



An Explosive Chain of Events

BY FRANK GIBBARD

Every law student knows the case of *Palsgraf v. Long Island Railroad Co.*, the famous decision authored by esteemed jurist Benjamin Cardozo.¹ In *Palsgraf*, the New York Court of Appeals considered a defendant's duty of care to parties injured by unforeseeable events. Helen Palsgraf, the plaintiff, was standing on a railroad platform waiting for a train to Rockaway Beach. A passenger train headed for a different destination arrived at the platform. Two men ran to catch the train. Railroad employees helped one of them on board. Unfortunately, their efforts caused the man to drop a package he was carrying that contained fireworks. When the

fireworks fell to the platform, they exploded. The explosion caused scales at the other end of the platform to collapse, injuring Palsgraf. The New York Court of Appeals held that under these circumstances, the railroad employees could not have foreseen the harm suffered by Palsgraf, and the railroad therefore was not legally responsible for her injuries.²

In 1912, the Colorado Court of Appeals considered a liability claim brought by a man named Jonas Bergheim that, like *Palsgraf*, involved a railroad, an explosion, and an attenuated chain of events.³ In the Colorado case, the limits on the defendant's duty were not defined by the law of negligence but by the

terms of an insurance contract. And, under the unique circumstances of Bergheim's case, the court ruled that the plaintiff could recover for his unusual loss.

A Horrific Explosion

In August 1907, switchmen for the Colorado and Southern Railway (C&S) went on strike. The strikers were demanding a two-cent increase in their hourly pay rate. Soon, brakemen and conductors joined the strike in solidarity with the switchmen.

The C&S operated a freight depot in Boulder. In the early morning hours of August 10, 1907, while the strike was still ongoing, a suspicious

fire broke out at the depot. The fire soon reached a boxcar filled with 2,300 pounds of dynamite. The flames ignited the dynamite, causing a massive explosion.

The explosion left a huge crater where the boxcar had stood. The depot, its tracks and buildings, and many other nearby businesses were destroyed or severely damaged. The force of the explosion was felt miles away. Hundreds of windows in Boulder homes and businesses were shattered by the shock wave from the blast.

At least four people died in the cataclysm, and dozens were injured, some of them seriously.⁴ Many of the victims were hurled through the air, one as far as 75 feet, by the blast.⁵ Some had limbs blown off their bodies.

George Whiteley Saves the Town of Boulder

If there was a silver lining to the disaster, it lay in the heroic actions of George Whiteley.⁶ Whiteley, a Rhodes scholar and athletic young man, was the 25-year-old son of M.S. Whiteley, a former mayor of Boulder and hardware dealer. The boxcar that exploded, containing 47 boxes of dynamite each weighing 50 pounds, had been consigned to Mr. Whiteley and was scheduled to be delivered to his “powder house” in the Boulder Canyon when it blew up.⁷

As it happened, however, this boxcar was not the only one consigned to Mr. Whiteley at the depot in Boulder. Another car containing a much larger quantity of explosive—eight tons of blasting powder—was parked at the top of a section of track, within range of the flames. Had that car exploded, the blast could have demolished the City of Boulder.

Before the blast occurred, George Whiteley managed to reach the second car. By then that car, parked on a sidetrack, was already on fire. Showing incredible courage and presence of mind, Whiteley called out to several other men nearby, and together they released the brakes and started the boxcar rolling downhill on the tracks. Whiteley rode atop the boxcar for two blocks as it sped away from the fiery depot. As he rode, the flames from the boxcar licked around his feet. Once the car was safely away from the main fire, he set the brakes and used his coat to successfully put out the flames before they ignited

the blasting powder. In doing so, he saved the City of Boulder from an unimaginable tragedy.

