 See Noonan, supra note 3, at 128.
5 Id.
6 Restatement (First) of Torts § 281 cmt. g (1934). Cardozo was present when the American Law Institute advisers met to discuss the Palsgraf case—before the case made its way to the New York Court of Appeals. He remained silent during the discussion and did not vote. See Prosser, supra note 5, at 4-5.
Suppose Cardozo had decided to join the three dissenters on the seven-member court. He then might have proposed a different statement of facts, one that told a story sympathetic to Mrs. Palsgraf. Drawing solely upon the case’s record, he could have introduced facts that might have related to the precise legal issue only marginally, but might sway a judge or other reader uncomfortable with taking away from Mrs. Palsgraf her $6,000 jury award.

Here is the statement of facts Cardozo might have drafted. Of course, it is also the statement that Mrs. Palsgraf’s attorney might have included in his brief.

On a hot Sunday in August, Helen Palsgraf decided to escape her basement flat and take her two youngest children, Elizabeth and Lilian, to the Rockaway Beach. A janitor and single parent with an annual income of $416, she chose the most economical means of transportation, the Long Island Railroad, a subsidiary of the Pennsylvania Railroad. After buying the tickets, Mrs. Palsgraf led her children onto the crowded station platform, 12 to 15 feet wide.

A train stopped at the station bound for another place. Two Italian men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, seemed unstable as if about to fall. In his hurry, he hit a woman in the stomach. A guard on the moving car held the door open and reached forward to help him in. Another guard on the platform pushed from behind.

In this act, the package was dislodged and fell upon the rails. The package was a round or oval bundle, 15 to 20 inches in diameter. In fact, it contained fireworks or some sort of explosive. When the package fell, it exploded.

The Palsgraf family stood near an ordinary penny scale of the type often found on railroad platforms. The explosion either knocked it over or the stampede of the panicked crowd caused it to fall. According to Mrs. Palsgraf: “Flying glass—a ball of fire came, and we were choked in smoke, and I says, ‘Elizabeth, turn your back, and with that the scale blew and hit me on the side.’” She testified: “Well, all I can remember is I had my mind on my daughter, and I could hear her holler, ‘I want my mama!’—the little one [Lilian].”

Mrs. Palsgraf was hit by the scale on the arm, hip, and thigh. About one week later, she began stuttering and stammering. Dr. Graeme Hammond, a prominent neurologist, attributed her condition to traumatic hysteria. According to Dr. Hammond, “It was with difficulty that she could talk at all.”

Mrs. Palsgraf sued for the injuries. At the trial, the jury awarded her $6,000. The Supreme Court Appellate Division upheld the award.

In addition to offering a practical lesson in advocacy, this exercise in revision highlights how malleable narratives are. Adding, omitting, or recasting a few facts can radically change a story and influence how a decision maker resolves a conflict. Yet, an opponent emphasizing different facts can construct a different narrative and contribute to a different outcome. In the words of one contemporary musical group:

Facts are simple and facts are straight
Facts are lazy and facts are late
Facts all come with points of view
Facts don’t do what I want them to
Facts just twist the truth around
Facts are living turned inside out
Facts are getting the best of them
Facts are nothing on the face of things
Facts don’t stain the furniture
Facts go out and slam the door
Facts are written all over your face
Facts continue to change their shape.

7 This was the era of the controversial Sacco-Vanzetti murder case. In 1920, anarchists Nicola Sacco and Bartolo Vanzetti allegedly robbed two men of the payroll of a shoe factory and murdered them. In 1927, still maintaining their innocence, the Italian immigrants were executed. Quaere: In the 1920s, would an advocate be sensitive about invoking a racial or ethnic stereotype?

8 See Prosser, supra note 3, at 3 n.9 ("Notwithstanding all this, it is very probable, in line with the original theory of the plaintiff’s complaint . . . . , that the scale was in fact knocked over by the stampede of frightened passengers . . . .") The record fails to offer evidence on how far the Palsgrafs were from the explosion. See id. at 3 n.9.


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