

December 1942

Public Utilities--Respondent Superior Plus Nondelegable Duty to Protect Patrons

Thomas P. Hardman

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Torts Commons](#)

Recommended Citation

Thomas P. Hardman, *Public Utilities--Respondent Superior Plus Nondelegable Duty to Protect Patrons*, 49 W. Va. L. Rev. (1942).
Available at: <https://researchrepository.wvu.edu/wvlr/vol49/iss1/6>

This Editorial Notes is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

West Virginia Law Quarterly

and The Bar

Published by the Faculty of the College of Law of West Virginia University, and issued in December, February, April and June of each academic year. Official publication of The West Virginia Bar Association.

Subscription price to individuals, not members of The West Virginia Bar Association, \$2.00 per year. To those who are members of the Association the price is \$1.00 per year and is included in their annual dues. Single copies, 50 cents.

BOARD OF EDITORS

Faculty of College of Law, *ex officio*

EDITOR IN CHARGE

CLYDE L. COLSON

BUSINESS MANAGER

LOUISE FARRELL CONAWAY

ASSOCIATE STUDENT EDITORS

GRACE WESTFALL EDGEELL, *President*

DOROTHY VIRGINIA BROWN, *Secretary*

GILBERT SMITH BACHMANN

DONALD CLYDE HOTT

LOUIS ECKERT BLACK

KENNETH JACKSON VANCE

PUBLIC UTILITIES — *RESPONDEAT SUPERIOR PLUS* NONDELEGABLE DUTY TO PROTECT PATRONS

MUCH difference of opinion exists in the cases as to the nature and extent of the duty of a public utility to its patrons. When, for example, a passenger in a taxicab is injured by the outrageous acts of the driver, is the taxicab company's liability governed by the duty to use due care ["the utmost care compatible with driving"¹] together with the doctrine that a principal is liable for the acts of an agent only when done within the scope of his employment? Or is there an additional extraordinary duty—a *suī generis* nondelegable duty—which not only transcends the doc-

¹ The standard of care required in West Virginia in this class of cases is the "utmost care compatible with the practicable operation of the vehicle." See, *e. g.*, *Venable v. Gulf Taxi Line*, 105 W. Va. 156, 141 S. E. 622 (1928); *Gilmore v. Huntington Cab Co.*, 21 S. E. (2d) 137 (W. Va. 1942). In order to measure up to the standard of "due care", a common carrier must, as the courts often put it, exercise a so-called "highest degree of care" or the utmost care compatible with the operation of the particular mode of transportation. Sometimes this measure of care is dealt with as something more than "due care".

trine of *respondet superior* but materially limits the applicability of the ordinary defenses of contributory negligence and assumption of risk?

Several West Virginia decisions, including one handed down on August 1, 1942,² aptly illustrate the pertinency of these questions. In one of the earliest cases in point, a case decided in 1890,³ a brakeman on a train wantonly assaulted a passenger. The principal was held liable. The basis of liability was not, however, stated by the court.

What then is the nature of the duty which is breached in such a case? Suppose that the assault has nothing whatever to do with the work which the particular agent is employed to do. Thus in a leading case a conductor kissed a female passenger without her consent. Clearly the conductor's act was not within the scope of his employment; he was "on a frolic of his own". Therefore the ordinary doctrine of *respondet superior* would not impose liability. Yet the principal was held responsible.⁴ Similarly where a porter on a Pullman car criminally attacked a girl.⁵ So, too, in an important West Virginia case in which a railroad company was held liable to a passenger for an insult by a conductor though the insulting act was unattended by physical injury or deprivation of the transportation which the passenger sought.⁶ Likewise, to cite only one more of numerous examples in point,⁷ where a telegraph agent used indecent language to a patron, the utility was held liable even though no one else heard the insult.⁸

The nature and extent of this stringent duty are illuminatingly indicated in a comparatively early West Virginia case in which the court used the following language:

"It is among the implied provisions of the contract between a passenger and a railway company that the latter has employed suitable servants to run its trains, and that passengers shall receive proper treatment from them; and a violation of

² *Gilmore v. Huntington Cab Co.*, 21 S. E. (2d) 137 (W. Va. 1942).

³ *Ricketts v. Chesapeake & Ohio R. R.*, 33 W. Va. 433, 10 S. E. 801 (1890).

⁴ *Craker v. Chicago & N. W. Ry.*, 36 Wis. 657 (1875).

