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Negligence -- Common Carriers -- Degrees of Care

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Negligence—Common Carriers—Degrees of Care.

In *Jackson v. Stancil*[1] actions for wrongful death and personal injuries were consolidated against the pilot and the owner of an air-taxi to recover for damages sustained when the plane crashed while landing. Plaintiffs alleged that the pilot had committed specific acts of negligence and that the owner was a common carrier of passengers. The trial judge charged the jury that the defendants, being "carriers," owed the plaintiffs as passengers "the highest degree of care . . . consistent with the practical operation and conduct of its business . . . ."[2] On appeal the supreme court pointed out that in North Carolina it is only the common carrier which has the highest degree of care imposed upon it, not the contract carrier, and ordered a retrial on the issue of whether the defendant was a common or a contract carrier.

By way of dictum the court said that the phrase "highest degree of care" does not relate merely to the quantum or degree of care required to measure up to the standard of ordinary care but that it instead establishes a different and higher standard[3] by which the common carrier's conduct is measured.[4]

[1] 253 N.C. 291, 116 S.E.2d 817 (1960).

[2] *Id.* at 296, 116 S.E.2d at 821.

[3] Justice Bobbitt, dissenting, regards the highest degree of care as descriptive of the *duty* of carriers (common or contract) depending upon the circumstances. He said: "In respect of air travel, ordinary or due care, namely care commensurate with the known or foreseeable dangers, is no less than the highest degree of care consistent with the practical operation and conduct of the business." 253 N.C. 291, 305, 116 S.E.2d 817, 827 (1960). It seems apparent that Justice Bobbitt would not agree with the majority that a different *standard* is applicable in common carrier cases.

It should also be noted that the charge given by the trial judge in the principal case clearly made no attempt to create a different standard for the jury to apply. The trial judge instructed the jury to measure the carrier's duty by "what is called 'the rule of the prudent man,'" and stated that the defendants would be guilty of negligence only "if they failed to do what a person of ordinary prudence would have done to perform the duty imposed upon them by law." Record, p. 113.

[4] This appears to be the first time the North Carolina court has explicitly said that the duty to exercise the highest degree of care is to be measured by a standard other than the standard of due care under all the circumstances as tested by what the reasonable and prudent man would have done. In prior cases our court has treated the problem more as one of defining the duty which is owed. Harris v. Atlantic Greyhound Corp., 243 N.C. 346, 351, 90 S.E.2d 710, 714 (1956); Jenkins v. City Coach Co., 231 N.C. 208, 56 S.E.2d 571 (1949) (by implication); Humphries v. Queen City Coach Co., 228 N.C. 399, 404-05, 45 S.E.2d 546, 549-50 (1947) (concurring opinion); White v. Chappel, 219 N.C. 652, 665, 14 S.E.2d 843, 852 (1941) (dissenting opinion). Accordingly in application the standard has been that of the reasonable and prudent man. See Harris v. Atlantic Greyhound Corp., 243 N.C. 346, 90 S.E.2d 710 (1956); Jenkins v. City Coach Co., 231 N.C. 208, 56 S.E.2d 571 (1949); Humphries v. Queen City Coach Co., 228 N.C. 399, 45 S.E.2d 546 (1947); White v. Chappel, 219 N.C. 652, 14 S.E.2d 843 (1941); Cates v. Hall, 171 N.C. 360, 88 S.E. 524 (1916); Fitzgerald v. Railroad, 141 N.C. 530, 54 S.E. 391 (1906) (dictum). See generally, as to various statements of the duty by the North Carolina court, Note, 17 N.C.L. REV. 453 (1939).

