Louisiana Law Review

Volume 20 | Number 4
June 1960

Torts - Duty of a Commom Carrier to Passenger with Infirmity

Martin Smith Jr.

pressed doubt that mere worry, concern, fear, or humiliation are capable of producing an insanity so intense that the victim will be entirely deprived of his ability to choose between life and death. However, any reluctance resting on such a foundation might be overcome if it were found that suicide by the victim was the very purpose to be served by the defendant's conduct.[8] It is difficult to believe that one who deliberately practices hypnotism, or who plays on his victim's superstitions in order to induce his self destruction would not be held legally accountable for his death whether or not the deceased was actually insane at the time of his suicide. Such a case might be compared to a battery, except that here the defendant would be using the psychic propensities of the deceased as a weapon.

Despite the tendency of courts to refuse recovery in wrongful death actions involving suicide with no antecedent physical injury, recent developments in the law[9] indicate that a different position might well be taken. Although it is not relied upon in the instant case, the Restatement of Torts[10] has recognized that one who by his extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is liable for the emotional distress and the resulting bodily harm. The cases cited in support of this section indicate that the bodily harm protected against is usually physical illness such as paralysis, heart attack, or miscarriage resulting from the emotional distress.[11] It would seem that insanity could easily fall within the protection of the same rule. It is submitted that, once liability for insanity is established, the situation is similar to the physical injury cases, and a death resulting from an irresistible impulse induced by the insanity should therefore be compensated.[12]

Edward C. Abell, Jr.

TORTS — DUTY OF A COMMON CARRIER TO PASSENGER WITH INFIRMITY

Plaintiff's intestate was a passenger in defendant's subway car which remained stalled in a tunnel for almost two hours after

8. See RESTATEMENT, TORTS § 280 (1934).
9. See Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956).
10. RESTATEMENT, TORTS § 46 (Tent. Draft No. 1, April 5, 1957).
11. Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920); Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916); Rogers v. Williard, 144 Ark. 587, 223 S.W. 15 (1920); Johnson v. Sampson, 167 Minn. 203, 208 N.W. 814 (1926); Janvier v. Sweeney, [1919] 2 K.B. 316; Wilkinson v. Downton, [1897] 2 Q.B.D. 57.
12. See RESTATEMENT, TORTS § 455 (1934).

a power failure caused by defendant's negligence. After approximately one hour of being exposed to the hot, humid, smoky atmosphere in the crowded car, the passenger, who suffered from a heart condition, had an attack and subsequently died. The jury's verdict for the plaintiff was set aside by the Superior Court. On appeal to the Massachusetts Supreme Court, *held,* affirmed. A common carrier's liability for defective works and crowded conditions extends only to probable consequences to persons of ordinary and normal health.[1] *O'Leary v. Metropolitan Transit Authority,* 159 N.E.2d 91 (Mass. 1959).

In general, common carriers owe a duty of utmost care and diligence to their passengers.[2] They are liable for the slightest negligence, but are not insurers.[3] If the carrier knew or should have known of a passenger's delicate or unusual condition, the carrier may be required to give the passenger special attention and care.[4] A somewhat different problem is presented when the carrier has no actual or constructive notice of the passenger's delicate condition.[5] In such cases, a majority of the courts have held common carriers liable for physical injuries to persons in a delicate condition even though persons in ordinary health would not have been injured.[6] Since carriers undertake to provide

1. The court added, quoting from Silver v. New York Central Ry., 329 Mass. 14, 105 N.E.2d 923 (1952): " 'Except possibly where [it, as] a common carrier has or reasonably should have, particular knowledge of a passenger's delicate condition.' " 159 N.E.2d 91, 94 (Mass. 1959). No notice of the passenger's condition was had in the instant case until the occurrence of the heart attack. Although the issue of care after notice of the illness was raised, it will not be discussed at length in this Note. See note 4 *infra.*

Res ipsa loquitur is frequently available in common carrier cases. For the development of res ipsa loquitur in common carrier cases, see Prosser, *The Procedural Effect of Res Ipsa Loquitur,* 20 MINN. L. REV. 241, 260 (1936).

In Louisiana the liability of a common carrier is similar to that of an innkeeper. LA. CIVIL CODE arts. 2751, 2752, 2754, 2965-2971 (1870). See Hollinquist v. K.C.S. Ry., 88 F. Supp. 905 (W.D. La. 1950); Hopper v. Shreveport Ry., 51 So.2d 845 (La. App. 1951).

2. E.g., Callaway v. Hart, 146 F.2d 103 (5th Cir. 1944); Mosley v. Teche Lines, Inc., 232 Ala. 110, 166 So. 800 (1936); Dilley v. Baltimore Transit Co., 183 Md. 557, 39 A.2d 469 (1944); Pitcher v. Old Colony St. Ry., 196 Mass. 69, 81 N.E. 876 (1907). See 10 AM. JUR., *Carriers* § 1246 (1937).

3. E.g., Tall v. Baltimore Steam Packet Co., 90 Md. 248, 44 Atl. 1007 (1899); Palmer v. Pennsylvania Co., 111 N.Y. 488, 18 N.E. 859 (1888). See 10 AM. JUR., *Carriers* § 1247 (1937).

4. E.g., McMahon v. New York, N.H. & H. R.R., 136 Conn. 372, 71 A.2d 557 (1950); Carroll v. St. Paul Union Depot Co., 164 Minn. 28, 204 N.W. 470 (1925); Talbert v. Charleston & W.C. Ry., 75 S.C. 136, 55 S.E. 138 (1906).

