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THE DEGREE OF CARE REQUIRED IN THE OPERATION OF A SCENIC RAILWAY.
—The case of *O'Callaghan v. Dellwood Park Co.*, — Ill. —, 89 N. E. 1005,
decided by the supreme court of Illinois, October 26, 1909, is of interest

because of the holding of owners and operators of scenic railways to the same high degree of care required of railroads and common carriers of passengers in general. The action was in case for the recovery of damages for injuries suffered by the plaintiff by reason of having been thrown out of a car on defendant's scenic railway. The plaintiff had paid the usual charge for the ride and was, at the time of the accident, a passenger on the car. The trial court charged the jury, in substance, that it was the duty of the defendant in operating the railway to exercise the highest degree of care and caution for the safety of its passengers and to do all that human foresight and vigilance could reasonably do, consistent with the mode of conveyance and the practical operation of the railway, to prevent accidents to passengers while riding on its cars. On appeal the instructions were approved.

This seems to be the only reported case involving the precise point, and is, therefore, on that account, of peculiar interest. As said by the court, "The precise question now under discussion has not been decided by this court, and our attention has not been called to any case where the degree of care and responsibility resting upon those managing a railway of this kind has been considered. * * * We think, not only by fair analogy, but on reason and sound public policy, appellant should be held to the same degree of responsibility in the management of the railway in question as a common carrier."

In Illinois it is held that persons operating passenger elevators in buildings are chargeable with the same degree of care required of common carriers. *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222, 50 N. E. 178, 64 Am. St. Rep. 35; *Chicago Exchange Building Co. v. Nelson*, 197 Ill. 334, 64 N. E. 369; *Steiskal v. Field & Co.*, 238 Ill. 92, 87 N. E. 117. These cases follow the leading case on this point. *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. On the other hand there are well considered cases holding the opposite view. See *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 525, 52 L. R. A. 922, 82 Am. St. Rep. 630, and *Burgess v. Stowe*, 134 Mich. 204, 96 N. W. 29, 10 Det. Legal News 434. The court in the principal case was of the opinion that the principle of these passenger elevator cases afforded the strongest sort of analogy for the rule applied.

The holding in the principal case would seem to be in accord with reason and public policy. In *Phila. & R. R. Co. v. Derby*, 14 How. 468, 486, 14 L. Ed. 502, the court said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to sport of chance, or the negligence of careless agents." See, also, COOLEY, TORRS, (Ed. 2) 768, 769; *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304. The comparative helplessness of the passengers in case of accident and the tenderness of the law for human life and limb, and not the mere nature of the motive power, seem to be the true reasons for requiring the high degree of care. In *Farish v. Reigle*, 11 Gratt, 697, 709, where the point involved was whether the proprietor of a stage coach was liable for more than ordinary care, the court said: "As they under-

take for the carriage of human beings, whose lives and limbs and health are of great importance as well to the public as to themselves, the ordinary principle in criminal cases, where persons are made liable for personal wrongs and injuries arising from slight neglect, would seem (he says) to furnish the true analogy and rule." See also STORY, BAILMENTS, § 601, and *Jackson v. Follett*, 3 Eng. C. L. 307. And in *Treadwell v. Whittier*, supra, the court held the proprietor of a passenger elevator liable for the use of the utmost care and vigilance, on the ground that the danger in such transportation is as great or greater than in the case of the ordinary railroad transportation. To anyone familiar with the modern scenic railway it is evident that the danger and helplessness of the passenger in case of accident are fully as great as in the case of the passenger elevator or ordinary railroad. In this connection may be noted the case of *Johnson v. Coey*, 237 Ill. 88, 86 N. E. 678, in which the action was against the owner of an automobile hired by the plaintiff, for negligent operation of the machine by defendant's servant. In the course of the opinion the court observed that the "driver of the automobile was bound to use at least reasonable and ordinary care." Inasmuch as the defendant was held liable it was unnecessary, for the purposes of that case, for the court to go further.

The rule of the principal case should not be confused with the holding in cases involving the degree of care in general required of owners of amusement parks. The rule, almost without exception, in those cases is that only ordinary care is required. *Hart v. Washington Park*, 157 Ill. 9, 41 N. E. 620, 29 L. R. A. 492, 48 Am. St. Rep. 298; *Dunn v. Agricultural Society*, 48 Oh. St. 93, 18 N. E. 496, 1 L. R. A. 754, 15 Am. St. Rep. 556; *Sebeck v. Verein*, 64 N. J. L. 624, 46 Atl. 631, 50 L. R. A. 199, 81 Am. St. Rep. 512. Cf. *Scott v. University of Michigan Athletic Ass'n.*, 152 Mich. 684. R. W. A.