It can be seen, however, that the result in the principal case would have been the same whether the instruction was deemed to relate to the duty or to a different

While the majority of American jurisdictions hold that the common carrier owes its passengers the highest degree of care,[5] few courts have explicitly stated, as has North Carolina in the principal case, that a difference in standards is involved. Instead, most of the courts have treated the difference in the degree of care owed by a common carrier as relating merely to the *duty* imposed by law.[6] Moreover, in many cases, because of the court's brief and perfunctory statement of the issue, it is impossible to determine whether a difference in standards was actually within the court's contemplation or whether the court envisioned only a difference in duty within the usual standard, that of due care.[7]

In some cases the language used to state the duty shows that no difference in standards is involved.[8] An early North Carolina opinion gave the following statement of the duty:

> [T]he carrier is required to exercise that high degree of care . . . which a prudent man would use in view of the nature and risks of the business, or, in general, the highest degree of care, prudence, and foresight . . . which the situation and circumstances demand in view of the character and mode of conveyance, and which a prudent man engaged in the business as usually conducted would employ . . . .[9]

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standard since the record was found to be inadeqaute to establish defendant's status as a common carrier as a matter of law. This note is concerned chiefly with the implications raised by the court's discussion of standards of care.

[5] "It is a well settled rule of law that a carrier owes to a person in a passenger status the duty to exercise the highest degree of care . . . ." Ortiz v. Greyhound Corp., 275 F.2d 770, 773 (4th Cir. 1960). See generally 10 AM. JUR. *Carriers* § 1245 (1937); 13 C.J.S. *Carriers* § 678(a) (1939). Various similar emphatic phrases are used by the courts to state the degree of care, such as "the utmost care and diligence," "the utmost caution characteristic of very careful men," "extraordinary care and caution," or simply "a high degree of care." See generally 10 AM. JUR. *Carriers* § 1246 (1937); 13 C.J.S. *Carriers* § 678(a) (1939).

[6] *E.g.*, Krentzman v. Connecticut Co., 136 Conn. 239, 70 A.2d 133 (1949); Johnson v. Kansas City Pub. Serv. Co., 265 S.W.2d 417 (Mo. 1954); Nix v. Gulf, Mobile & Ohio R.R., 362 Mo. 187, 240 S.W.2d 709 (1951); Centofani v. Youngstown Municipal Ry., 157 Ohio St. 396, 105 N.E.2d 633 (1952); Gedney v. Clark, 201 Ore. 67, 268 P.2d 357 (1954); Werlein v. Milwaukee Elec. Ry., 267 Wis. 392, 66 N.W.2d 185 (1954).

[7] The North Carolina court clearly recognizes the distinction between the terms "duty" and "standard." The opinion in the principal case said: "The difference between ordinary care and the highest degree of care as these terms are applied in carrier cases is, in final analysis, largely a difference in the degree of duty, but it also involves a difference in standards." 253 N.C. at 297, 116 S.E.2d at 822. This distinction will be preserved in this note.

[8] *E.g.*, Black & White Cab Co. v. Doville, 221 Ark. 66, 251 S.W.2d 1005 (1952); Ken-Ten Coach Lines v. Siler, 303 Ky. 263, 197 S.W.2d 406 (1946); North Carolina cases cited note 4 *supra*.

[9] Marable v. Railroad, 142 N.C. 557, 562-63, 55 S.E. 355, 357 (1906). And in Humphries v. Queen City Coach Co., it is said that " 'ordinary care,' when that term is used in defining the duty a transportation company owes to its passengers, means 'the highest degree of care consistent with the practical operation and conduct of its business.' One is the standard and the other is the degree of care

The implication to be derived from these cases is that no different standard is intended but that "the highest degree of care" refers to the quantum of care due under the circumstances as measured by the rule of the prudent man.

