Common Carrier Litigation: An Overview of Relevant Case Law

by Ryan Quinn

Successfully litigating personal injury cases involving common carriers requires a nuanced understanding of several legal principles unique to common carrier litigation. This article will examine the relevant case law and set forth the broad legal principles that guide legal assessments in common carrier cases.

What is a "common carrier"?

In Virginia, a common carrier is classically defined as "one who, by virtue of his calling and as a regular business, undertakes for hire to transport persons or commodities from place to place, offering his services to all such as may choose to employ him and pay his charges."[1] Embedded in this somewhat esoteric definition are two key defining features: (1) a common carrier expressly holds itself out to the public as offering transportation services; and (2) the transportation services provided are not incidental to another more fundamental function. The Supreme Court of Virginia offered a clear example of this distinction in *Bregel v. Busch Entertainment Corp*.[2] In *Bregel*, the Court held that Busch Gardens' beloved Skyline attraction, which offers patrons a scenic aerial overview of the park, was not a common carrier as it was offered for primarily "entertainment purposes, and the transportation function is incidental to the entertainment function."[3] The Court further reasoned that "patrons do not pay admission to the park to obtain transportation services; rather, they pay to be entertained by amusement rides, shows, and other attractions."[4]

Utilizing this two-part analysis, Virginia courts have determined that taxicabs, buses, limousines, railroads, and ferries are common carriers.[5] Each expressly markets itself as a transportation provider, and each offers fundamentally transportation services, services that are not incidental to another more significant function. However, under the logic of *Bregel*, a company offering scenic helicopter tours of the Potomac River, for example, would likely not be considered a common carrier, as the transportation element of their services might be considered incidental to the more fundamental entertainment purpose of the scenic transportation. A more interesting potential example is a dinner cruise travelling a regular route (think "Booze Cruise" in *The Office*). Such a ride has all the earmarks of a common carrier (offers what are generally considered transportation services, ticketed entry, regular routes, etc.) but it could be easily argued that the transportational element of the service provided is incidental to the more paramount entertainment function. Following the rationale of *Bregel*, one critical aspect of this analysis will be whether patrons, when paying admission to the cruise, do so primarily for entertainment or transportation reasons.[6]

On their own merits, ridesharing companies like Uber and Lyft might appear to meet the standards of the "common carrier" designation, as they, at least on the surface, satisfy the *Bregel* twin criteria as expressly offering transportation services that are not incidental to another, more elemental function. However, Virginia law expressly excluded Uber, Lyft, and other ride-sharing entities from the definition of "common carriers."[7] This legislative decision has potentially massive implications for the plaintiff's bar, implications that exceed the scope of this article.

A heightened standard of care

Determining whether a transportation provider is a "common carrier" under Virginia law is critical because Virginia courts have long imposed a higher standard of care to common carriers than other motorists. This heightened standard of care has its origins in two common law assumptions regarding common carriers: (1) that motorized travel is an intrinsically dangerous activity; and (ii) that during transport, passengers are largely dependent on the common carrier to provide for their safety. As the Supreme Court of Virginia has explained, rather charmingly if somewhat anachronistically, "[t]he reason for the high degree of care required of carriers is the tender regard the law has for life and limbs, and the fact that the carrier has the selection, control, management and operation of the

whole instrumentalities of carriage, and a limited control over and direction of the conduct of the passenger."[8]

While courts are in broad agreement on the underlying logic of a higher duty of care for common carriers, courts have used varying formulations to define the specific nature of this heightened duty. In one common formulation, a common carrier "must exercise the highest degree of practical care for the safety of its passengers."[9] An even more exacting standard is in *Chesapeake Ferry Co v. Cummings*, where the Virginia Supreme Court imposed on a common carrier "the duty to use the highest degree of care for their safety known to human prudence and foresight, and is liable for the slightest negligence against which human care and foresight may guard."[10] (This is an advisable standard for plaintiff's counsel to adopt, as it is difficult to see anything short of absolute perfection that could satisfy "the highest degree of care against which human care and foresight may guard.")

