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Torts - Carrier Liability - Duty to Warn Negro Passengers of Southern Traditions

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TORTS — CARRIER LIABILITY — DUTY TO WARN NEGRO PASSENGERS OF SOUTHERN TRADITIONS

Plaintiff, a Jamaican Negro on his first visit to the United States, was touring the country by bus. He was accompanied by his wife, who appeared to be Caucasian, although in fact she was a Negress. While traveling through Florida the bus driver, on the complaint of another passenger, requested them to sit in the rear, which they declined to do. At a rest stop the bus driver discussed the situation with the police, stating that the plaintiff was married to a white woman and pointing her out when she entered the restaurant. A local citizen, who was seated at the same table as the police, overheard this conversation but made no comment. He bought a ticket from the driver, boarded the bus, and assaulted the plaintiff without warning. In a suit for damages against the bus company the United States District Court entered judgment for defendant; the Court of Appeals, *held*, reversed. Where, because of local customs, an assault on a Negro seated in the front of a bus is a foreseeable danger, a public carrier is under a duty to explain to colored passengers who are unfamiliar with southern traditions the reasons why it would be advisable to sit in the rear. Furthermore, a public carrier is under a duty to refrain from either negligently or intentionally making known to potential assailants the presence and position of Negro passengers on the bus. *Bullock v. Tamiami Trail Tours*, 266 F.2d 326 (5th Cir. 1959).

A public carrier is not an insurer of its passengers[1] but is only liable for its own negligence.[2] With regard to dangers that are not inherent in the transportation and are not foreseeable the carrier owes only a duty of reasonable care.[3] However,

1. Martin v. Interurban Transportation Co., 15 La. App. 256 (1930); Tall v. Baltimore Steam Packet Co., 90 Md. 248, 44 Atl. 1007 (1899).

2. This is true, of course, only if the carrier's negligence is the proximate cause of the passenger's injury. Chicago, St. P., M. & O. Ry. v. Elliott, 55 Fed. 949 (8th Cir. 1893); McElvane v. Central of Georgia R.R., 170 Ala. 525, 54 So. 489 (1911); Haley v. St. Louis Transit Co., 179 Mo. 30, 77 S.W. 731 (1903).

3. When dangers arise which are not naturally to be apprehended there is a duty of reasonable care. McBride v. Pennsylvania R.R., 99 N.J.L. 464, 123 Atl. 765 (1924); Terre Haute I. & E. Traction Co. v. Scott, 197 Ind. 587, 150 N.E. 777 (1926). However, the courts often state that the carrier owes a duty to its passengers of "utmost care and diligence," St. Louis & S.F. Ry. v. Murray, 55 Ark. 248, 18 S.W. 50 (1891), or of "the highest degree of care," e.g., Louisville Taxicab & Transfer Co. v. Smallwood, 311 Ky. 405, 224 S.W.2d 450 (1949); Johnson v. Santa Fe Trail Transp. Co., 206 Okla. 455, 244 P.2d 576 (1952). See HARPER & JAMES, TORTS § 16:14 (1956), where it is suggested that the real rule is that the carrier has a duty of ordinary care *under the circumstances*, which, considering modern rapid transportation, will often amount to a very high

where the danger is foreseeable or with reasonable care could have been foreseen, the carrier must exercise the highest degree of care and vigilance.[4] An assault by a fellow passenger is not normally a foreseeable risk of travel,[5] except where there are circumstances which would cause a reasonable man to anticipate the danger.[6] Such circumstances generally involve prior conduct of the assailant, such as boisterousness,[7] fights,[8] and, in some cases, consumption of alcoholic beverages.[9] Knowledge by the carrier of the dangerous propensities of some of its passengers or a showing of a prior history of assaults on the carrier's line in the same geographical area also serve to make such a danger foreseeable. Thus, the conductor who is aware of the presence on the same train of strikers and strike breakers is bound to exercise the highest degree of care and precaution.[10] Likewise, a previous history of fights between white and Negro passengers makes the danger a foreseeable one, even in an instance where the carrier had no knowledge of the particular fight which resulted in the plaintiff's injury.[11] A carrier has also been held responsible for an assault resulting from its failure to obey a statute requiring partition of the coach into white and Negro sections.[12] The theory supporting such liability would seem to be founded upon foreseeability as well as violation of statute.[13]

degree of care. To this effect, see Mayonberg v. Pennsylvania R.R., 165 F.2d 50 (3d Cir. 1957); Kinsey v. Hudson & Manhattan R.R., 130 N.J.L. 285, 32 A.2d 497 (1943).