The language used by other courts in discussing the highest degree of care doctrine is incompatible with the standard of ordinary care and implies a difference in standards.[10] For example in *Hill v. Texas, N.M. & Okla. Coaches, Inc.*,[11] the court said that the duty of the common carrier is "to exercise such a high degree of foresight . . . and prudence . . . as would be used by very cautious, prudent and competent men."[12] And in *Christoff v. Noto*[13] it was said: "The degree of care which [a common carrier] . . . owes to a passenger is a high degree of care, not ordinary care, such as one driver—one pedestrian owes to another."[14]

In some jurisdictions statutes have been enacted which define the care owed by a common carrier. When the statute is strongly worded and unambiguous in declaring a higher standard,[15] the courts must give recognition to the legislative intent.[16] If on the other hand the statute will admit of the interpretation that it is merely declarative of the common law,[17] it is not necessarily regarded as creating a different standard. Thus in *Johnson v. Santa Fe Trail Transp. Co.*,[18] the court held that the statute related only to the duty, which was to be measured by the standard of ordinary care. The court said: "[I]t was his duty under the statute to exercise that degree of care and caution of an

necessary to measure up to the standard." 228 N.C. 399, 404-05, 45 S.E.2d 546, 549-50 (1947) (concurring opinion).

[10] *E.g.*, Christoff v. Noto, 327 Mich. 514, 42 N.W.2d 732 (1950); Austin v. St. Louis & S.F. R.R., 149 Mo. App. 397, 130 S.W. 385 (1910); Robinson v. Duke Power Co., 213 S.C. 185, 48 S.E.2d 808 (1948); Hill v. Texas, N.M. & Okla. Coaches, Inc., 153 Tex. 581, 272 S.W.2d 91 (1954).

[11] 153 Tex. 581, 272 S.W.2d 91 (1954).

[12] *Id.* at 584, 272 S.W.2d at 92.

[13] 327 Mich. 514, 42 N.W.2d 732 (1950).

[14] *Id.* at 516-17, 42 N.W.2d at 733.

[15] See GA. CODE ANN. § 18-204 (1935) which declares: "A carrier of passengers must exercise extraordinary diligence to protect the lives and persons of his passengers, but is not liable for injuries to them after having used such diligence"; and GA. CODE ANN. § 105-202 (1956) which declares: "In general, extraordinary diligence is that extreme care and caution which very prudent and thoughtful persons exercise under the same or similar circumstances . . . . The absence of such diligence is termed slight negligence."

[16] See Delta Air Lines, Inc. v. Mullirons, 87 Ga. App. 334, 73 S.E.2d 598 (1952).

[17] OKLA. STAT. ANN. tit. 13, § 32 (1951) reads as follows: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." MONT. REV. CODES ANN. § 8-405 (1947) is identical in langauge. These are typical of such statutes which have been held merely declarative of the common law. See Taillon v. Mears, 29 Mont. 161, 169, 74 Pac. 421, 423 (1903).

[18] 206 Okla. 455, 244 P.2d 576 (1952).

ordinarily prudent person *whose duty it was to exercise the highest degree of care.*"[19]

A minority of American courts have held that negligence is incapable of division into degrees, and that since there can be no slight or gross negligence there can be no slight or extraordinary care. On this premise these courts refuse to recognize any standard other than due care under all the circumstances as measured by the rule of the prudent man.[20] They hold that negligence, by definition, excludes liability for conduct that is reasonable under the circumstances and that the rule of the prudent man is the only standard by which the jury can intelligently determine reasonableness.

The minority view appears logically to be the sounder[21] because while "the degree—that is the quantity—of care necessary to measure up to the standard is as variable as the attendant circumstances,"[22] the standard itself would seem invariable and applicable to all negligence cases since it involves a consideration of every fact, condition and circumstance existing in the particular case. Considering the broad requirements of the standard of ordinary care,[23] any standard which exacts more than ordinary care would, it has been said,[24] "require more

[19] *Id.* at 458, 244 P.2d at 579-80; *accord*, G. A. Nichols Co. v. Lockhart, 191 Okla. 296, 129 P.2d 599 (1942); Chicago, R.I. & P. Ry. v. Shelton, 135 Okla. 53, 273 Pac. 988 (1929). See also Riskin v. Northern Pac. Ry., 350 P.2d 831 (Mont. 1960), where the Montana statute is cited as merely defining the carrier's *duty*.

