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THE TORT LIABILITY OF THE PROPRIETOR OF A PASSENGER ELEVATOR

O'Neill & Co. v. Crummitt[1]

Plaintiff-appellee, while shopping in the defendant's department store, boarded a passenger elevator provided by the defendant for the transportation of customers. On arrival at the plaintiff's destination, the elevator attendant stopped the car with its floor about four inches above the landing. As the plaintiff sought to step down, the elevator suddenly dropped. The plaintiff lost her balance, and as she touched the floor, she slipped upon "a dirty, greasy substance" which partially covered a strip of linoleum on the landing, thereby sustaining injury. The plaintiff recovered a judgment against the defendant on a claim based upon the negligent operation of the elevator by the defendant's agent, and upon the negligent condition of the elevator landing. The trial court refused to grant the demurrer prayers offered by the defendant. On appeal, *held:* Affirmed. The plaintiff's status at the time of the injury was that of a passenger on the elevator. Therefore, the defendant owed to the plaintiff the duty of exercising the highest degree of care and diligence practical under the circumstances for the latter's safety. In view of the evidence, it could not be said as a matter of law that the defendant fulfilled its duty; and the trial court properly allowed the case to go to the jury.

In determining the tort liability of proprietors and operators of passenger elevators for injuries caused to those who are expressly or impliedly invited to ride therein, the courts have almost uniformly imposed upon the former the same legal duty of care and caution which rests upon common carriers with respect to the safe transportation of the latter's passengers. Some courts have obtained this result by apparently holding that a passenger elevator is a common carrier.[2] Others have reached this conclusion by analogy based upon the common elements of danger to the individual found in many types of carriage and the desirability of imposing a strict accountability with respect thereto.[3] A minority of jurisdictions have refused to apply the strict liability of the common carrier to such a

[1] 172 Md. 53, 190 Atl. 763 (1937).
[2] See Springer v. Ford, 189 Ill. 430, 59 N. E. 953 (1901).
[3] See Fox v. City of Philadelphia, 208 Pa. 127, 57 Atl. 356 (1904).

situation either by means of direct identification, by analogy, or by other methods.[4]

A review of several cases dealing with the different points of view, including a brief survey of the relevant Maryland decisions, will serve to illustrate the real nature of the problem involved and the reasons behind the various solutions offered.

Treadwell v. Whittier,[5] a California decision, is a leading case supporting the majority view. There, the plaintiff sued to recover damages for personal injuries caused by the falling of a passenger elevator operated by the defendants in their store where the plaintiff had gone on business. The court held that the defendants owed the same degree of care that would be required of a railroad or stage-coach company in the carriage of their passengers, and in California this entailed the utmost care and diligence of very cautious persons. This responsibility was said to be based upon the undertaking to carry human beings whose lives and limbs and health are of great importance, to the public as well as to the individuals themselves. The court used the following words, which have quite often been quoted in subsequent cases:

> "Persons who are lifted by elevators are subjected to great risks to life and limb. They are hoisted vertically, and are unable, in case of the breaking of the machinery, to help themselves. The person running such elevator must be held to undertake to raise such persons safely, as far as human care and foresight will go. . . . Such responsibility attaches to all persons engaged in employments where human beings submit their bodies to their control, by which their lives or limbs are put at hazard. . . . We know of no employment where the law should demand a higher degree of care and diligence than in the case of the persons using and running elevators for lifting human beings from one level to another."

Springer v. Ford[6] is another decision exemplifying the majority view-point. The plaintiff, an employee of a tenant in the defendant's building, was injured in the fall of

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[4] See Edwards v. Mfrs'. Bldg. Co., 27 R. I. 248, 61 Atl. 646 (1905); Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925 (1901); Burgess v. Stowe, 134 Mich. 204, 96 N. W. 29 (1903).

[5] 80 Cal. 574, 22 Pac. 266 (1889).

[6] 189 Ill. 430, 59 N. E. 953 (1901).

an elevator in said building.[7] The court held that the proprietor of such an elevator was a common carrier of passengers for hire, and that the compensation was the rental paid by the tenant. In addition, the court stated:

> "The operators of such elevators, upon the grounds of public policy, are required to exercise the highest degree of care and diligence. The lives and safety of a large number of human beings are intrusted to their care and the law requires them to use extraordinary diligence in and about the operation of such elevators to prevent injury to passengers carried thereon."

