**Transcript CALI Podcast - Palsgraf v. Long Island RR Co.**

**CALI STAFF**: Hi, my name is Deb Quentel. I'm the Director of Curriculum Development for CALI, and I'm sitting here today with Professor Lawrence Wilkins from Indiana University School of Law, Indianapolis. Welcome.

**PROFESSOR WILKINS**: Thank you. Thank you for inviting me.   
 **CALI STAFF**: You're very welcome. We're going to talk about Palsgraf today. And my first question to you is why is Palsgraf versus Long Island Railroad Company considered to be such an important case? Why does it appear in every torts casebook?

**PROFESSOR WILKINS**: Well, I think the answer to the first part of the question is fairly simple. It addresses a fundamental problem in tort law. How far along the chain of consequences from wrongful conduct are we going to make a defendant liable? If you think about conduct being like a stone that we throw in a pond. It sends out ripples and those ripples will extend as far as the water goes, and the problem that Palsgraf addresses is, are we going to make a wrong-doer accountable for the ripples as far as they go? Or are we going to put some kind of limitations on it? So that's the reason why it's important.

The reason why it is difficult for students in tort law to study the case is that - is actually there are I think three main difficulties.

One is the case appears in a section entitled Proximate Cause. And yet the author of the majority of opinion, Judge Benjamin Cardozo, says rather emphatically that the case is not at all about proximate cause. And then the dissent just as emphatically says, well, yes it is about proximate cause. So there's this disagreement by judges on a very influential court about what the case is really about. And so that poses a difficulty for students.

Second difficulty is implied by what I just said. The writers of the opinions in the case are diametrically opposed. And they are diametrically opposed on this fundamental question. How far along the chain of causation do we hold people accountable?

And the third reason for difficulty that students have is that it involves the often perplexing dichotomy between questions of law and questions of fact.

One reason students often have some problems with the case is that a very prominent jurist, Benjamin Cardozo, has very firm ideas about what the case is not about. And he takes some pains to say this case is not about proximate causation. He says it's not about causation proximate or otherwise. He says the case is about something else.

It's about duty and how we determine the scope of duty. Judge Andrews, Judge William Andrews, the dissenter, said that in he argued very strenuously that duty is almost a universal thing. We owe a duty to the world at large. And so the problem of the case is not going to be decided by deciding the scope of duty. Rather it has to do with proximate causation. Now where they really part company I think is on the question of who should decide these problematic cases.

We've got a case of complicated facts in Palsgraf. A couple of railway employees were helping a passenger who was obviously in a hurry, who was late, who was trying to get on a train as the train was moving. The car that he was trying to get on was crowded with people.

Bulging at the seams, if you will. And if you can imagine there was one railway employee riding on the train helping pull this person onto the car as it was moving along and another pushing the passenger along, trying to get him up on this car. In their helpful conduct, they dislodged the package that the passenger was carrying, and it fell beneath the wheels of the moving car and it turns out that the contents of that package was fireworks and it set off a tremendous explosion. One of the interesting things about the case in the way that Cardozo decided cases was that he left a lot of the details out of the case in his opinion.

The blast was reported by the New York Times. And it reported that 19 people were injured. That the force of the explosion actually blew out a great portion of the platform upon which passengers were standing. And it knocked over a rather sizable scale. So, the article in the Times referred to it as a weighing machine, a penny weighing machine.

A Big heavy thing, it's knocked over. And according to Palsgraf, the plaintiff, she was injured when this scale fell over and knocked against her.

So it was a news worthy case when it happened in Manhattan.

But Cardozo kind of left some of these details out because he was focused on the law. Now, Cardozo believed that matters like this of limiting liability somewhere short of the full extension of cause and effect was so important that it should be decided by judges, as a matter of law. He didn't trust juries to be deciding things about how we're going to be limiting liability as a matter of a broad proposition. And he came up with the idea that the legal concept of duty would be the vehicle by which judges would limit liability and he thought that judges could do it on an objective basis by applying the concept of foreseeability. The famous words that he used in the case was “the risk to be perceived determines the scope of the duty to be obeyed.”