⁵ *Campbell v. Pullman P. C. Co.*, 42 Fed. 484 (N. D. Iowa 1890).

⁶ *John v. Baltimore & O. R. R.*, 82 W. Va. 149, 95 S. E. 589 (1918).

⁷ See, e. g., *Nichols v. Camden Interstate Ry.*, 62 W. Va. 409, 59 S. E. 968 (1907); *Teel v. Coal & Coke Ry.*, 66 W. Va. 315, 66 S. E. 470 (1909); *McDade v. Norfolk & W. Ry.*, 67 W. Va. 582, 68 S. E. 378 (1910); *Turk v. Norfolk & W. Ry.*, 75 W. Va. 623, 84 S. E. 569 (1915). But cf., *McKain v. Baltimore & O. R. R.*, 65 W. Va. 233, 64 S. E. 18 (1909).

⁸ *Buchanan v. Western Union Tel. Co.*, 115 S. C. 433, 106 S. E. 159 (1920). Cf. *Dunn v. Western Union Tel. Co.*, 59 S. E. 189 (Ga. App. 1907).

this implied duty or contract is actionable in favor of the passenger injured by its breach, though the act of the servant was willful and malicious, as for a malicious assault upon a passenger committed by any of the train hands, whether within the line of his employment or not. The duty of the carrier towards a passenger is contractual, and among other implied obligations is that of protecting a passenger from insults or assaults by other passengers or by their own servants.' 2 Wood, R'y Law, p. 1194. *There is no inquiry in such case as to whether the wrong to the passenger is within the scope of his authority, or whether his act is wanton.*'⁹

To be sure, we realize today that this extraordinary duty of a public utility to its patrons is *relational* rather than contractual, *i. e.*, it arises out of the peculiar relation existing between public utility and patron and is not dependent on contract.¹⁰ But otherwise this West Virginia statement of the duty is fairly representative of the better view.¹¹

This duty of a common carrier is therefore more than a duty to use care; it is more than a duty to use the utmost care compatible with the operation of the particular mode of transportation; it is this and more: it is an affirmative duty to provide such protection for the patron as is reasonably practicable.¹² And this duty is non-delegable, *i. e.*, the one operating such a public service cannot escape responsibility for the proper performance of this duty by delegating the duty to an agent.¹³ Therefore if one who undertakes such a public service turns the performance of it over to another he is responsible for the proper carrying out of this duty precisely as if he had performed the service in person and had himself breached the duty.

The extraordinary nature of this duty has been further indicated by the Supreme Court of Appeals of West Virginia in the

⁹ Bess v. Chesapeake & O. Ry., 35 W. Va. 492, 494, 14 S. E. 234 (1891). Italics ours.

¹⁰ See 1 WYMAN, PUBLIC SERVICE CORPORATIONS (1911) §§ 331, 333 *et seq.* See also POUND, THE SPIRIT OF THE COMMON LAW (1921) 29. ". . . we have established that the duties of public service companies are not contractual, as the nineteenth-century sought to make them, but are instead relational; they do not flow from agreements which the public servant may make as he chooses, they flow from the calling in which he has engaged and his consequent relation to the public."

¹¹ See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, c. 27; 1 RESTATEMENT, AGENCY (1933) § 214, including Comment.

¹² See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, c. 27. See particularly Bess v. Chesapeake & O. Ry., 35 W. Va. 492, 14 S. E. 234 (1891) quoted *supra* at note 9.

¹³ See 1 RESTATEMENT, AGENCY § 214, including Comment.

case of *John v. Baltimore & Ohio Railroad Company*, decided in 1918.¹⁴ Said the court:

“A breach of the obligation of a common carrier to its passenger, working injury to him, is a cause of action standing upon a higher plane than that of one arising from an injury by mere negligence, because the relation subsisting between them is founded upon a direct, special and personal obligation, peculiar in its nature, and not upon general law constituting the basis of the relation subsisting between many other persons, such as neighbors or strangers, who stand upon an equal footing and deal with each other at arm’s length, wherefore conduct on the part of a carrier working grievous injury only to the feelings and sensibilities of a passenger is actionable.”¹⁵