The minority view upon the subject is well set forth in *Edwards v. Manufacturers' Building Co.*[8] The plaintiff was an employee of one of the defendant's tenants and was injured by the falling of an elevator which the defendant maintained and operated in its building for the use of its tenants and their employees and customers. The Court fully recognized the existence of the decisions holding that an elevator operator was a common carrier owing the highest degree of care to its passengers, but it refused to assent to the reasoning upon which such opinions were ostensibly based. Said the Court:

> "The rule (as to the liability of the common carrier) is imposed not on account of the danger of the journey, but because of his relation to the public. If a private person transports a friend in his coach or in his automobile, he is liable only for want of ordinary care, though the danger may be the same as in traveling by public coach or by railway. The duty of a landlord towards those who enter upon his premises by implied invitation is to exercise reasonable care for their safety, and we see no reason for modifying the rule when he introduces and operates an elevator. He is not, like a common carrier, a servant of the public. His relations and duties are with a limited number of persons who have contracted with him for the use of

[7] In this case, the elevator was primarily used for freight. To the defendant's contention that the principles of law applicable to passenger elevators should not be applied to freight elevators carrying passengers, the court replied, "There is no reason, in principle, why the analogy held to exist between passenger and freight trains, as common carriers, does not exist between passenger and freight elevators, in cases where the owners of freight elevators permit the carriage of passengers thereon for hire." The court stated that the measure of liability was the same in both cases.

[8] 27 R. I. 248, 61 Atl. 646 (1905).

his premises, and others who have business with his tenants."

Griffen v. Manice,[9] a New York case, also supports the minority approach. Here, the plaintiff's intestate was also the employee of a tenant of the defendant. He was killed when elevator weights fell down the shaft into the passenger car. The lower court instructed the jury that the elevator proprietor was subject to the same rule that applied to a railroad company in the care of its machinery, namely, the utmost care and diligence. This instruction was declared to be erroneous by the appellate court. The latter court reasoned along the lines of the *Manufacturers' Building Co.* case, acknowledging the danger involved in the operation of an elevator, but pointing out that there were other equally dangerous appliances in modern buildings, such as steam boilers and open hatchways, and that it was not customary to impose upon the building owner any greater responsibility as to those things than that of exercising reasonable care. In conclusion, the court said:

> "In the exercise of the same degree of care different degrees of precaution may be necessary. . . . So, the more dangerous an appliance may be, the more attention may be requisite. If the fair purport of the charge of the court was only that the care should be commensurate with the danger, it might not be objectionable. The charge, however, goes far beyond this. The utmost human care and foresight would require the owner of a building to use the most modern and improved form of elevator, the latest successful mechanical device, and the most skilfull operators. Such is the rule in the operation of railroads. . . . But common knowledge informs us that such a rule would be unreasonable applied to elevators in ordinary buildings."

The leading case in Maryland having to do with the tort liability of passenger elevator proprietors is *Belvedere Building Co. v. Bryan*.[10] Prior to that decision, however, there were two other cases concerning tort suits arising from injuries sustained in connection with elevators, namely, *Peoples Bank v. Morgolofski*, [11] and *Wise v. Ackerman*.[12] In both of these cases the elevators involved were com-

[9] 166 N. Y. 188, 59 N. E. 925 (1901).
[10] 103 Md. 514, 64 Atl. 44 (1906).
[11] 75 Md. 432, 23 Atl. 1027, 32 A. S. R. 403 (1892).
[12] 76 Md. 375, 25 Atl. 424 (1892).

bination passenger and freight elevators;[13] in the *Morgolofski* decision, the injured party was an employee of defendant's tenant; in the *Ackerman* case the plaintiff was an employee of the defendant himself;[14] in both cases the plaintiffs' prayers were based on the theory that the defendant owed the duty of ordinary care and prudence only.

In *Belvedere Building Co. v. Bryan,* the plaintiff, while a guest in the defendant's hotel, was injured when the hotel passenger elevator suddenly dropped as he was preparing to leave the car. In a subsequent successful suit against the defendant company, the trial court instructed that the elevator proprietor owed to the plaintiff the highest degree of care and diligence practicable under the circumstances. The Maryland Court of Appeals stated that the question of the degree of care required in the operation of a passenger elevator had never been distinctly raised and decided in the state before, and that the prior *Morgolofski* and *Ackerman* cases did not conflict with the rule of liability sought to be laid down by the plaintiff. The Court distinguished the previous cases on their facts, and pointed out that those decisions rested validly upon the theory of ordinary care because the plaintiffs had phrased their prayers in that manner, and that the trial court was not bound to go beyond the request of the prayer offered, and grant stronger law than was asked, even though it might be able to do so if asked.

In the *Belvedere Building Co.* case, the Maryland Court examined the various views of the different jurisdictions and textwriters and finally cast its lot with that of the majority of the states. The Court of Appeals criticized, in passing, the minority view, in general, and the case of *Griffen v. Manice,*[15] in particular. With reference to the basis of the latter decision, the Maryland Court said:

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[13] See *supra* n. 7.