Other common formulations include:

- "the highest degree of care"[11]
- "very high degree of care"[12]
- "utmost degree of care"[13]

Perhaps the most widely cited standard is found in *Shamblee v. Virginia Transit Co*.,[14] where the court held that a common carrier should provide to passengers "the highest degree of care for their safety…it is liable for the slightest negligence that such care could have foreseen and guarded against." However, the Court followed this grand statement with the potentially contradictory caveats that common carriers are "not insurers" for the safety of their passengers and that the heightened standard of care "means no more than every care which is practicable by common carriers engaged in the business of transporting passengers."[15] The *Shamblee* Court, and subsequent opinions, have offered precious little guidance on how to interpret these two potentially conflicting instructions. All that is certain is that common carriers are held to a standard more exacting than ordinary negligence, but short of strict liability.

The *Virginia Model Jury Instructions* thread the same needle, imposing liability for the "slightest negligence" while cautioning that common carriers are not insurers for the safety of their passengers. Virginia Model Jury Instruction No. 22.000 states:

> The defendant is a common carrier. A common carrier has the duty to use the highest degree of practical care for the safety of its passengers. It is liable for the slightest negligence causing injury that could have been foreseen and guarded against, but it is not an insurer of the safety of its passengers. If the defendant fails to perform this duty, then it is negligent.

What does this mean in practice? A 1964 opinion from the Supreme Court of Virginia provides a nice illustration of the differing liability standards imposed to common carriers and other vehicles. In *Terminal Cars, Inc. v. Wagner*,[16] a woman engaged a cab in Norfolk to take her home. As the cab driver was following a truck closely, the truck driver started to turn, the cab driver applied the brakes and brought the vehicle to sudden stop, injuring the passenger. She sued the cab company, the cab driver, and the truck driver to recover damages for her injuries. The Virginia Supreme Court held that the cabdriver, as a common carrier, was liable for "slight negligence" and required the cab driver to use "the highest degree of care."[17] In contrast, the truck driver could only be held liable if he failed to act reasonably under the circumstances pursuant to ordinary negligence standards.[18] The imposition of differing standards of care to common carriers has some very significant ramifications – making these cases substantially easier to pursue, and heavily incentivizing plaintiff's counsel to find common carrier defendants whenever possible.

One question left open by the heightened standard of care imposed on common carriers is whether common carrier defendants can make use of a plaintiff's contributory negligence as a defense to liability. Virginia courts have not expressly ruled on the issue, but other jurisdictions have found that the heightened standard of care essentially precludes contributory negligence claims grounded in ordinary passenger negligence.[19] While not binding in civil actions, Virginia Code §8.01-58 bars contributory negligence claims in cases brought by injured railroad employees against their employers. This further suggests that contributory negligence might not bar claims against common carriers.

Identifying the limits of common carrier liability

The passenger-carrier relationship

In perhaps the most critical limitation on the heightened standard of care required of common carriers, courts have held that the higher standard applies only in instances where the plaintiff can properly be considered a "passenger" of the defendant carrier at the moment the injury sued upon was sustained.[20] Courts have further clarified the dimensions of a plaintiff's "passenger" status - a plaintiff's status as a passenger is deemed to commence at or about the time of boarding,[21] and continues "until after the [plaintiff] has alighted from the conveyance and has had a reasonable opportunity to reach a place of safety,"[22]

Of great potential significance to defective premises claims, Virginia courts have generally held that a carrier's duty of the highest degree of practical care does not extend to the condition of station grounds.[23] Instead, courts have generally held that where non-transportational, and presumptively,

less dangerous aspects of a carrier's business are concerned, the law imposes on carriers the same duty of ordinary care it requires of all proprietors.[24] Thus, courts in Virginia impose on common carriers the lesser standard of "reasonably safe and adequate" with regard to the condition of stations and other common grounds not expressly involved in the literal transport of passengers.[25]

A recent federal case applying Virginia law provides a useful illustration of the passenger vs. non-passenger distinction. In *Jones v. Wash. Metro. Area Transit Auth*.,[26] the plaintiff disembarked the 16-U WMATA Metrobus at the Pentagon Metro Station, a transit station in Arlington, Virginia. After leaving the bus, plaintiff began walking toward an escalator descending to the rail platform, where she tripped on what she described as an "uneven seam," approximately one inch high, causing significant personal injuries. The common carrier defendant argued that plaintiff ceased to be a passenger once she had reached a point of safety at the bus drop-off point, while the plaintiff contended that she remained a passenger because she was in the process of transferring to one of defendant's trains, and was under defendant's control at all material times.

