

Facts and Procedural History

Plaintiff, unable to find a seat in a New York City bus, grasped a metal strap to steady herself. When the bus began to move, the strap slid out of position, causing injuries to her shoulder and hand. Plaintiff sued the public authority that operated the bus and its parent, claiming that the strap was defective.

Defendants asked the court to charge the jury on actual and constructive notice. While the request was never put in writing, an extended colloquy made it clear. The court was asked to charge that, even if the strap was defective, defendants were not negligent if they did not know, and would not by the use of reasonable care have known, of the defect. The court rejected the request and charged the jury, without objection, in the language of New York Pattern Jury Instruction (PJI) 2:164:

"A common carrier such as a bus company is required to know, and is charged with knowing the danger of its passengers from faulty maintenance of its vehicle and equipment, and is also charged with knowing how to avoid such dangers.

"A common carrier of passengers has the duty to use reasonable care under all of the circumstances in the maintenance of vehicles and equipment for the safety of its passengers. Reasonable care means that care that a reasonably prudent bus company would use under the same circumstances in keeping with the dangers and risks known to the bus company, or which it should reasonably have foreseen."

The jury returned a verdict for plaintiff, judgment was

entered in her favor, and the Appellate Division affirmed. We granted leave to appeal and now reverse.

Discussion

In Bethel v New York City Tr. Auth. (92 NY2d 348, 351 [1998]), we abandoned the rule that common carriers owe a "duty of highest care," and decided to "realign the standard of care required of common carriers with the traditional, basic negligence standard of reasonable care under the circumstances." It follows from Bethel that a common carrier, like any other defendant, is not an insurer of the safety of its equipment; it can be held liable for defects in the equipment only if it knew, or with reasonable care should have known, that the equipment was defective (see, e.g., Picacquadro v Recine Realty Corp., 84 NY2d 967 [1994]; Levinstim v Parker, 27 AD3d 698 [2d Dept 2006]; Fetterly v Golub Corp., 300 AD2d 1056 [4th Dept 2002]). Plaintiff does not dispute this principle, but argues that the court's charge here adequately communicated it to the jury. We disagree.

The charge the court gave was not incorrect, but the statement that "a bus company is required to know, and is charged with knowing the danger of its passengers from faulty maintenance of its vehicle and equipment" is open to misinterpretation. Indeed, the trial judge himself, in discussing the charge with counsel, stated the law incorrectly. He said "once it's established that there is a defect, given the obligations of the

common carrier to maintain those things without defects . . . it's the burden of proof on the defendant to show that in the exercise of due care, they could not have discovered this defect." The court's charge, in the absence of the specific explanation defendants requested of actual and constructive notice, could have led the jury to the same error.

In cases like this one, courts should, if requested, give a charge on actual or constructive notice. Such a charge should inform the jury that the plaintiff must prove the defendant knew, or using reasonable care should have known, that the equipment was not in a reasonably safe condition; the charge could be quite similar to PJI 2:226, which is applicable to claims against municipalities. Also, although both sides in this case agreed to the language the court did charge, future trial courts should avoid using the first sentence of PJI 2:164, which seems to suggest, contrary to Bethel, that there is something special or unique about a common carrier's duty of care.

Because of the trial court's error in refusing to give a notice charge, defendants are entitled to a new trial. They argue, however, that no new trial is necessary because plaintiff failed, as a matter of law, to make a prima facie case on the issue of actual or constructive notice. We reject this argument. The evidence supports conflicting inferences as to whether defendants made an adequate inspection of the bus, and as to whether the defect in the strap was readily observable. The

choice between these inferences is for the jury.

Accordingly, the order of the Appellate Division should be reversed, with costs, and a new trial ordered.

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Order reversed, with costs, and a new trial ordered. Opinion by Judge Smith. Chief Judge Kaye and Judges Ciparick, Graffeo, Read, Pigott and Jones concur.

Decided October 18, 2007