4. Hoff v. Public Service Ry., 91 N.J.L. 641, 103 Atl. 209 (1918); Penny v. Atlantic Coast Line R.R., 153 N.C. 296, 69 S.E. 238 (1910); Jansen v. Minneapolis & St. L. Ry., 112 Minn. 496, 128 N.W. 826 (1910).

5. Louisville & N. R.R. v. Renfro's Adm'r, 142 Ky. 590, 135 S.W. 266 (1911); Brown v. Chicago, R.I. & P. Ry., 139 Fed. 972 (8th Cir. 1905); Tall v. Baltimore Steam Packet Co., 90 Md. 248, 44 Atl. 1007 (1899).

6. Chicago & A. R.R. v. Pillsbury, 123 Ill. 9, 14 N.E. 22 (1887); Penny v. Atlantic Coast Line R.R., 133 N.C. 221, 45 S.E. 563 (1903), re-decided at 153 N.C. 296, 69 S.E. 238 (1910).

7. McMahon v. Interborough Rapid Transit Co., 59 Misc. 242, 110 N.Y. Supp. 876 (1908).

8. Terrell v. Key System, 69 Cal. App. 2d 682, 159 P.2d 704 (1945); Louisville & N.R.R. v. McEwan, 51 S.W. 619 (Ky. App. 1899).

9. Brown v. Chicago, R.I. & P. Ry., 139 Fed. 972 (8th Cir. 1905); Lige v. Chicago, B. & Q. R.R., 275 Mo. 249, 204 S.W. 508 (1918); Putnam, Adm'x v. Broadway & S. Ave. R.R., 55 N.Y. 108 (1873). Something in addition to mere drunkenness on the part of a passenger is required before the carrier is bound to anticipate that he will become insulting and violent. Great vigilance is required on the part of the carrier's employees, however, to detect any such suspicious conduct. Tomme v. Pullman Co., 207 Ala. 511, 93 So. 462 (1922); Liljegren v. United Rys. Co. of St. L., 227 S.W. 925 (Mo. App. 1921).

10. Chicago & A. R.R. v. Pillsbury, 123 Ill. 9, 14 N.E. 22 (1887).

11. Terrell v. Key System, 69 Cal.App.2d 682, 159 P.2d 704 (1945). See also Louisville & N.R.R. v. McEwan, 51 S.W. 619 (Ky. App. 1899).

12. Mississippi Power & Light Co. v. Garner, 179 Miss. 588, 176 So. 280 (1937).

13. Such laws are now, however, unconstitutional. Interstate transportation:

Once there is a foreseeable danger of assault a public carrier has, as a general rule, a duty to protect its passengers by controlling the conduct of others.[14] In doing this the carrier is required to use all available means of protection.[15] In those cases of a prior history of disturbances, the carrier is required to assure that the means available for such protection are reasonably sufficient under the circumstances.[16] When, however, it is foreseeable that control of the assailant will be impossible, even with the exercise of the highest degree of care, the duty of the carrier is discharged by a warning to the passenger which will allow him to avoid the harm.[17] Thus, it has been held that the duty of a transit company was to warn a Negro passenger that at the destination of the bus a race riot was in progress, a situation in which no amount of protection the carrier could provide would be adequate.[18] In like manner, a cab driver's duty was to forewarn a prospective customer of the strike against the taxi company and the consequent risk involved in traveling in one of the defendant's taxies.[19] There is no duty to warn a passenger of a danger of which he is already aware.[20]

In the instant case the court based its finding of a duty on the fact that the folkways prevalent in that part of Florida would cause a reasonable man "to anticipate that violence might result if a Negro man and a seemingly white woman should ride into the county seated together toward the front part of an inter-

Morgan v. Virginia, 328 U.S. 373 (1946). Intrastate transportation: Browder v. Gayle, 142 F.Supp. 707 (N.D. Ala. 1956), affirmed per curiam, 352 U.S. 903 (1956); Morrison v. Davis, 252 F.2d 102 (5th Cir. 1958), cert. denied, 356 U.S. 968 (1958).