The court first noted that while the common lay definition of "passenger" often extends to a broader category of persons engaging in travel, including, for example, those with tickets who intend to travel or who are awaiting boarding in airport lounges, Virginia case law applies a more rigid, limited definition to the term. When determining whether the more stringent common carrier standard of care applies, the term "passenger" is "properly construed as limited to persons on the conveyances or transports or directly boarding or alighting from them."[27] This narrower definition of "passenger" is warranted, according to the *Jones* Court, because only those individuals in transport or directly boarding or departing from transit are "subject to the degree of carrier control and the type of hazard that warrants imposing the higher standard of care on a carrier."[28]

The *Jones* Court relied heavily on the Supreme Court of Virginia's *Dressler* decision, where the Court held that the plaintiff was not a passenger at the time of injury where the transferring plaintiff was struck within minutes by a different railcar while she was crossing the street to board another railcar on a different line also operated by the same carrier.[29] Relying on the underlying rationale for a higher standard of care for common carriers – the dangerousness of travel and the carrier's complete control over the passenger's safety -- the *Dressler* Court concluded that "[t]here seems to be good reason ... for holding that the relation of passenger is not sustained while a passenger with a transfer is outside the direction and control of the carrier and walking along the public highway."[30] Consequently, whether the passenger-carrier relationship is sustained exists during transfer — and thus whether the carrier's duty of the highest degree of practical care continues — turns on: (i) the degree and type of risks to which the person is exposed during transfer, and (ii) the degree and type of control that the carrier maintains over the person. As the Eastern District of Virginia concluded, "[o]nly where the risks involved and the carrier's control over the person are essentially the same as those that exist during carriage should the highest degree of practical care be imposed on a carrier. In other circumstances, a duty of ordinary care is appropriate."[31] Therefore, the court held that WMATA did not owe plaintiff a duty of the highest degree of practical care following her disembarkation from the bus and her subsequent approach to the escalator descending to the rail platform since the plaintiff had "reached a place of safety" on the public walkway leading to the escalator and was therefore no longer under the common carrier's exclusive, or even primary, control.[32]

This logic is embodied in the *Virginia Model Jury Instructions*, which offer the following guidance for when the passenger-carrier relationship is terminated: "The passenger-carrier relationship does not end until the passenger has exited the [conveyance] and has had a reasonable opportunity to reach a safe place.[33]

Municipal liability

Another important limitation on common carrier liability is the inconvenient reality that many such carriers are subject to Virginia's sovereign immunity statute which specifically exempts city, county and state employees who are doing their jobs from civil lawsuits unless evidence exists that the person acted with gross negligence.[34] As we are all likely aware, proving gross negligence is a very high evidentiary bar. The Supreme Court of Virginia has held that: [G]ross negligence is that degree of negligence which shows indifference to others as constitutes an utter disregard of prudence amounting to a complete neglect of the safety of the guest. It must be such a degree of negligence as would shock fair minded persons although something less than willful recklessness."[35] Stated differently, gross negligence is found where a tortfeasor "disregard[s] prudence to the level that the safety of others is completely neglected."[36] Consequently, gross negligence is generally found in instances of intentional or quasi-intentional conduct, and relatively rarely in pure negligence.[37]

For the above reasons, municipal liability can render the otherwise favorable treatment of common carrier negligence moot. For example, a recent federal court applying Virginia law determined that sovereign immunity precluded plaintiff's claims for injuries suffered while a passenger on a CUE bus operated by the City of Fairfax, Virginia.[38] While a complete discussion of the complicated area of sovereign immunity exceeds the scope of

this article, it is vital that plaintiff's counsel identify and analyze any potential municipal or city liability issues posed in common carrier cases.

Conclusion

When considering personal injury cases involving potential common carriers, plaintiff's counsel will need to assess several threshold questions. First, is the potential defendant considered a "common carrier"? If so, was the injured party a passenger at the time of the subject incident, or was the injured party a non-passenger more analogous to an invitee on a premise controlled by the defendant? If the injured party was a passenger at the time of injury, will the defendant be held to the higher standard of care imposed to common carriers? If so, which specific standard of care will the court impose? Will the defendant be able to avail itself of sovereign immunity in some capacity? It is only after careful consideration of each of these questions, and many more, that counsel may maximize the value of a potential common carrier injury case.

