

Common carriers have their day in court

Arizona rejects strictest standard of care for common carriers: **Is this a trend?**

By Bill Poorten

In 2011, I argued the case, *Nunez v. PTMTI*, to the Arizona Supreme Court which considered whether the law should hold common carriers to a heightened standard of care; something more than reasonable under the circumstances. As common carriers include transit buses, shuttle buses, paratransit vans, streetcars, light rail, trolleys, taxis and even elevators the issue had broad implications.

A heightened standard of care for common carriers is and remains prevalent throughout the United States and is expressed in various language including “highest duty of care,” “highest practical duty of care,” and “strictest duty.”

In a unanimous decision, the Arizona Supreme Court rejected the heightened duty of care standard and held that the general rule of reasonable care under the circumstances applies to common carriers just as it applies to most everyone else. The court reasoned that in 1987, Arizona had adopted statutes that created a pure comparative fault scheme. Serving as the fact-finder, a jury or judge considers the alleged fault of all parties and non-parties and is able to allocate percentages of fault to each party or non-party found to have caused or contributed in some way to the incident, claimant’s injuries and damages based upon the evidence. This pure comparative fault scheme requires the fact-finder to compare the alleged relative fault of each party and non-party.

Such a comparison is inherently unfair to a common carrier if it measures its conduct using a heightened standard of care as compared to others’ actions considered against a less demanding reasonable care standard.

It appears that the court was persuaded to think the heightened standard of care might mislead a jury into believing a common carrier is something akin to an insurer of the safety of its passengers and the public, and tend to cause a jury to find responsibility even in the absence of proof of negligence.

The court’s opinion also indicates it was unconvinced that a rejection of the heightened standard of care would translate into a “lowering” of the standard of care which would promote less care and result in reduced safety and more accidents.

Rather, it seems that the court accepted my arguments. “Reasonable

care under the circumstances” did not equate to less care and would not encourage less prudent common carrier practices. As I argued to allow a claimant to argue that in the determination of “reasonable care under the circumstances,” a jury should consider:

1. A common carrier driver or operator is specially trained
2. A common carrier driver or operator is a paid professional
3. A common carrier driver or operator is entrusted with greater responsibilities because of the size and weight of the vehicle, number of occupants, potential for greater risk of injury and damage.
4. Passengers entrust themselves to the care of the common carrier to whom they pay a fare.

As noted in *Nunez*, the obligation required by the law of torts is typically the duty to use reasonable care. Before *Nunez*, common carriers were seen as one of a group for whom the law prescribed a duty requiring a higher degree of care. This group includes innkeepers, employers, the owners or possessor of land, and power companies. This higher standard was justified by a special relationship between persons or a belief that there was a greater risk associated with certain activities. The *Nunez* Court may be foretelling a trend that rejects this notion of special relationships and heightened degrees of care, and toward the application of the principle of reasonable care in all circumstances regardless of the nature of any particular relationship.

What does *Nunez* mean beyond the borders of Arizona? Should the view of the *Nunez* decision be as merely an anomaly or outlier? Or, does *Nunez* foretell a broader trend in the evolution of American tort law?

Since *Nunez*, no other state has followed Arizona and adopted a reasonable care under the circumstances standard for common carriers. However, 11 other states have adopted a pure comparative fault scheme similar to Arizona.

In my opinion, those states are likely candidates to join Arizona because the comparison of the proportionate degrees of fault is fairer and simplified if the same standard of care (i.e. reasonable care under the circumstances) is applicable to all. This decision preserves the important feature of a pure comparative scheme that allows a claimant to recover damages despite some fault allocation to the claimant. Eliminating the unfairness of measuring a common carrier’s conduct by a higher standard of care actually improves the system. **BR**

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