5. Cases involving emotional distress and physical consequences are not discussed here. Spade v. Lynn & B. R.R., 172 Mass. 488, 47 N.E. 88 (1899), is the most often cited case in this area. An interesting case was presented in Louisville & Nashville R.R. v. Brewer, 147 Ky. 166, 143 S.W. 1014 (1912) (the child born to a pregnant woman frightened by a lunatic was said to act like the lunatic).

6. E.g., Allison v. C. & N.W. R.R., 42 Iowa 274 (1875) (arm previously injured was broken in train wreck); Owens v. Kansas City, St. J. & C.B. R.R., 95

transportation for the public at large, this necessarily involves risk to an indeterminate group of persons whose conditions, physical and mental, vary widely.[7] The courts, therefore, have required common carriers to take into account the fact that feeble or infirm persons may be among this group.[8]

An important distinction is made regarding the duty of the carrier to provide heat for its passengers. The carrier has a duty to exercise at least reasonable care to provide sufficient heat in its vehicle, for the reasonable comfort and safety of passengers therein.[9] If a carrier has no notice of a passenger's weakened condition, recovery for injury can be had only if there is not sufficient heat for a person in ordinary health.[10]

In the instant case the court concluded that a common carrier owed no duty to an infirm person for injuries incurred during a delay in transit, unless a person in ordinary health would have been injured. The plaintiff failed to sustain the burden of proving the conditions would have been harmful to a normal person. In formulating this duty, the court relied exclusively[11] on *Silver v. New York Central Ry. Co.*[12] It is significant that the *Silver* case involved the duty of a carrier to provide heat to its passengers. As has already been pointed out, the duty of a carrier is different in heat cases, although the reason for such a difference is not clear from the cases. The explanation may stem from the fact that persons have varying predispositions to heat and cold. If the carrier were to undertake to heat his cars so that persons sensitive to cold would be comfortable, discomfort or injury might occur to those persons sensitive to heat. The question then involves the actual amount

Mo. 169 (1888) (back injury aggravated when conductor assisted passenger from moving train); Shenandoah Valley R.R. v. Moose, 83 Va. 827, 3 S.E. 796 (1887) (diseased hip broken when passenger thrown from seat after collision). See 13 C.J.S., *Carriers* § 694 (1939). *But cf.* 10 AM. JUR., *Carriers* § 1273 (1937) (the cases cited deal with emotional distress or where the carrier had or should have had notice of passenger's infirmity or the supplying of heat to passengers).

7. See 2 HARPER & JAMES, TORTS § 16.12 (1956). *Cf.* Holton v. Boston Elevated Ry., 303 Mass. 242, 245, 21 N.E.2d 251, 253 (1939).

8. Allison v. C. & N.W. Ry., 42 Iowa 274 (1875); East Line & R.R. Ry. v. Rushing, 69 Tex. 306, 6 S.W. 834 (1887); Sawyer v. Dulaney, 30 Tex. 479 (1867). See 13 C.J.S., *Carriers* § 694 (1939).

9. E.g., Bulloch v. Missouri, K. & T. Ry., 171 S.W. 808 (Tex. 1914). See Annot., 33 A.L.R.2d 1358 (1954), 33 A.L.R. 168, 172 (1924). *But see* Owen v. Rochester-Penfield Bus Co., 304 N.Y. 457, 108 N.E.2d 600 (1952); St. Louis S.W. Ry. v. Rutherford, 184 S.W. 700 (Tex. 1916).

10. See note 9 *supra*.

11. The court did cite additional authority but for a different proposition. See note 1 *supra*.

12. 329 Mass. 14, 105 N.E.2d 923 (1952).

of heat to be supplied to passengers and not the degree of care to be used. Since it would be impossible to satisfy the needs of everyone, it would seem that the only reasonable course of conduct a carrier could take would be to provide heat for persons of ordinary sensitivity.[13] This is distinguishable from the duty owed by a carrier in other situations such as avoiding accidents and undue delays where the exercise of care operates for the benefit of all passengers regardless of their health conditions.

It is submitted that the carrier should be liable for injuries to feeble or infirm persons in its general operations even though no injury would have resulted to persons of ordinary health. It is true that they have not been so held in the "heat cases," but these should not be extended, for the reasons indicated. The common carrier serves a large, indeterminate group of individuals and should conduct its operations with care consistent with the knowledge that some of its passengers may be feeble and infirm.

Martin Smith, Jr.

TORTS — FIREARMS — LIABILITY FOR SALE TO MINOR IN VIOLATION OF CRIMINAL STATUTE

Plaintiff, a sixteen-year-old minor, sued to recover damages for the loss of his thumb caused by the accidental discharge of a rifle sold him by defendant. The sale was made in violation of a city ordinance which prohibited the sale of deadly weapons to minors under seventeen, and of a state statute which proscribed the sale of any pistol, repeating rifle, bowie knife, brass knuckles, or sling-shot to any minor. The trial court excluded the defense of contributory negligence[1] and granted plaintiff's motion for summary judgment. The district court of appeal affirmed the granting of the motion for summary judgment holding that defendant's violation of the statute and ordinance amounted to negligence in itself. The trial court's rejection of the defense of contributory negligence was affirmed on the ground that the statute and the ordinance were designed to protect minors against their own carelessness. On certiorari to the

13. Stated differently, the risk of injury to the class of passengers sensitive to cold cannot be protected by any course of conduct of the carrier without the possibility of endangering that class of passengers sensitive to heat. See Annot., 33 A.L.R.2d § 1358 (1954).

1. The defense was grounded on defendant's carelessness in holding the barrel of a rifle he knew to be loaded while riding in an automobile.