[20] *E.g.*, Union Traction Co. v. Berry, 188 Ind. 514, 121 N.E. 655, *aff'd on rehearing*, 188 Ind. 525, 124 N.E. 737 (1919); Chicago & Calumet Dist. Transit Co. v. Stravatzakes, 156 N.E.2d 902 (Ind. App. 1959); Bannister v. Berkshire St. Ry., 301 Mass. 598, 18 N.E.2d 342 (1938); Nadeau v. Fogg, 145 Me. 10, 70 A.2d 730 (1950); Raymond v. Portland Ry., 100 Me. 529, 62 Atl. 602 (1905); McLean v. Triboro Coach Corp., 302 N.Y. 49, 96 N.E.2d 83 (Ct. App. 1950); Stierle v. Union Ry., 156 N.Y. 70, 50 N.E. 419 (Ct. App. 1898); Picket v. Rochester Transit Corp., 274 App. Div. 1088, 86 N.Y.S.2d 177 (1949); Barbato v. Vollmer, 273 App. Div. 169, 76 N.Y.S.2d 528 (1948); O'Brien v. New York Ry., 185 App. Div. 867, 174 N.Y. Supp. 116 (1919).

[21] Most writers support this view. See 1 BEVEN, NEGLIGENCE 15 (4th ed. 1928); 2 HARPER & JAMES, TORTS 945-46 (1956); PROSSER, TORTS § 33 (2d ed. 1955); SALMOND, TORTS § 125 (12th ed. 1957); 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 98 (1909); WINFIELD, TORTS 494 (6th ed. 1954); Green, *High Care and Gross Negligence*, 23 ILL. L. REV. 4 (1928).

[22] Rea v. Simowitz, 225 N.C. 575, 579, 35 S.E.2d 871, 874 (1935).

[23] In Union Traction Co. v. Berry, 188 Ind. 514, 121 N.E. 655, *aff'd on rehearing*, 188 Ind. 525, 124 N.E. 737 (1919), the court stated the requirements of the standard of ordinary care as follows: "the party owing the duty to use ordinary care must take into consideration the character and extent of the dangers incident to the business . . . he must regard the conditions and the circumstances which surround and attend it . . . he must foresee every danger that a person of reasonable foresight would anticipate, and he must take every means of guarding against such dangers that reasonable judgment and prudence would suggest . . . ." *Id.* at 526, 124 N.E. at 738. See also for the requirements of the law's reasonable and prudent man, 2 HARPER & JAMES, TORTS § 16 (1956); PROSSER, TORTS § 31 (2d ed. 1955).

[24] Union Traction Co. v. Berry, *supra* note 23.

care than a person of ordinary intellectual endowments would be capable of exercising."[25]

Few of the courts which have attempted to establish a different standard in common carrier cases have undertaken to explain the standard in significant detail.[26] As in the principal case, courts do not say how the standard is to be explained, in what terms, or how such standard compares with that of the prudent man whose conduct is reasonable in view of all the circumstances.

Since the negligence action is founded on a breach of legal duty, it is the function of the court to declare and explain the duty which the law imposes.[27] In the ordinary negligence case the defendant's duty is explained in terms of how the reasonable man would have acted in similar circumstances. In the common carrier cases, however, the courts do not resort to analogy but simply rest on a statement of an abstraction—the highest degree of care. The problem becomes one of imagining in any real sense how the defendant should have acted, or in other words, of determining what in addition to all that is "reasonable" is to be expected of the defendant. It is thus a question of whether or not the higher standard is capable of intelligent application by the jury.[28]

In spite of the short-comings of the majority view, both in legal theory and practical application, it has been suggested[29] that it has at least one salutary effect. By describing the common carrier's duty in

[25] *Id.* at 526-27, 124 N.E. at 737-38.

[26] In explaining the higher standard courts have generally found it sufficient to intimate to the jury that they are to require "something more" or "something different" than would be required of an ordinary individual. See, *e.g.*, Robinson v. Duke Power Co., 213 S.C. 185, 48 S.E.2d 808 (1948) ("higher than that which is ordinarily required of an ordinary individual").