14. Birmingham Ry., Light & Power Co. v. Lipscomb, 198 Ala. 653, 73 So. 962 (1917); Pittsburg, C.C. & St. L. Ry. v. Richardson, 40 Ind. App. 503, 82 N.E. 536 (1907); Pittsburg & C.R.R. v. Pillow, 76 Pa. 510, 18 Am. Rep. 424 (1874).

15. Tall v. Baltimore Steam Packet Co., 90 Md. 248, 44 Atl. 1007 (1899). But see Terre Haute I. & E. Traction Co. v. Scott, 197 Ind. 587, 150 N.E. 777 (1926), to the effect that an employee of the carrier is not required to attempt what is impossible or obviously dangerous. If he sees that he lacks the ability to stop the aggressions of a robber grappling with a passenger, he is not obliged to rush blindly to the defense of that which ordinary common sense tells him he cannot defend. See also RESTATEMENT, TORTS § 348 (1934).

16. Stanley v. Southern R.R., 160 N.C. 323, 76 S.E. 221 (1912); Spires v. Atlantic Coast Line R.R., 92 S.C. 564, 75 S.E. 950 (1912); RESTATEMENT, TORTS § 348 (1934).

17. It must be remembered, however, that a carrier is a public utility and there exists a right to its services on the part of the public and a warning which allows the passenger to avoid the harm only by relinquishing his right of transportation is, generally speaking, not acceptable. RESTATEMENT, TORTS § 348 (1934).

18. Williams v. East St. Louis & S. Ry., 207 Mo. App. 233, 232 S.W. 759 (1921); Indianapolis St. Ry. v. Dawson, 31 Ind. App. 605, 68 N.E. 909 (1903).

19. Rose v. Chicago, 317 Ill. App. 1, 45 N.E.2d 717 (1943).

20. *Ibid.* (dictum).

urban bus."[21] There was no showing of any conduct on the part of the assailant that would have put the carrier's employees on guard, nor was there proof of a prior history of assaults against Negroes on public carriers in that or the surrounding area. On the contrary, as pointed out in the opinion of the lower court, integration in public carriers had been in effect in that part of Florida for approximately four years without a single incident of this kind.[22] Having thus disposed of the foreseeability issue, however, the court found the carrier's negligence consisted of a failure to forewarn the plaintiff of the tradition of segregation in the South, and further, in negligently informing the assailant of the plaintiff's position on the bus and of his color. The duty to warn was twofold, consisting of a duty to instruct the travel agency in Jamaica to inform ticket purchasers of the segregation customs of the South and a duty of the bus driver to explain his reasons for requesting the plaintiff to take a seat in the rear. Assuming arguendo that the danger was foreseeable, it is submitted that this was a proper instance for the application of the duty to forewarn. This would follow from the fact that, although the risk of an assault was foreseeable, the particular assailant was unknown until the moment of assault. To require the carrier to control the assailant in such a case would be clearly unreasonable, for the assault was consummated before the carrier even had knowledge of it.[23] However, there may be some doubt

21. Bullock v. Tamiami Trail Tours, 266 F.2d 326, 332 (5th Cir. 1959).

22. Bullock v. Tamiami Trail Tours, Inc., 162 F. Supp. 203, 205 (N. D. Fla. 1958): "Plaintiffs try to take this case out of the law established in the decision of the Supreme Court of Florida cited above [to effect that if the accident is not foreseeable the carrier is not liable] by arguing that because of the attitude of the South towards integration carriers of passengers should anticipate assaults and adopt measures to protect passengers therefrom.

