Marquette Law Review

Volume 22
Issue 3 *April 1938*

Article 10

Carriers: Negligence: Duty to Passenger Who Slips on Refuse Left on Floor of Public Conveyance

John H. Russell

to be withdrawn for private purposes, is subrogated to the rights of the one secured against risk. *U. S. Fidelity & Guar. Co.* v. *Union Bank & T. Co.*, 228 Fed. 448 (C.C.A. 6th, 1915). The provisions for subrogation in a bank's bond to repay the commonwealth's deposits and a stipulation in the application giving the surety rights and remedies of individual sureties refers only to the bank's rights and remedies, and does not put the surety upon paying in the position of the commonwealth as a preferred creditor. *South Philadelphia State Bank* v. *National Surety Co.*, 228 Pa. 300, 135 Atl. 748 (1927). In opposition to this view the Wisconsin court has held that the county treasurer's surety upon paying to the county the amount of a judgment against him could be subrogated to the rights of the county as against third persons. *Forest County* v. *Poppy*, 193 Wis. 274, 213 N.W. 676 (1927). In 1923 the legislature in Wisconsin passed a statute providing that upon the insolvency of any bank or trust company which had deposits of the state or any political subdivision thereof, such claim for payment should not be a preferred claim with the exception of claims arising prior to the passage of the act, and for any claim for taxes. WIS. STAT. (1937) § 224.05. In conformity with the spirit of the act creating the FDIC the Wisconsin legislature has by statute provided that the FDIC be given the same right which the depositor would have up to the extent of the subrogation. WIS. STAT. (1937) § 220.082.

KEARNEY W. HEMP.

CARRIERS—NEGLIGENCE—DUTY TO PASSENGER WHO SLIPS ON REFUSE LEFT ON FLOOR OF PUBLIC CONVEYANCE.—The defendant was a common carrier operating a number of motor busses. The plaintiff had been a passenger on one of these busses. She had been injured when she slipped on a banana peel as she was getting out of her seat on the bus. It was brought out by the plaintiff's witnesses at the trial that a number of children had been on the bus when the accident occurred, and that these children were returning from a picnic and had been eating bananas and throwing refuse on the floor. The company's driver said that he had not seen the children doing any of these acts. The trial court let the case go to the jury and the judge instructed the jury that the defendant company owed the passenger only ordinary care in making inspection of the bus but that in all other respects it owed the plaintiff the highest degree of care for her safety. Judgment was entered on a verdict for the plaintiff. On appeal, *held*, judgment affirmed; a bus company is a common carrier and owes its passengers the highest degree of care for their safety. *Jones* v. *Youngston Municipal Ry. Co.*, (Ohio, 1937) 12 N.E. (2d) 279.

Whenever a patron has sustained injuries after slipping on refuse left on the floor of a public conveyance, or about a carrier's station premises, he must show more than the mere happening of the accident to make out a case against the carrier. *Sisson* v. *Boston Elevated Ry. Co.*, 277 Mass. 139, 178 N.E. 733 (1931); *Thomas* v. *J. Samuels & Bros., Inc.*, 47 R.I. 206, 132 Atl. 8 (1926); *Windham* v. *Atlantic Coast Line Co.*, 71 F. (2d) 115 (C.C.A. 5th, 1934). The burden is on the plaintiff to show how, when and by whom the refuse was placed on the floor of the conveyance or station. *Devine* v. *Empire State R. R. Corp'n.*, 220 App. Div. 466, 221 N.Y. Supp. 623 (1927); see also *Taylor* v. *Kansas City Terminal Ry. Co.*, (Mo. App. 1922) 240 S.W. 512. He must have assumed this burden although the court on appeal is satisfied that he is entitled to an instruction on highest degree of care if he does get his case to the jury. *Davis* v. *South Side Elevated R. R. Co.*, 292 Ill. 378, 127 N.E. 66, 10 A.L.R. 254 (1920).

Evidence as to the condition of the refuse, the banana peel or apple core, for example, may be something to support the plaintiff's contention that the refuse had been on the floor for some period of time. *Anjou* v. *Boston Elevated Ry. Co.*, 208 Mass. 273, 94 N.E. 386 (1911). But see *Sisson* v. *Boston Elevated Ry. Co., supra,* where the company showed also that a porter was constantly on duty and where the court accepted the company's contention that the bruised condition of the apple core would not support any inference about length of time it might have been on the platform. In *Vick* v. *Schoff,* (Tex. Civ. App. 1924) 260 S.W. 116, the plaintiff supported his case with the testimony of witnesses who had seen the company's employees eating bananas on the train. In *St. Louis-San Francisco Ry. Co.* v. *Daniels,* 170 Ark. 346, 280 S.W. 354 (1926), the appellate court held that an instruction on highest degree of car was proper and that the plaintiff had introduced enough evidence to get his case to the jury where he could show that other passengers had kicked other bits of refuse off the same station platform about the same time the plaintiff had been injured. *Cf. Kelly* v. *Boston Revere Beach & Lynn R. Co.*, 266 Mass. 23, 164 N.E. 624 (1929). In that case the plaintiff had sat upon a needle which was sticking out of a car seat. It appeared that shortly before that happened the conductor had helped a passenger, who had been sitting in the same seat, to pick up the contents of a sewing basket which had been spilled upon the floor. Under the circumstances the court held that an instruction on highest degree of care was warranted and that the plaintiff had made out a case against the company. In the instant case the court seemed concerned only about the instructions on the degree of care. The court felt that the instructions had been too favorable for the defendant but that the error, such as it was, had not affected the plaintiff adversely. It is obvious that the plaintiff did have a case to suggest how the banana peel had come to be where it was and to suggest, too, that the carrier's employees should have discovered it.

MUNICIPAL CORPORATIONS—RESPONSIBILITY IN TORT—CITY LIABLE LIKE PRIVATE LANDOWNER.—The plaintiff's eight year old son was accidentally shot and killed on the afternoon of April 22, 1930 when struck by a bullet fired by an older boy, one Uccelino. At the time of the accident the deceased was standing near his home and Uccelino was across the street in a public park. The park was an open 18-acre tract of land owned, maintained, and controlled by the defendant city; the management of the park was supervised by a force of city employees. For a period of seven or eight years promiscuous rifle shooting had been indulged in throughout the park by many persons who were not members of any rifle club or similar authorized organization, and the city employees in the park had been present on many occasions and knew that this shooting was being carried on. A verdict was entered for the plaintiff parents of the deceased boy in the sum of $2,259.72, but the trial court rendered judgment for the defendant city notwithstanding the verdict on the ground that the only negligence shown had no relation to the physical condition of the park, its equipment or the ordinary use thereof, but at most consisted in the neglect of the city to so police the park as to keep order. On appeal, *held,* judgment reversed, the city occupied the position of a landowner in regard to this park and thus the full proprietary liability of a private property owner attached to the city and it became liable for the damages caused by its breach of duty in failing to abate a dangerous condition of which it had notice. *Stevens* v. *City of Pittsburgh,* (Pa. Super. 1937) 194 Atl. 563.