And so he believed that judges could properly determine what were foreseeable risks of conduct and which were not. And if the plaintiff’s injury or the plaintiff them self was outside the scope of this foreseeable risk, then the defendant owed no duty. And of course, liability could not be imposed as a matter of law.

And so for Cardozo, the best way to decide these cases was before they even went to trial. The judge would decide as a matter of law whether the risk was foreseeable or whether the plaintiff was within the scope of that foreseeable risk. And if not, no duty. Plaintiff did not have a prima facie case. The trier of fact would not hear the case.

Andrews believed that we all owe the world at large a duty of care. And that we should leave these questions to the entity in our system of justice that has a good handle on practical politics. He believed that juries are the best agency of our system of justice to decide these difficult questions applying logic, practical politics he called it. A rough sense of justice. For some, and this is one reason why the case is controversial, Cardozo's foreseeable approach is actually fact finding by the judge. And so he is allowing the judge in his foreseeability approach to invade the province of the jury.

On the other hand, critics of Andrews’ opinion say that if you give it to the jury and you instruct them to go back into secret and decide matters on pragmatics, practical politics, and a rough sense of justice, that's essentially a lawless approach. That would lend no predictability to cases. And it was clearly one of Cardozo's objectives to lend some objectivity and predictability to deciding these kinds of cases.

**CALI STAFF**: How do you think the students should approach the case in seeking to understand it and to place it into the larger context of the law of torts?

**PROFESSOR WILKINS**: Well, I think that they are best served if they approach the study of this case in the context of proximate cause with an open mind that there is no single formula for deciding the question of limiting liability.

And first to understand that proximate cause is a limiting concept. It serves the purpose of deciding how far along the chain of cause and effect we should hold someone responsible for their acts. Recognizing that we couldn't possibly hold everyone liable for all possible consequences of what happened.

Otherwise we would actually go back generations and hold parents and grandparents of wrongful actors responsible because they are connected with a cause and effect chain. I think they also should recognize that when this case was decided there was a general ferment there was a lot of dissatisfaction with an ad hoc way of deciding cases like this. That there was a movement afoot to try to identify objective, predictable, stable, patterned way of deciding cases and Cardozo was one of the advocates of that philosophy. Andrews on the other end was probably representative of a competing view, so called realist view.

And so they should approach it from an open mind, put it in historical context and recognize that there is a great deal of room for disagreement.

**CALI STAFF**: That does bring me to my last question actually. This case was decided as you said nearly 80 years ago. How has this debate between Judges Cardozo and Andrews played out in the larger scheme of things?

**PROFESSOR WILKINS**: Well, I would say that the controversy that characterized the opinions themselves and obviously the discussions among the justices of the New York Court of Appeals - that controversy remains. The case really did not resolve the large question as I've suggested earlier - didn't come up with a formula. Cardozo despite his efforts did not persuade very many other courts during his tenure on the court to adopt that approach.

Although the Restatement of Torts, the American Law Institute, in the Restatement First almost immediately adopted it; that could have something to do with the fact that Cardozo was a prominent participant in that conference. But even though the Restatement did adopt his approach, I would say in the long run, Andrews’ approach has found greater favor with a larger number of courts.

I think this pragmatic realists, practical politics approaches has held greater appeal certainly for courts of appeals judges but probably even more so by trial judges. Trial judges don’t want to get themselves in trouble by deciding difficult cases as a matter of law. And so it's an attractive outlet for them to give cases to the jury.

I should add kind of an interesting little sideline to this as we close and that is the relatives of principles in the case – a relative of Judge Cardozo and a relative of Helen Palsgraf – met, fell in love and were married some years ago. It was in the nineties, I believe.

**CALI STAFF**: Well, that's very interesting discourse on the case and its applications. Professor Wilkins, thank you very much for your time today.

**PROFESSOR WILKINS**: I appreciate the invitation.