[14] See Walsh v. Cullen, 235 Ill. 91, 85 N. E. 223 (1908); and, Putnam v. Pacific Monthly Co., 68 Or. 36, 130 Pac. 986 (1913), for a holding that the elevator owes a different duty to his own employees from that owed to third parties, namely, ordinary care to the former and the highest degree of care to the latter.

In the Ackerman case, *supra* n. 13, the Maryland Court said that where employees of the proprietor ride upon a freight elevator for their own pleasure or convenience they accept the risks incident to such an appliance and can only require of the elevator proprietor the use of ordinary care in the construction and operation of the machine, but that if said employees are directed to use such an elevator in the course of their employment, the employer controlling the machine must exercise "great care". Any such distinction is presumably obviated where the particular employment is covered by the Maryland Workmen's Compensation Act.

[15] 166 N. Y. 188, 59 N. E. 925 (1901). See also *supra* n. 4, and n. 9.

> "With great respect for that eminent Court this reasoning seems to us to lay out of view the true ground upon which all the cases sustain the rule (of the 'highest degree of care') laid down in the lower court. The liability of the common carrier is not imposed because he is a *common* carrier, but because he is a *carrier* of passengers. The liability is not imposed upon the owner or occupant of real property as such, but irrespective of such ownership and occupancy, and because he is engaged in the undertaking of running an elevator as a means of personal transportation. . . ."

Following the *Belvedere Building Co.* decision there appeared the Maryland case of *Owners' Realty Co. v. Richardson.*[16] There, the plaintiff was an employee of an occupant of the defendant's apartment house. The plaintiff was injured when the gate of an automatic elevator suddenly closed upon her finger as she was attempting to get into the car. In the course of its opinion, the Court said:

> "The rule approved by this court is that the landlord engaged in transporting passengers by elevators must exercise great care not only in their operation but in providing safe and suitable equipment. It is a rule which has its sanction in sound public policy, which exacts a high degree of care where security of person and life is frequently involved, under circumstances in which the carrier is in control of the movement or of the equipment."

The Court decided that there was testimony in the case which, if believed, tended to show that the defendant did not exercise the highest care consistent with the practical operation of the business in which it was engaged to have the elevator fit for such use.

There is something favorable to be said about both the majority and the minority viewpoints; but it is submitted that, assuming the "degrees of care" doctrine to be sound in principle,[17] the majority approach is more consistent,

[16] 158 Md. 367, 148 Atl. 543 (1929).

[17] Perhaps the majority of jurisdictions, including Maryland, have adopted the "degrees of care" negligence doctrine. The degree of care owed will vary with the relationship involved. Thus, a mere bailee owes the duty of "ordinary care", while the obligation to exercise "the highest degree of care" is imposed upon the common carrier. There can be little doubt but that a substantial difference exists between the various levels of care in the minds of many of the courts which apply them. This fact is

logically speaking, and is more desirable from the standpoint of public safety and well-being. The rationale of the minority view in the opinions cited above seems to be based upon the following contentions: (1) That the elevator owner is not bound to serve all in the manner required of the common carrier, and that as the extraordinary tort liability of the latter is predicated upon this obligation of equal and universal servitude, the elevator proprietor should not be considered a common carrier and be burdened with the responsibility thereof; (2) that there is no reason to impose the rule of strict accountability upon a landlord or building owner who operates an elevator as an exception to the traditional requirement of ordinary care for the safety of invitees. In rebuttal, the majority view argues: (1) That the legal status of the elevator proprietor should coincide with that of the common carrier because of the similar characteristics involved; (2) that the true reason for the common carrier tort liability principle is based upon the hazard of the carriage to the passenger, which danger is equally present in elevator transportation; (3) that the principles concerned transcend any rule applied to landlords and building owners as such.

As to the minority view contention that the elevator proprietor's relation to the public does not warrant the imposition of an obligation to serve all equally, it would be pertinent to point out that, in view of the ever increasing importance which passenger elevators are playing in the socio-economic development of modern civilization, especially in urban districts, it would hardly be unreasonable to demand such an obligation in the interest of the public

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illustrated by the quotation from the Griffen case. It is also emphasized in Burgess v. Stowe, *supra* n. 4, where the Court stated that an elevator operator was bound to use only the care required of an ordinarily prudent person under the circumstances, i. e. "ordinary care", and that in reference to the operation of an elevator this would call for a high degree of care because of the danger involved. But the Court refused to sustain a charge that the elevator owner was bound to exercise the "highest degree of care" of a cautious person, because the Court felt that an elevator proprietor should not have such an extraordinary obligation resting upon him, assuming it to exist in other relations.