"The evidence of the case completely refutes the contention of the plaintiffs in this regard. Integration in transportation has now been in effect in Florida and elsewhere in the South for approximately four years and the undisputed evidence in this case is to the effect that insofar as the carriers, both railway and bus transportation, are concerned, this is the only case in which an unprovoked assault of this nature has occurred. In fact, the evidence in this case commends highly the attitude of the public, both colored and white, as to the matter of integration in transportation facilities."

The remark that follows may, however, shed some light on the question as to *why* there has been no trouble. It continues: "The colored people, by an overwhelming majority, prefer to be segregated and voluntarily segregate themselves on public transportation. The testimony is that it is a rare occasion when a colored person, riding on public transportation, insists upon the right to sit among white passengers, but where such right is asserted no violence, except in this case, has ever occurred in this state or any of its adjoining states."

23. Hillebrecht v. Pittsburg R.R., 55 Pa. Super. 204 (1913) (a carrier is not guilty of any negligence in the case of a sudden attack when the assailant had, up until that moment, been quiet and orderly, and the blow was struck quickly and without warning).

as to whether the driver's failure to explain to the plaintiff and his wife why they should sit in the rear was a cause in fact of the injury, for the assailant stated that, to his mind, the fact that a Negro was sitting up front was no more reprehensible than the fact that he was married to a white woman.[24]

As to the bus driver's conversation with the police, it is submitted that if in fact an assault on the plaintiff was foreseeable, the bus driver had a duty to enlist the aid of local law enforcement authorities in protecting the plaintiff.[25] However, if the bus driver was acting out of some other motive or an assault was not foreseeable he was not fulfilling any duty owed to the plaintiff or to the other passengers in speaking to the police, for the plaintiff's seating was no concern of theirs.[26] If the latter is the case, the bus driver's conduct can at best be considered negligent, with resulting aggravation of any danger which already existed. In fact, the court might have been justified in finding that his conduct in informing the assailant and anyone else within earshot of the plaintiff's position on the bus and of his wife's color

24. Bullock v. Tamiami Trail Tours, 266 F.2d 326, 328-29 (5th Cir. 1959). The testimony of the assailant is quoted as follows:

"Q. Mr. Poppell in your testimony in this court yesterday, you stated that you had nothing against colored people? A. That's right.

"Q. You added that if they kept their place? A. That's right.

"Q. Did you attack the Reverend Bullock simply from the fact he was seated on the bus? A. Well, yes. And I wanted to see and as a matter of fact he was with a white woman.

"Q. What do you mean, with a white woman? A. Well, his wife is supposed to be white, I understand.

"Q. Did he [the bus driver] say the man on the bus was married to a white woman? A. I believe he did.

". . .

"Q. Now, of the two things, which do you think is the worse, in your opinion—

". . .

"A. Well, that's about fifty-fifty proposition.

"Q. You mean you don't like either one? A. Either one. Otherwise he was out of his place in my opinion in the front of the bus and he was certainly out of his place being married to a white woman."

25. Spires v. Atlantic Coast Line R.R., 92 S.C. 564, 75 S.E. 950 (1912).

26. Neither state statutes, municipal ordinances, nor carrier regulations can prescribe seating for passengers based upon their race or color, and, with the exception of carrier regulations, this is true whether the passenger is in interstate or intrastate transportation. With regard to state statutes or municipal ordinances requiring segregated seating, see note 13 *supra*.

Carrier regulations requiring segregation in interstate transportation were declared in violation of Section 3(1) of the Interstate Commerce Act in the case of NAACP v. St. Louis-San Francisco Ry., 11 Fed. Carr. Cas. No. 33,403, 1 Race Rel. L. Rep. 263 (1955).

Carrier regulations calling for segregation in intrastate transportation have not yet been tested.

Despite all of this, however, there would seem to be no objection to a suggestion by the bus driver to a colored passenger that he take a particular seat, especially if done to avoid a possible incident.

amounted to a deliberate inciting of the trouble which ultimately did occur.

It is submitted that without a showing of a prior history of assaults on Negroes traveling on integrated buses through Florida the court was not justified in finding such an event foreseeable. Similar findings in future cases could result in imposing a much greater standard of care upon public carriers. This finding did not alter the result of the instant case, however, for the misfeasance of the bus driver was sufficient in itself to support the finding of liability.

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