Kiser and Reeves Are Convicted

Soon after the blast, people began speculating that the fire had been deliberately set by the strikers or their allies. Four C&S brakemen were initially arrested but not charged.⁸ The Brotherhood of Railway Trainmen, who had led the C&S strike, suggested defensively that it may have been inexperienced replacement workers whose negligence was responsible for the fire.⁹

Before long, however, authorities settled on two suspects: Frank Kiser and John Reeves.¹⁰ Both of these railroad men claimed they’d been drunk when the fire happened. Kiser said he’d set fire to a piece of trash and carried it with him

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to the caboose of a train parked at the depot, thinking to scare the nonunion men inside the caboose. But he claimed his little fire had been put out before it did any damage.¹¹ For his part, Reeves confessed that he’d put some “oiled waste” under the caboose and ignited it to scare the “scabs,” but he claimed to know nothing about a car with dynamite that was parked nearby.¹²

Kiser and Reeves were charged with murder. A jury found them guilty. The governor later pardoned Kiser, who was viewed as merely Reeves’s accomplice, on Thanksgiving Day in 1911. But Kiser’s freedom was short-lived: he died less than a year later in Utah, where he had been working as a switchman when he was crushed beneath the wheels of a train.¹³

After the explosion, the strike did not continue for long. By mid-August, the parties had settled their differences. The switchmen got their two cents an hour raise, and they went back to work. But the process of sorting out liability from the blast had only begun.

Jonas Bergheim’s Complaint

Newspaper accounts emphasized the damage the explosion did to windows in Boulder homes and businesses, often far away from the depot. One of these victims was Jonas Bergheim. He had insured the plate glass in his building against breakage but was unable to collect on his policy. Several other insureds in the same situation assigned their claims to Bergheim. On December 12, 1907, Bergheim sued the Metropolitan Casualty Insurance Company of New York (formerly known as the Metropolitan Plate Glass and Casualty Company of New York) in Boulder County District Court.¹⁴

Bergheim’s complaint, containing 13 claims, asserted that Metropolitan had insured plate glass that he or his assignors owned against breakage. This glass had been broken by the force of the explosion on August 10, 1907, but Metropolitan had refused to replace the broken plate glass.

In its plate glass insurance policies, Metropolitan had promised to cover “all such loss or damage as shall happen by breakage of the glass” specified in the policies.¹⁵ But the policies excluded loss or damage “resulting directly or indirectly from fire (whether on the premises above described or not).”¹⁶ Metropolitan argued that the breakage resulted from a fire and was therefore excluded from coverage.

But it wasn’t the fire at the depot that caused the glass to break. It was the massive explosion caused by the fire that broke the windows—windows that, in the insureds’ case, were located two to eight blocks away from the depot, far from the flames. Bergheim contended that under these circumstances, the exclusion did not apply. The district court agreed and ruled in favor of Bergheim. Metropolitan appealed.

The Appeal

Metropolitan’s appeal, filed in 1908, was initially assigned to the Colorado Supreme Court. At that

time the Court was the only appellate court of general jurisdiction in Colorado because the Colorado Court of Appeals had been abolished in 1905. But by the time the court of appeals was reestablished in 1911, the Bergheim case was still pending. So, it was reassigned and proceeded to disposition in that court.¹⁷

In their appellate briefing to the court of appeals, the parties marshaled a significant number of cases discussing proximate cause under insurance policy exclusions, usually contained in fire insurance policies. But the court of appeals stated it did not need to consider this case law. Instead, it concluded the issue was resolved by a Colorado Supreme Court case, *German American Insurance Co. v. Hyman*, decided three years earlier.¹⁸

In *Hyman*, a sort of mirror image of Bergheim's case, a fire insurance policy excluded damages caused by explosions unless the explosion triggered a fire and the fire caused the loss. The Colorado Supreme Court had ruled that under this policy,

[i]f the fire preceded the explosion and the explosion was an incident thereto, the fire was the direct or proximate cause of the injury by the explosion, and plaintiff was entitled to recover for his entire loss. But, if the explosion preceded the fire and was not caused by it, plaintiff can, under the express terms of the policy, only recover for that proportion of the damage resulting from the fire alone.¹⁹


Hyman had further distinguished between legitimate and intentional flames, such as a lit cigar or a welding torch, and an unintentional or accidental blaze, ruling that only the latter constituted a "fire" covered by insurance.²⁰ Bergheim attempted to capitalize on this distinction, citing an Iowa case where an insurance policy excluded coverage for damage caused by fire. In that case, leaking gasoline fumes had been ignited by a "legitimate" source of flame, most likely a lit match. The Iowa Supreme Court held the fire exclusion did not apply because there had not been a "fire," only an explosion of the fumes. The court of appeals did not find that case helpful, however, because in Bergheim's case, unlike the Iowa case, the fire (a real, "illegitimate" fire) had preceded the explosion that caused the loss.

