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As a Matter of Law, Carrier Had Fulfilled Its Duty to Passengers When Its Driver after Warning Certain Passengers to Quieten Down, Left the Bus to Summon the Police, and a Passenger Was Injured in His Absence, as There Was No Duty to Remove, Restrain, or Eject Assailant.

Donato D. Ramos

The *Lemle* case does not directly deal with the point. However, the court's complete rejection of the doctrine of constructive eviction tends to support the proposition that an implied warranty to repair latent defects, which are material, may be a part of habitability.[35] Since implied warranty does not require either an act by the landlord or abandonment, it places the tenant on an equal plane with the landlord regarding problems of rent repair. In those jurisdictions that do not recognize implied warranty in leases and have not remedied the problem by statute, the law is heavily in favor of the landlord.[36] Even those jurisdictions that apply the limited exceptions to *caveat emptor* have not significantly improved the tenant's position. The exceptions have always been applicable only to very specific fact situations. The *Lemle* discussion intimates that implied warranty in lease agreements is not an exception to the rule—it is the rule. The court reaffirms this stand approximately one month later in *Lund v. MacArthur*.[37] In *Lund* the court extended the operation of implied warranty to unfurnished as well as furnished dwellings, and *caveat emptor* was laid to rest.

The *Lemle* case is the first in what should be a long line of decisions that seek to reform and re-evaluate the problems surrounding contemporary urban lease transactions. The theoretical or conceptual basis applied by the court has been the traditional tool for judicial reform. The common law is not afflicted with unalterable rigidity. If it is to prevent injustice, law must respond to contemporary needs.

V. Camp Cuthrell

TORTS—COMMON CARRIERS—AS A MATTER OF LAW, CARRIER HAD FULFILLED ITS DUTY TO PASSENGERS WHEN ITS DRIVER, AFTER WARNING CERTAIN PASSENGERS TO "QUIETEN DOWN," LEFT THE BUS TO SUMMON THE POLICE, AND A PASSENGER WAS INJURED IN HIS ABSENCE, AS THERE WAS NO DUTY TO REMOVE, RESTRAIN, OR EJECT ASSAILANT. *City of Dallas v. Jackson*, 450 S.W.2d 62 (Tex. Sup. 1970).

Plaintiffs, surviving heirs of M. C. Johnson, sought to recover damages pursuant to the provisions of the Wrongful Death Statute.[1] Johnson, a passenger on a bus owned and operated by the Dallas Transit

[35] *See* Lemle v. Breeden, 462 P.2d 470, 473 (Hawaii 1969). *Contra*, Kallison v. Ellison, 430 S.W.2d 839 (Tex. Civ. App.—San Antonio 1968, no writ).

[36] Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 552 (1966).

[37] 462 P.2d 482 (Hawaii 1969). *Contra*, Kallison v. Ellison, 430 S.W.2d 839 (Tex. Civ. App.—San Antonio 1968, no writ).

[1] TEX. REV. CIV. STAT. ANN. arts. 4671-4678 (1952).

System, was shot and killed by another passenger following an exchange of words and threats. The shooting occurred after a warning by the bus driver that both parties "quieten down" and after the bus driver had stepped off the bus to seek police assistance. The trial court held for the defendants; the court of civil appeals reversed.[2] Plaintiffs brought error to the Supreme Court of Texas. Held—*Reversed and judgment of the trial court affirmed.* As a matter of law, carrier had fulfilled its duty to passengers when its driver, after warning certain passengers to "quieten down," left the bus to summon the police and a passenger was injured in his absence, as there was no duty to remove, restrain, or eject assailant.[3]

A public carrier has been defined as:

> One who holds himself out to the public as engaged in the business of transportation of person or property from place to place for compensation, offering his services to the public generally. The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently, and hence is regarded in some respects as a public servant.[4]

The relationship of carrier and passenger arises when the carrier receives and agrees to transport another whether this be by contract between the carrier and passenger or between the carrier and the employer of the person to be carried.[5] One in the waiting room of a railroad station waiting to purchase a ticket[6] and one with a ticket awaiting the arrival of his train[7] have both been held to be passengers.