Because, as the West Virginia court puts it, a public utility and its patron do not “stand upon an equal footing and deal with each other at arm’s length” and “because the relation subsisting between them is founded upon a direct, special and personal obligation, peculiar in its nature, and not upon general law”, it would seem to follow that the “general-law” defenses of contributory negligence and assumption of risk may well have a somewhat more limited application in public utility law than in ordinary private law. If, for example, a passenger in a taxi observes that the lights are defective, continuing the journey with such knowledge does not *per se* amount to contributory negligence and therefore bar recovery for personal injury due to driving with improper lights.¹⁶ The affirmative nondelegable duty to provide such protection for the patron as is reasonably practicable gives the passenger a right to assume that the authorized operator of the vehicle will fully perform this duty.¹⁷ Said the court in this case:

“Complaint is made of the refusal of the [trial] court to give an offered instruction on contributory negligence, it

¹⁴ 82 W. Va. 149, 95 S. E. 589 (1918).

¹⁵ Point 2 of the syllabus. At page 151 the court adds: “. . . the principles under which recovery for mental anguish unattended by physical injury is denied in the application of the law of negligence and between persons not peculiarly related, such as mere neighbors or strangers, do not apply. A carrier assumes and holds a legal, economic and social position which brings the traveling public within its own power and influence, as regards their persons and their comforts and conveniences, to a very considerable extent, wherefore it and its passenger do not stand on an equal footing nor deal with each other at arm’s length.”

¹⁶ See *Shelton Taxi Co. v. Bowling*, 244 Ky. 817, 51 S. W. (2d) 468 (1932). In this case, however, there was evidence that the passenger had protested against going further without lights. But after an unsuccessful attempt to obtain lights it seems that he elected to go on.

¹⁷ See *Shelton Taxi Co. v. Bowling*, 244 Ky. 817, 51 S. W. (2d) 468 (1932).

being argued that there was evidence tending to show that appellee elected to continue the journey with knowledge of the fact that the lights were defective. Appellant being engaged in the business of transporting passengers for hire, was a common carrier, *Louisville & N. R. Co. v. Molloy's Adm'x*, 122 Ky. 219, 91 S. W. 685, 28 Ky. Law Rep. 1113; *Anderson v. Yellow Cab Co.*, 179 Wis. 300, 191 N. W. 748, 31 A. L. R. 1197, and therefore under the duty to use the highest degree of care for the safety of its passengers, and 'the highest degree of care' means the utmost care exercised by prudent and skillful persons in the operation of the conveyance. *Louisville & N. R. Co. v. Kemp's Adm'r*, 149 Ky. 344, 149 S. W. 835; *Consolidated Coach Corporation v. Hopkins*, 228 Ky. 184, 14 S. W. (2d) 768. In view of this rule appellee had the right to assume that appellant's driver, whatever may have been the situation, would exercise the care necessary to transport him safely. The driver was not subject to his control, or under his direction, and appellee was under no duty to warn him, or to interfere with his driving. In short, the case is one where appellee did nothing that tended in the least to bring about the accident, and appellant could not transfer to him, a mere passenger, its responsibility for its own neglect."¹⁸

If a passenger's knowledge that the taxicab's lights are defective will not *per se* bar recovery, will his knowledge that the driver is "defective", *e. g.*, intoxicated, constitute either contributory negligence or assumption of risk in case the passenger with such knowledge enters upon or continues upon his journey with such driver? This question was interestingly raised, though perhaps not squarely adjudicated, in a recent West Virginia case.¹⁹ There it was admitted that the driver of a taxicab was intoxicated at the time of the plaintiff's injury which resulted from the overturning of the taxi. Moreover, he became intoxicated in the presence of the plaintiff. Whether the passenger knew, when she entered the cab, that the driver was so drunk that he could not safely operate the car was, however, not altogether clear. But the passenger and the driver had had some intoxicating drinks together.²⁰ Shortly before the car overturned, the plaintiff protested

¹⁸ *Id.* at p. 821.

¹⁹ *Gilmore v. Huntington Cab Co.*, 21 S. E. (2d) 137 (W. Va. 1942).

²⁰ The plaintiff, together with Lafe Clark and Sadie Clark, got in a taxi driven by Himes and started to "Tanner's hamburger stand." "En route there, each of the passengers 'took a little drink of brandy', and, according to the testimony of Sadie Clark and plaintiff, Himes stopped the cab and requested a drink of the brandy, to which request Clark acquiesced.

