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Public Utilities--Duty of Carrier to Passenger During Transfer

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PUBLIC UTILITIES — DUTY OF CARRIER TO PASSENGER DURING TRANSFER. — The defendant bus company was attempting to maintain service along a highway closed to vehicular traffic by the commonwealth. At one point the highway was impassable, and while making transfer across this place on foot, and under the defendant's direction, the plaintiff fell into a large pit and was injured. The accident occurred at night, and the pit was not marked in any way. *Held*, that while a person is making a transfer, the relation of passenger and carrier continues, and the carrier owes the same "high degree of care" which it owes to all passengers. *Damm v. East Penn Transportation Company*.¹

This seems to be the first case to be decided upon the immediate point.² It is supposed that no one could find any fault with the result reached by the court. However, when laying the basis for the decision, the court quotes with approval from the statement of the lower court, that "when the Defendant Company used such portion of the highway as had been determined by the authorities 'not in use', the Defendant Company was in the same position as if it had provided its own way . . ." ³ It appears quite clear that whether the bus company was responsible for the condition of the highway is immaterial to the decision of the case. However, the question which immediately arises is whether the court, in attempting to restrict the decision and make it certain, did not arrive at too broad a statement of the duty that the carrier owes. While it is conceded that the bus company should be held to a duty to use due care in providing for the transportation of passengers, identical with that to which the railway or traction company is held, it will be observed, in reality, that the bus company does not, in any instance, provide its own way in the sense that these other carriers do. May a bus company be held for the maintenance and repair of its way in the same sense, and to the same extent, as these other carriers?

If any liability is to be placed upon a public carrier, it must arise from the violation of the duty that the carrier owes the passenger. This duty the courts have stated in various ways. The carrier, it is said, is not an insurer of the safety of the passenger,⁴

¹ 120 Pa. Super. 381, 182 Atl. 720 (1936).

² No other cases were found in the digests where the duty of a bus company to a passenger during transfer was adjudicated.

³ *Damm v. East Penn Transp. Co.*, 120 Pa. Super. 381, 382, 182 Atl. 720 (1936).

⁴ *Mannon v. Camden Interstate Ry. Co.*, 56 W. Va. 554, 49 S. E. 450 (1904); *Connell's Ex'rs v. Chesapeake & Ohio Ry. Co.*, 93 Va. 44, 24 S. E. 467 (1896).

and neither need the duty run into unreasonableness or impossibility.⁵ Various courts state the duty of the carrier as "the highest degree of care known to human foresight",⁶ "the greatest possible care and diligence",⁷ "extraordinary care and caution",⁸ "extraordinary diligence",⁹ "the highest degree of care and diligence";¹⁰ or state the duty in the negative, that the slightest imputation of negligence against which human care and skill can provide will make the carrier responsible.¹¹ In certain instances this duty has been limited in a slight degree, and stated as the highest degree of care and prudence compatible with the practical performance of the duty of transportation.¹² In spite of all these statements of the greater degree of care and caution required when carriers are involved, it appears that the common tort statement of liability would cover each and all of these statements. The circumstances in which the care is exercised will, if properly considered, when applying the common rule of tort liability, necessitate the exercise of greater diligence in one set of circumstances than in another. For this reason, it is submitted that the simple statement of tort liability — that care and caution which a reasonably prudent man would exercise in the particular circumstances of the case — is also the proper standard to be applied to determine the liability of carriers.¹³ Further, it will be noted, that in the last few years several courts have held, and, it appears, properly so, that an instruction to the jury which holds the carrier to the higher "degrees of care" is reversible error.¹⁴

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⁵ *Trippett v. Monongahela West Penn Public Service Co.*, 100 W. Va. 319, 130 S. E. 483 (1925).

⁶ *Norfolk-Southern Ry. Co. v. Tomlinson*, 116 Va. 153, 81 S. E. 89 (1914).

⁷ *Searles v. Ry. Co.*, 32 W. Va. 370, 9 S. E. 248 (1889).

⁸ *Seaboard Air-Line Ry. v. Andrews*, 140 Ga. 254, 78 S. E. 925 (1913).

⁹ *Southern Ry. Co. v. Reeves*, 116 Ga. 743, 42 S. E. 1015 (1902); *Seaboard Air-Line Ry. v. Brewton*, 23 Ga. App. 621, 99 S. E. 226 (1919).

¹⁰ *Brogan v. Union Traction Co.*, 76 W. Va. 698, 86 S. E. 753 (1915); *Perkins v. Monongahela Valley Traction Co.*, 81 W. Va. 781, 95 S. E. 797 (1918).

¹¹ *Norfolk & Western Ry. Co. v. Williams*, 89 Va. 165, 15 S. E. 522 (1892).

¹² *Sutton v. Southern Ry. Co.*, 82 S. C. 345, 64 S. E. 401 (1909); *Venable v. Gulf Taxi Line*, 105 W. Va. 156, 141 S. E. 622 (1928).

¹³ *Union Traction Co. v. Berry*, 188 Ind. 514, 121 N. E. 655 (1919); *Pittsburg etc. Ry. v. Stephens*, 86 Ind. App. 251, 157 N. E. 58 (1927); *O'Brien v. New York Rys. Co.*, 185 App. Div. 867, 174 N. Y. S. 116 (1919); *Pomroy v. Bangor & Aroostook R. Co.*, 102 Me. 497, 67 Atl. 561 (1907); *Magrane v. St. Louis, etc. Ry.*, 183 Mo. 119, 81 S. W. 1158 (1904). See also Note (1928)-14 VA. L. REV. 200.

¹⁴ *Buckley v. Boston Elev. Ry. Co.*, 215 Mass. 50, 102 N. E. 75 (1913); *Raymond v. Portland R. Co.*, 100 Me. 529, 62 Atl. 602 (1905); *Gulf, Colo. etc.*