With the onset of this carrier-passenger relationship, a higher degree of care is imposed on the carrier regarding the safety of its passengers. As early as 1880, the Texas Supreme Court said that a public carrier is to exercise that degree of care to its passengers which very cautious, prudent and competent persons would exercise under similar circumstances.[8] A series of Texas Supreme Court cases later spoke of the "highest degree of care,"[9] "the utmost care,"[10] "great care,"[11] "a high degree of care,"[12] "the greatest care,"[13] and "the utmost practical

2 Jackson v. City of Dallas, 443 S.W.2d 771 (Tex. Civ. App.—Dallas 1969), *rev'd*, 450 S.W.2d 62 (Tex. Sup. 1970).
3 City of Dallas v. Jackson, 450 S.W.2d 62 (Tex. Sup. 1970).
4 Kelly v. General Electric Co., 110 F. Supp. 4 (E.D. Pa. 1953), *aff'd*, 204 F.2d 692 (3d Cir. 1953), *cert. denied*, 346 U.S. 886, 74 S. Ct. 137, 98 L. Ed. 390 (1953).
5 Gulf, C. & S.F. Ry. Co. v. Wilson, 79 Tex. 371, 15 S.W. 280 (1891).
6 McCardell v. Gulf, C. & S.F. Ry. Co., 102 S.W. 941 (Tex. Civ. App. 1907, no writ).
7 Houston & T.C.R. Co. v. Phillio, 96 Tex. 18, 69 S.W. 994 (1902).
8 Railroad Co. v. Halloren, 53 Tex. 46 (1880).
9 Texas Cent. Ry. Co. v. Burnett, 80 Tex. 536, 16 S.W. 320 (1891).
10 Gallagher v. Bowie, 66 Tex. 265, 17 S.W. 407 (1886).
11 Texas Cent. Ry. Co. v. Stewart, 20 S.W. 962 (Tex. Civ. App. 1892, writ ref'd).
12 Dillingham v. Anthony, 73 Tex. 47, 11 S.W. 139 (1889).
13 Texas & P. Ry. Co. v. Miller, 79 Tex. 78, 15 S.W. 264 (1890).

care".[14] This higher standard of care for carriers, however, is not so far reaching as to insure the safety of passengers.[15] Each passenger has a duty to use reasonable care to prevent his own injury.[16] Other jurisdictions in the United States require of public carriers "the utmost caution of very careful, prudent men,"[17] "extraordinary diligence,"[18] and "the highest degree of care."[19] Prosser in his treatise on torts describes the duty of carriers as "the highest possible care consistent with the nature of the undertaking."[20]

The criteria of foresight or anticipation must be present in determining whether carriers are liable for injuries to their passengers. The case of *International & G. N. R. Co. v. Duncan*[21] held that a carrier is not liable for injuries to passengers where the carrier has no reason to know or to anticipate improper conduct. The United States Court of Appeals for the Fifth Circuit expressed this view in *Garrett v. American Airlines, Inc.*,[22] by saying that in the Texas approach to carrier liability it is precisely this element of anticipation of common practice and likelihood of harm that distinguishes cases of carrier liability from those of nonliability. *Bennevendo v. Houston Transit Co.*[23] was an action brought by a passenger to recover for injuries caused by a bottle thrown into defendant's bus. The court held that although the company owed a duty to protect its passengers it was not liable because it was not bound to anticipate that the bottle would be thrown through the open door of the bus.[24]

Texas considers two elements in determining whether a carrier is liable for injuries to its passengers. The first element is whether the carrier has exercised a high degree of foresight as to possible dangers, and the second, whether the carrier has exercised such a high degree of prudence in guarding against these dangers as would be used by a very cautious, prudent and competent man under the same or similar circumstances.[25] It is these two elements that were applied in *City of*

14 Levy v. Campbell, 19 S.W. 438 (Tex. Comm'n App. 1892, jdgmt adopted), *rev'd on other grounds*, 20 S.W. 196 (Tex. Comm'n App. 1892).
15 Conwill v. Gulf, C. & S.F. Ry. Co., 85 Tex. 101, 19 S.W. 1017 (1892).
16 *Id.*
17 Pennsylvania Co. v. Roy, 102 U.S. (12 Otto) 451, 26 L. Ed. 141 (1880).
18 Andrews Taxi & U-Drive It Co. v. McEver, 114 S.E.2d 145 (Ga. App. 1960).
19 Fieve v. Emmeck, 78 N.W.2d 343 (Minn. 1956).
20 PROSSER, HANDBOOK OF THE LAW OF TORTS § 34, at 184 (3d ed. 1964).
21 121 S.W. 362 (Tex. Civ. App. 1909, no writ).
22 332 F.2d 939 (5th Cir. 1964).
23 238 S.W.2d 271 (Tex. Civ. App.—Galveston 1951, writ ref'd n.r.e.).
24 *Id.*
25 Hill v. Texas, New Mexico & Oklahoma Coaches, 153 Tex. 581, 272 S.W.2d 91 (1954); Gulf, C. & S.F. Ry. Co. v. Conley, 113 Tex. 472, 260 S.W. 561 (1924); Holeman v. Greyhound Corp., 396 S.W.2d 507 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.); Harrison v. Southwest Coaches, 207 S.W.2d 159 (Tex. Civ. App.—Eastland 1947, writ ref'd n.r.e.); Gulf, C. & S.F. Ry. Co. v. Baldwin, 2 S.W.2d 520 (Tex. Civ. App.—Dallas 1928, no writ); Gulf, C. & S.F. Ry. Co. v. Besser, 200 S.W. 263 (Tex. Civ. App.—Beaumont 1918, writ dism'd); Texas & P. Ry. Co. v. Storey, 83 S.W. 852 (Tex. Civ. App. 1904, writ ref'd).