"There is a conflict in the testimony offered by plaintiff as to what occurred when they reached Tanner's. Plaintiff and Sadie Clark testified that Lafe Clark paid Himes the fare and, advising him that 'we wouldn't be out

to the driver that he was going too fast, and it would seem from the facts in the case²¹ that the passenger probably should have known that the drinking was such that it was calculated to affect the driver's ability to operate the taxi safely.²² The court held, in a three-to-two decision, that the taxicab company was liable.²³

If this decision is supportable — and the weight of authority tends to support it²⁴ — the conclusion must be justified, it would seem, on the ground that, because of the affirmative nondelegable duty of a common carrier to protect its patrons so far as reasonably

there but a little bit', asked Himes for his name and number, that Himes then 'got in the cab', that the others went into Tanner's, occupied a booth, and plaintiff and Sadie each ordered a Coca-Cola and Lafe Clark a beer, and 'about the time they brought our order', Himes came in and asked if he might sit with his passengers, and the response being favorable, he joined them. Himes stated, however, that the women preceded Clark into Tanner's and while paying the fare, Clark asked him if he wanted another drink and Himes having answered in the negative, Clark invited him to drink a Coca-Cola. Himes ordered beer. According to him he consumed three or four bottles, while plaintiff and Sadie Clark are positive in their testimony that he drank only one and one-half bottles. The remainder of the brandy was poured into an empty Coca Cola bottle and consumed by the four. . . .

"Between nine and nine-thirty o'clock the three passengers and Himes proceeded to Poe's Raven, located in Wayne County, twelve or fourteen miles from Tanner's. Himes invited Sadie Clark to ride in the front seat with him, while Lafe Clark and plaintiff occupied the rear seat. Plaintiff testified that Himes 'started just like any other cab. And then he speeded.' She estimated Himes' driving at sixty or seventy miles an hour. There was a protest from each of the passengers and a request that Himes drive 'a little slower'. Having complied with the request, Himes then announced that he was 'not going to drive like this', began to speed, and in going around a curve, the car upset."

²¹ See footnote 20 for a detailed statement of the facts.

²² As Fox, J., dissenting, said: "The defendant cab company furnished the plaintiff and her companions a sober driver. He became intoxicated thereafter, and that intoxication resulted from drinking in the presence of the plaintiff, and, if not on the invitation of some members of her party, certainly with her knowledge and acquiescence. I think it clear that the driver was intoxicated at the time of the accident, and whether plaintiff knew that he was actually in an intoxicated condition at the time she entered the automobile with him, subsequent to the drinking of which she had knowledge, is relatively immaterial. She did know of this drinking, and should have known that it was calculated to affect his ability to carefully drive an automobile. In these circumstances, when she entered the automobile driven by him, she assumed the risk, and this bars recovery on her part." Rose, J., concurred in this dissent.

²³ More narrowly stated, and perhaps more accurately, the court held on this point that the "trial court correctly regarded the issue of plaintiff's contributory negligence one for jury determination." The court therefore refused to disturb the verdict of the jury in favor of the passenger.

²⁴ See, *e. g.*, *Morris v. City Transfer & Yellow Taxi Co.*, 220 Ky. 219, 204 S. W. 1030 (1927); *Shelton Taxi Co. v. Bowling*, 244 Ky. 817, 51 S. W. (2d) 468 (1932); 4 *Blashfield*, *Cyclopedia of Automobile Law & Practice* (1935) § 2221. But see, *e. g.*, *Wayson v. Rainier Taxi Co.*, 136 Wash. 274, 239 Pac. 559 (1925); *Arneson v. Buggs*, 231 Wis. 499, 286 N. W. 19 (1939). *Cf.*, also, *Peters v. Monongahela Transport Co.*, 109 W. Va. 417, 155 S. E. 178 (1930); *Koon v. Monongahela West Penn Public Service Co.*, 119 W. Va. 76, 192 S. E. 332 (1937).

practicable, a passenger is under no duty to anticipate a possible breach of this obligation, but, on the contrary, has a right to assume, at least so long as he acts in good faith, that the utility will furnish the protection which it is legally bound to do. Unless the patron may so assume, the result would seem to do violence to the undoubtedly sound theory that public utility and patron do not deal with each other at arm's length. It is largely because of this inequality that the law imposes upon the utility a nondelegable duty to protect the passenger. But an affirmative duty to protect would be an empty obligation unless the person entitled to the protection were accorded a right to place a fair measure of reliance on due performance.

THOMAS P. HARDMAN.