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CARRIERS - GRATUITOUS PASS - LIMITATION OF LIABILITY

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RECENT DECISIONS

CARRIERS — GRATUITOUS PASS — LIMITATION OF LIABILITY — Appellee was traveling between Louisville and New Orleans on a gratuitous pass issued to her by reason of being the mother of a conductor employed by the Missouri-Pacific lines. The pass contained the following condition: "The person accepting and using it thereby assumes all risk of accident to person or property." Appellee had signed: "I accept the above conditions." The train gave a slight jerk due to coupling onto other cars, causing appellee to fall and sustain the injuries for which she sues. *Held*, where a passenger using a free interstate railroad pass agreed to assume the risk of accident, the passenger, to recover for injuries suffered on the train, has the burden of showing that the negligence of the railroad was wilful or wanton and not merely ordinary negligence. Judgment for plaintiff reversed. *Louisville & N. R. R. v. George*, (Ky. 1939) 129 S. W. (2d) 986.

The common-law liability of a common carrier of personal property is practically that of an insurer; and it is generally held to be against public policy to allow a carrier to exempt itself from the consequences of negligence by mere notice.[1] However, most states allow such a carrier to contract for limited liability, provided the limitation is a reasonable one.[2] The same rules apply to the carriage of passengers. In cases involving interstate railroad passes, the Supreme Court of the United States has held that a stipulation exempting the carrier from liability for negligence is valid.[3] But if there is consideration for the passage, no matter of what kind, the courts are agreed that a common carrier cannot contract away liability for negligence with the person who is carried or whose goods are transported.[4] But it is recognized that a common carrier may become a private carrier, or a bailee for hire, or a party to a special engagement, where it undertakes to carry something which it is not its business to carry. Under this exception it has been held that a railroad company could enter into a written contract with a circus and release itself from all liability for any loss or damage to persons or property that might be carried under the contract.[5] However, it should be noted that in none of the cases is the carrier relieved from

[1] 2 WYMAN, PUBLIC SERVICE CORPORATIONS, § 1001 (1911).

[2] Silverman v. Bermuda & West Indies S. S. Co., (D. C. N. Y. 1935) 12 F. Supp. 164; Henderson v. Canadian Pacific Ry., 258 Mass. 372, 155 N. E. 1 (1927).

[3] Northern Pac. R. R. v. Adams, 192 U. S. 440, 24 S. Ct. 408 (1904); Charleston & W. C. Ry. v. Thompson, 234 U. S. 576, 34 S. Ct 964 (1914); Boering v. Chesapeake Beach Ry., 193 U. S. 442, 24 S. Ct. 515 (1904); Stevens v. Colombian Mail S. S. Corp., (D. C. N. Y. 1936) 15 F. Supp. 534.

[4] York Co. v. Central R. R., 3 Wall. (70 U. S.) 107 (1865); New York Central R. R. v. Lockwood, 17 Wall. (84 U. S.) 357 (1873); School District in Medfield v. Boston, Hartford & Erie R. R., 102 Mass. 552 (1869); 5 R. C. L. 8 (1914) and cases there cited.

[5] Cleveland C. C. & St. L. Ry. v. Henry, 170 Ind. 94, 83 N. E. 710 (1908); Clough v. Grand Trunk W. Ry., (C. C. A. 6th, 1907) 155 F. 81; Robertson v. Old Colony R. R., 156 Mass. 525, 31 N. E. 650 (1892); Baltimore & O. S. W. Ry. v. Voigt, 176 U. S. 498, 20 S. Ct. 385 (1900).

wilful or wanton negligence. As to interstate passes the Supreme Court of the United States, in its interpretation of that provision of the Hepburn Act[6] limiting the issuance of free interstate passes to certain classes of persons, has held that by this legislative enactment Congress took over the whole subject of free interstate passes to the exclusion of state laws, not only superseding the state laws as to what passes might be issued, but also as to their limitations and effect upon the rights of the passenger and carrier respectively.[7] The sole question remains as to what constitutes "wilful or wanton negligence." The authorities are uniform in holding that to constitute wilful or wanton negligence it is not necessary to show ill will toward the person injured, but an entire absence of care for the life, person, or property of others which exhibits indifference to consequences and makes a case of constructive or legal wilfulness. A complete indifference to consequences distinguishes wrongs caused by wantonness and recklessness from torts arising from negligence.[8] The Supreme Court of the United States has always relegated the task of determining gross negligence to the jury.[9] In *Steamboat New World v. King*,[10] the Court said: "If the law furnishes no definition of the terms gross negligence, or ordinary negligence, which can be applied in practice, but leaves it to the jury to determine, in each case, what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned." In that case it appeared that the plaintiff was scalded by steam and hot water from the explosion of a boiler flue on the defendant's steamboat, on which plaintiff was traveling as a free passenger. This was held to be gross negligence and plaintiff recovered. So it has been held that a head-on collision was gross negligence,[11] but not where there was a collision between a passenger train and a standing freight train.[12] It is, therefore, difficult to predict what will or will not constitute "gross negligence" in a particular case, but once that has been determined it is clear that the carrier will be liable even as to gratuitous passengers. It should be remembered that even if the passenger does not pay for his ticket but is a driver or other person accompanying freight, a mail clerk, express messenger, or news agent, he will

[6] 34 Stat. L. 584-585 (1906), 49 U. S. C. (1934), § 1 (7).

[7] Kansas City So. Ry. v. Van Zant, 260 U. S. 459, 43 S. Ct. 176 (1923).

[8] Higbee Co. v. Jackson, 101 Ohio St. 75, 128 N. E. 61 (1921).

[9] 10 AM. JUR. 120-121 (1937). For cases holding what was or was not gross negligence in cases involving the liability of carriers for injury to free passengers, see: Lanier v. Bugg, 32 Ga. App. 294, 123 S. E. 145 (1925); Forster v. Southern Ry., 39 Ga. App. 216, 146 S. E. 516 (1928); Bowman v. Pennsylvania R. R., 299 Pa. 558, 149 A. 877 (1930); and the annotation in 7 A. L. R. 852 (1920).

[10] 16 How. (57 U. S.) 469 at 473-474 (1853).

[11] Philadelphia & Reading R. R. v. Derby, 14 How. (55 U. S.) 468 (1852).

[12] Welles v. New York Cent. R. R., 26 Barb. (N. Y.) 641 at 645, 647 (1858). The court said: "All collisions of trains must be the result of negligence. . . . there is nothing in this case to warrant the finding that the defendants were guilty of such gross negligence as is the equivalent to fraud, or *evidence* of fraud or bad faith." And it was held that by reason of a contract by which the passenger had agreed to assume the risk of all injury, the defendants were absolved from liability.

not be classed as a gratuitous passenger but a passenger for hire by the great weight of authority.[13]

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[13] O'Brien v. Chicago & N. W. Ry., (C. C. Iowa, 1902) 116 F. 502; Starr v. Great Northern Ry., 67 Minn. 18, 69 N. W. 632 (1896); Davis v. Chesapeake & O. R. R., 29 Ky. L. Rep. 53, 92 S. W. 339 (1904). Contra: see McDermon v. Southern Pac. Co., (C. C. Mo. 1903) 122 F. 669.