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Endnotes

1. *Carlton v. Boudar*, 118 Va. 521, 527, 88 S.E. 174, 176 (1916); *Riggsby v. Tritton*, 143 Va. 903, 906, 129 S.E. 493, 494 (1925).
2. *Bregel v. Busch Entertainment Corp*., 248 Va. 175 (1994).
3. *Id*. at 175.
4. *Id*. at 177.
5. *Terminal Cars, Inc. v. Wagner*, 205 Va. 214 (1964) (taxis); *Shamblee v. Virginia Transit Co.*, 204 Va. 591(1963) (buses); *Norfolk-Southern Ry. Co. v. Tomlinson,* 116 Va. 153, 156 (1914) (railroads); *Chesapeake Ferry Co v. Cummings,* 158 Va. 33, 164 S.E. 281 (1932) (ferries); *Murphy's Hotel v. Cuddy's Adm'r,* 124 Va. 207 (1919) (elevators).
6. *See Bregel* at 177.
7. *See* Virginia Stat. §46.2-2000.
8. *Va. Ry. & Power Co. v. Dressler,* 111 S.E. 243 (1922); *see also Balt. & Ohio R.R. Co. v. Wightman's*, 70 Va. 431, 445 (1877).
9. *Crist v. Wash., Va. & Md. Coach Co*., 196 Va. 642, 645 (1955).
10. *Chesapeake Ferry Co v. Cummings*, 158 Va. 33, 164 S.E. 281 (Va. 1932).
11. *Shamblee v. Virginia Transit Co*., 204 Va. 591, 593 (1963); *Norfolk-Southern Ry. Co. v. Tomlinson*, 116 Va. 153, 156 (1914)
12. *Tri-State Coach Corp. v. Stidham*, 191 Va. 790, 795 (1951)
13. *Kaplan v. Balt. & Ohio R. Co*., 113 A.2d 415, 416 (Md. 1955)
14. *Shamblee v. Virginia Transit Co*., 204 Va. 591, 593-94 (1963)
15. *Id.*
16. *Terminal Cars, Inc. v. Wagner*, 205 Va. 214 (1964),
17. *Id.* at 219.
18. *Id.*
19. *See, e.g.*, *McKellar v. Yellow Cab Co., Inc*., 148 Minn 247 (Minn. 1921) (common carrier held to "highest degree of care" standard not "absolved from liability to a passenger for the consequences of its own negligence by the fact that the passenger failed to protest against the negligent manner in which the carrier operated its conveyance"...").
20. *See, e.g*., *Greater Richmond Transit Co. v. Wilkerson*, 242 Va. 65, 70, (1991); *Tri-State Coach Corp. v. Stidham*, 191 Va. 790, 795 (1951).
21. *See, e.g., Wilkerson*, 242 Va. at 70,
22. *Stidham*, 191 Va. at 795, 62 S.E.2d 894.
23. *See Cleveland v. Danville Traction & Power Co*., 179 Va. 256, 259-60 (1942) ("the highest degree of care ... applies only to those means and measures of safety which the passenger of necessity must trust wholly to the carrier. It is in general applicable only to the period during which the carrier is in a certain sense the bailee of the person of the passenger.").
24. *See Jones v. Wash. Metro. Area Transit Auth*., 378 F.Supp.2d 718, 722 (E.D. Va. 2005).
25. *See, e.g*., *Va. Ry. & Power Co*., 151 Va. 934, 949, 145 S.E. 833 (1928); *Va. Stage Lines v. Newcomb*, 187 Va. 677, 679 (1948) (applying ordinary care standard in case of slip-and-fall in bus terminal).
26. *Jones v. Wash. Metro. Area Transit Auth*., 378 F.Supp.2d 718, 719 (E.D. Va. 2005),
27. *Jones* at 723.
28. *Id.* at 723-24.
29. *Dressler*, 132 Va. at 350.
30. *Id.* at 362.
31. *Jones* at 724.
32. *Jones v. Wash. Metro. Area Transit Auth*., 378 F.Supp.2d 718 (E.D. Va. 2005).
33. *See Virginia Model Jury Instruction* 22.060 – Termination of Passenger-Carrier Relationship.
34. *See*, *e.g., Niese v. City of Alexandria*, 564 S.E.2d 127, 132 (Va. 2002).
35. *Community Motor Bus Co., Inc. v. Windley*, 299 S.E.2d 367, 369 (Va. 1983).
36. *Wilby v. Gostel*, 578 S.E.2d 796, 801 (Va. 2003).
37. *City of Lynchburg v. Brown*, 613 S.E.2d 407, 410 (Va. 2005) ("deliberate conduct is important evidence on the question of gross negligence.").
38. *Ali v. City of Fairfax*, Case No. 1:14-cv-1143 (E.D. Va. 2015).