For a criticism of the use of the "degrees of care" principle see Union Traction Co. v. Berry, 188 Ind. 514, 121 N. E. 655 (1919). This case suggests that the employment of such terms as "slight care", "great care", and "highest degree of care", when used in reference to certain peculiar relations, are misleading and constitute an invasion of the province of the jury, and that the duty to exercise care is always the same regardless of the nature of the relation out of which it arises. This duty is that of "due care", namely, what a person of ordinary prudence would do under the circumstances, and this depends upon the danger involved in any given instance. In this connection, see *Degrees of Care* (1919) 19 Columbia L. R. 166.

welfare in situations where the public interest would be most closely affected. Even in the absence of the finding of a holding out by elevator proprietors to serve all who legitimately offer themselves to be carried in the line of some activity connected with the elevator owner's business, the fact that a large part of the public is *actually* carried in such a manner makes the distinction between elevator operators and the traditional common carrier a merely technical one with respect to their relation to the public in any consideration of tort liability based upon the safety of the public *in solido*.

It is interesting to note that the Maryland Court's interpretation of the majority rule found in the *Belvedere Building Co.* case seems to predicate the elevator proprietor's responsibility upon the duty owed to the individual *qua* individual and not as a member of a large elevator-passenger public. The Court went as far as to say that the liability of the common carrier is not imposed on account of the public relation involved, but because of the danger of carriage necessitating a greater degree of care for the safety of the passengers than that of ordinary care. It would seem more logical that such a responsibility should be based *both* upon the public relation *and* the hazard of the journey, but, in any event, even if the danger to the particular individual is the controlling reason for the rule, it is submitted that the principle receives increased support when the social significance of public carriage is added. The analysis of the Maryland Court emphasizes the passive helplessness of the passenger in the hands of a transportation company, be it the accepted common carrier or the elevator operator, and thus stresses the existence of *personal* transportation rather than *public* carriage.

Proponents of the minority rule protest against the inconsistency of the adherents of the majority viewpoint in refusing to apply the principle contended for to other equally dangerous appliances found in modern life, such as steam boilers in buildings and private automobile carriage. Perhaps this anomaly, if it does exist, lies in the failure to see the relation involved rather than in any inconsistency in the rule itself. The Maryland Court found little difficulty in the objection that the majority rule would impose an exception upon the "ordinary care" duty imposed upon landlords with respect to invitees. It pointed out that the extraordinary tort liability of elevator oper-

ators is not imposed upon the owners of real property as such, but regardless of such ownership. There is an implication that personal carriage, of a dangerous nature, where the passenger's safety is subject to the operator's control, is a situation calling for the highest degree of care irrespective of the existence of any other legal status which the carrier may at the same time assume. Of course, the status of the passenger may modify the result, as it does in other types of carriage.

The foregoing discussion has laid a great deal of emphasis upon relation of the elevator operator to the common carrier. However, it is apparent that most of the cases involved, including the Maryland decisions, do not hold that the elevator manager or owner is a common carrier for all purposes although they do hold that the common-law tort liability of both with respect to the safety of the passengers carried is the same.

One would not take the cases as authority for treating the passenger elevator as within the term "common carrier" as used in statutes imposing general regulations of a business character upon public service companies.[18] Even in the interpretation of statutes dealing with the problem of liability of common carriers for negligence, or of defenses connected therewith, the courts have manifested a reluctance to include the passenger elevator within the term "common carrier".[19] Also, in California, which is one of the jurisdictions following the majority rule,[20] the courts have refused to treat the passenger elevator as within the meaning of an insurance policy protecting against injury sustained while riding as a passenger on any public conveyance provided by a "common carrier".[21] Such decisions emphasize the need for keeping the common law rule of liability for negligence, as stated in the instant case, distinct from any general classification of the elevator as a common carrier.

[18] The problem of the possibility of such a carry-over is reduced in a statute such as we have in Maryland which purports in early sections to give a fairly exclusive definition of "common carriage" as used in the law. See Md. Code, Art. 23, Secs. 346, 347, 348.

[19] Southern Ry. v. Taylor, 57 App. D. C. 21, 16 Fed. (2nd) 517 (1926), noted (1927) 13 Va. L. Rev. 651; Seaver v. Bradley, 179 Mass. 329, 60 N. E. 795 (1901); and see 9 R. C. L. 1237 interpreting the latter case saying, "When the question is squarely presented, as when it is sought to construe a statute referring to the duties or liabilities of 'common carriers' it is held that such expression does not refer to the proprietors of elevators."

[20] *Circa* note 5.

[21] Ogburn v. Travelers' Insurance Co., 56 Cal. App. Dec. 1177, 269 Pac. 728 (1928), noted (1929) 2 S. C. L. R. 301.