[27] N.C. GEN. STAT. § 1-180 (1953) provides that the trial judge "shall declare and explain the law arising on the evidence given in the case." The provision is mandatory. Smith v. Kappas, 219 N.C. 850, 15 S.E.2d 375 (1941). The chief purpose of a charge is to help the jury understand the case clearly and arrive at a correct verdict. Glenn v. City of Raleigh, 246 N.C. 469, 98 S.E.2d 913 (1957). For this reason "the courts have been rather meticulous, especially in the matter of negligence, in requiring that the law be explained in its connection with the facts in evidence." Smith v. Safe Bus Co., 216 N.C. 22, 23, 3 S.E.2d 362, 363 (1939). The statement of general principles of law, without an application to the specific facts involved in the issue, is not a compliance with the provisions of the statute. Hauser v. Forsyth Furniture Co., 174 N.C. 463, 93 S.E. 961 (1917). Without substantial compliance with the statute there can be no assurance that the verdict represents a finding by the jury under the law and on the evidence presented. Smith v. Kappas, *supra*. See generally, Paschal, *A Plea For A Return To Rule 51 of the Federal Rules of Civil Procedure in North Carolina*, 36 N.C.L. REV. 1 (1957). *Quaere* whether a standard incapable of intelligent application by the jury, if so determined, would be grounds for reversal under the statute.

[28] See Union Traction Co. v. Berry 188 Ind. 514, 121 N.E. 655, *aff'd on rehearing* 188 Ind. 525, 124 N.E. 737 (1919) wherein it is determined that such a standard is incapable of a definition which would enable a jury to apply it intelligently.

[29] See 2 HARPER & JAMES, TORTS § 15.4 (1956).

terms of the highest degree of care, the jury is impressed with the peculiar hazards and the unusual advantages inherent in that calling. It may be that these courts feel constrained to emphasize the most significant circumstance—defendant's being a common carrier—in the most conclusive way possible, in a legal rule or definition. This approach certainly seems to slight the opportunity courts have of describing all the circumstances in as great detail as deemed necessary and suggests taking the easy "way out."

It is submitted that the proposition that a common carrier owes its passengers the highest degree of care should be put to the jury *not* in terms of a standard of conduct different from that imposed on others, but rather in terms of what was reasonable and proper in view of the duty owed and *all* the conditions and circumstances of the particular case. A charge of this nature would accord with the universally accepted legal concept of the prudent man and at the same time make intelligible to the lay triers of fact what precisely they are to decide.[30]

JOHN H. P. HELMS

Sales—Disclaimer of Implied Warranty Void Because Against Public Policy.

In *Henningsen v. Bloomfield Motors, Inc.*[1] the Supreme Court of New Jersey considered the effect of disclaimer and limitation of liability clauses contained in a standard automobile warranty.[2] The plaintiff purchased an automobile from a local dealer as a gift for his wife. A warranty was set forth in fine print on the reverse side of the sales contract, together with a stipulation that there were no warranties, either express or implied, except as provided for in the agreement.[3] The disclaimer was contained in the following words: "[T]his warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities . . . ."[4] In addition, the following

[30] The charge by the trial judge in the principal case would have this effect. See note 3 *supra*.

[1] 32 N.J. 358, 161 A.2d 69 (1960).

[2] The warranty is the uniform warranty adopted by the Automobile Manufacturers Association. It is used by all the major automotive manufacturers in the sale of new automobiles. Thus, well over 90% of new car sales were covered by this warranty and disclaimer. See *Id.* at 390, 161 A.2d at 87.

[3] The express warranty provided: "The manufacturer warrants each new motor vehicle (including original equipment placed thereon by the manufacturer except tires), chassis or parts manufactured by it to be free from defects in material or workmanship under normal use and service. Its obligation under this warranty being limited to making good at its factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle *to the original purchaser* or before such vehicle has been driven 4,000 miles, whichever event shall first occur, be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective. . . ." *Id.* at 367, 161 A.2d at 74. (Emphasis by the court.)

[4] 32 N.J. at 367, 161 A.2d at 74.