In Bergheim's case, the court reasoned, "[t]he dynamite in the freight car was inert, and its explosive potency was latent, until contact with the great heat produced by the conflagration brought into activity its tremendous destructive power. The explosion did not constitute an independent, self-efficient agency, of itself responsible for the damage."²¹ Thus, proximate cause principles did not seem to favor Bergheim's position.

But the court of appeals also considered the interaction of the plate glass policy with other forms of insurance. The reason Metropolitan's policy excluded damage from fire, the court deduced, was that the insureds likely already had fire insurance and the parties wanted to avoid double coverage. But this rationale only worked if Bergheim could have recovered for his damages under a standard fire insurance policy. After surveying cases from several jurisdictions,

the court of appeals concluded that Bergheim would not have been able to recover for his harm under a fire insurance policy, "and therefore [Bergheim's loss] was not the loss or damage resulting directly or indirectly from fire intended by the condition of appellant's policy relied on in defense of this action."²² It therefore affirmed the district court's judgment in Bergheim's favor.

Aftermath

Jonas Bergheim, an early Jewish immigrant who came to Boulder penniless from Germany and later became a successful businessman in the city, died in 1931. In 1908, the Chicago, Burlington & Quincy Railroad bought out C&S, which later merged into the Burlington Northern Railroad in 1981. George Whiteley, the hero of the Boulder train fire, graduated from the University of Colorado College of Law in 1910 and later moved to Nevada. 



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NOTES

1. *Palsgraf v. Long Island RR*, 162 N.E. 99 (N.Y.Ct.App. 1928).
2. *See id.* at 100-01.
3. *Metro. Cas. Ins. Co. v. Bergheim*, 122 P. 812 (Colo.App. 1912).
4. "Day of Death and Disaster," *Daily Sentinel (Grand Junction)* at p. 1, col. 5 (Aug. 10, 1907).
5. "Four Deaths, Two May Die, 28 Are Hurt," *Rocky Mtn. News* at p. 1, col. 3 (Aug. 11, 1907).
6. "Boy Hero Risks Life and Saves the Town," *Rocky Mtn. News* at p. 1, col. 5. (Aug. 11, 1907).
7. *See id.*
8. *Id.*
9. "Railroad and Strikers Ask Investigation," *Rocky Mtn. News* at p. 1, col. 4 (Aug. 11, 1907).
10. "Boulder Explosion Suspects Ready for Trial," *Rocky Mtn. News* at p. 9, col. 1 (Oct. 10, 1907).
11. "Freedom Is Promised Kiser," *Rocky Mtn. News* at p. 1, col. 1 (Aug. 16, 1907).
12. "The Crime Confessed," *Daily Sentinel (Grand Junction)* at p. 1, col. 5 (Aug. 14, 1907).
13. "Frank Kiser Crushed Beneath Car Wheels," *Boulder Daily Camera* at p. 1, col. 2 (Aug. 30, 1912).
14. Complaint, *Bergheim v. Metro. Cas. Ins. Co. v. Bergheim*, available at Colo. State Archives as Colo. Ct. App. No. 3358, R. at 3 through 173.
15. *Bergheim*, 122 P. at 812 (internal quotation marks omitted).
16. *Id.* (internal quotation marks omitted).
17. *See generally* Linz and Munger, "The Early History of the Colorado Court of Appeals," 37 *Colo. Law* 91, 93-94 (Nov. 2008).
18. *German Am. Ins. Co. v. Hyman*, 94 P. 27 (Colo. 1908).
19. *Bergheim*, 122 P. at 813 (quoting *Hyman*, 94 P. at 32).
20. *Id.* This distinction between voluntary and involuntary "fires" was also the basis for a humorous sign seen on Denver's Sixteenth Street Mall shortly after marijuana was legalized in Colorado: "Lost all of my stash in a series of small fires. Please help!"
21. *Id.* at 814.
22. *Id.* at 815.



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