Dallas v. Jackson.[26] Although the Supreme Court of Texas in 1890 asserted that public carriers should "use such means and foresight as persons of the *greatest care* and prudence would usually use in similar cases,"[27] and the commission of appeals in 1923 said that it is the duty of carriers of passengers to exercise the *highest degree of care* from the wilful misconduct and violence of passengers,[28] such strict tests have not been applied in later cases. The two authorities cited by the supreme court in *Jackson* to support its decision are cases decided in 1880 and 1924 advocating the care exercised by very careful and prudent persons. This indicates that, although modern Texas courts do recognize that public carriers owe a higher degree of care to passengers than mere ordinary care, they are reluctant to apply the "highest degree of care" or "greatest care" tests. *Gulf, C. & S.F. Ry. Co. v. Shields* held that a charge to the jury requiring the defendant railway company to use "the highest degree of care and diligence that human judgment and foresight were capable of" was erroneous.[29] Likewise, a charge that all possible care be exercised has been held erroneous.[30]

It is well settled in Texas that public carriers have a duty to protect passengers from the violence and insults of other passengers and strangers and to protect them from the violence and insults of the carrier's own servants.[31] As a result of this duty, agents of public carriers are required to use all necessary power and means to eject from their carriers anyone whose conduct endangers the safety or interferes with the convenience of the other passengers.[32] In *Galveston H. & S.A. Ry. Co. v. Bell,*[33] Bell, while a passenger upon a train of defendant railway company, was shot during an altercation between two other passengers in the same coach. The court held that the railway company's failure to eject the passengers involved in the altercation was the proximate cause of the resulting injury and that the railway company was liable.[34]

Whether a defendant carrier is negligent in failing to eject or remove

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26 450 S.W.2d 62 (Tex. Sup. 1970).

27 Texas & P. Ry. Co. v. Miller, 70 Tex. 78, 15 S.W. 264 (1890) (Emphasis added.).

28 Nevill v. Gulf, C. & S.F. Ry. Co., 187 S.W. 388 (Tex. Civ. App.—Fort Worth 1916), *aff'd on rehearing*, 252 S.W. 483 (Tex. Comm'n App. 1923, jdgmt. adopted) (Emphasis added.).

29 28 S.W. 709 (Tex. Civ. App. 1894), *rev'd on rehearing on other grounds*, 29 S.W. 652 (Tex. Civ. App. 1895, writ ref'd).

30 International & G.N.R. Co. v. Welch, 86 Tex. 203, 24 S.W. 390 (1893).

31 Dillingham v. Anthony, 73 Tex. 47, 11 S.W. 139 (1889); Bennevendo v. Houston Transit Co., 238 S.W.2d 271 (Tex. Civ. App.—Galveston 1951, writ ref'd n.r.e.); Missouri, K. & T. Ry. Co. of Texas v. Gerren, 121 S.W. 905 (Tex. Civ. App. 1909, writ dism'd).

32 Galveston, H. & S.A. Ry. Co. v. Bell, 165 S.W. 1 (Tex. Civ. App.—San Antonio 1914), *aff'd*, 110 Tex. 104, 216 S.W. 390 (1919); Galveston, H. & S.A. Ry. Co. v. Long, 36 S.W. 485 (Tex. Civ. App. 1896, no writ).

33 165 S.W. 1 (Tex. Civ. App.—San Antonio 1914), *aff'd*, 110 Tex. 104, 216 S.W. 390 (1919).

34 *Id.*