

Common Carrier Liability

By Christopher B. Dolan

This article will address the liability of a common carrier to passengers for personal injury. Not included in the scope of this article is the liability that a common carrier has for luggage, goods and/or messages.

It is well established law in California that a carrier of persons for reward *must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose*, and must exercise to that end a reasonable degree of skill. (Civ. Code § 2100.) As part of that duty, carriers are bound to *provide vehicles safe and fit for the purposes to which they are put*, and are not excused for default in this respect by any degree of care. (Civ. Code § 2101.) Likewise, in providing services a common carrier *must give to passengers all such accommodations as are usual and reasonable, and must treat them with civility, and give them a reasonable degree of attention*. (Civ. Code § 2103.)

This elevated standard of care for common carriers has its origin in English common law. It is based on a recognition that the privilege of serving the public as a common carrier necessarily entails great responsibility, requiring common carriers to exercise a high duty of care towards their customers. (*Squaw Valley Ski Corp. v. Superior Court* (1992) 2 Cal. App.4th 1499, *citing with approval, Convey-All Corp. v. Pacific Intermountain Express Co.* (1981) 120 Cal.App.3d 116, 120-121.)

The California Legislature has declared that everyone who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever it offers to carry. (Civ Code § 2168.) Case law has interpreted what types of conveyances

and activities are covered by the heightened duty standard.

WHO IS A COMMON CARRIER?

The California Book of Standard Civil Jury Instructions sets forth the test for who is a common carrier:

To prove that [name of defendant] was a common carrier, [name of plaintiff] must prove that it was in the business of transporting [the property of] the general public. In deciding this issue, you may consider whether any of the following factors apply. These factors suggest that a carrier is a common carrier:

- (a) The carrier maintains a regular place of business for the purpose of transporting passengers [or property].
- (b) The carrier advertises its services to the general public.
- (c) The carrier charges standard fees for its services.
- (d) [Insert other applicable factor(s).]

A carrier can be a common carrier even if it does not have a regular schedule of departures, a fixed route, or a transportation license. (CACI 901.)

EXAMPLES OF COMMON CARRIERS

In addition to the original stage coach, street car, and wagon which were in existence at the time of the enactment of the first common carrier law, the law has recognized that the extension of the heightened duty runs to other conveyances widely used in today's society.



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Airlines:

There can be no doubt, under the general law of common carriers as we have found it, that those airlines which are engaged in the passenger service on regular schedules on definite routes fall within the classification. The industry itself should be desirous of assuring the public that those who accept their invitation to travel by air will be accorded that protection which may be afforded by the exercise of "the utmost care and diligence for their safe carriage." See section 2100, Civ. Code. (*Smith v. O'Donnell* (1932) 215 Cal. 714, 720.)

Elevators:

Even stores which operate elevators and escalators to propel patrons to the peaks of purchasing paradise have been deemed to be common carriers." (*Squaw Valley Ski Corp. v. Superior Court* (1992) 2 Cal. App.4th at 1508, *citing with approval, Champagne v. A. Hamburger & Sons* (1915) 169 Cal. 683, 690; *Treadwell v. Whittier* (1889) 80 Cal. 574, 585-592.)

Escalators:

An escalator in a department store is a common carrier. (*Hendershott v. Macy's*, 158 Cal.App.2d 324, 322 P.2d 596; *Simmons v. F. W. Woolworth Co.*, 163 Cal.App.2d 709, 329 P.2d 999;

Weiner v. May Department Stores Co., D.C., 35 F.Supp. 895.) Therefore an owner and/or operator of such a conveyance is required by law to use the utmost care and diligence in the safe carriage of individuals using the escalator for passage, to provide everything necessary for that purpose, and to exercise to that end a reasonable degree of skill. (Civ. Code, § 2100.) (*Vandagriff v. J.C. Penney Co* (1964) 228 Cal.App.2d 579, 582.)

Mule Trains:

The court has ruled that a mule train taking passengers, for a fee, over a designated route (scenic guided tour) is common carrier. (*McIntyre v. Smoke Tree Ranch Stables* (1962) 205 Cal.App.2d 489.)

Ski Lifts:

Ski lifts are common carriers for tort liability. (*Squaw Valley Ski Corp. v. Superior Court, supra*, 2 Cal. App.4th 1499.) This, despite the provisions of Public Utilities Code section 212 exempting them from regulation by the PUC. (*Id.* at 1504, 1505).

Taxi Cabs:

A taxicab company is common carrier. (*Bezera v. Associated Oil Co.* (1931) 117 Cal.App. 139.)

Amusement Park Rides:

Until recently it had seemed well established jurisprudence that an amusement park ride fell under the definition of a common carrier. (*Neubauer v. Disneyland, Inc.* (1995) 875 F.Supp. 672 [“Pirates of the Caribbean”]; *Kohl v. Disneyland, Inc.* (1962) 201 Cal.App.2d 780 [“Surrey with the Fringe on Top” ride of horse drawn carriage]; *Barr v. Venice Giant Dipper Co., Ltd.* (1934) 138 Cal.App. 563, 563-564 [roller coaster/scenic railway].)

In 2003 the California Supreme Court accepted review of *Gomez v. Superior Court* (2003) 110 Cal.App.4th 667. The plaintiff, Gomez, suffered a serious brain injury when riding the “Indiana Jones” ride at Disneyland.

The trial court sustained a demurrer by Disney claiming that Civil Code § 2100 was inapplicable to a provider of amusement rides stating that the common carrier statutes did not apply to an amusement

park ride where the transportation of persons was merely an “incidental consequence of what is essentially entertainment and a thrill ride....” (*Ibid.*) The appellate court granted the writ of mandate and reversed the lower court finding that the amusement park ride fell into the definition of a common carrier under Civil Code §§ 2100 and 2168.

Disney’s argument is that “statutes relevant to common carriers simply cannot be sensibly applied to an amusement ride....” Disney also claims that it was not a common carrier, claiming that if it was a carrier at all, it was a “private carrier” since it imposed height, weight and other restrictions on who could use its rides. (*Id.*) The appellate court rejected Disney’s arguments. The matter is fully briefed, but argument has not yet been scheduled in the Supreme Court. For more information and to track this case, visit the Supreme Court web site at <http://appellatecases.courtinfo.ca.gov/>. The Supreme Court Case No. is S118489.

NOT ALL CONVEYANCES ARE COMMON CARRIERS: PRIVATE VS. PUBLIC CARRIAGE

Private carriers are such as carry for hire and do not come within the definition of common carrier. Certain prominent characteristics mark the difference between these two classes. To impress upon one the character of common carrier it must be shown that he undertakes generally and for all persons indifferently to carry goods and deliver them for hire; and that his public profession of his employment be such that if he refuses, without some just ground, to carry goods for anyone, in the course of his employment and for a reasonable and customary price, he will be liable to an action. On the other hand, private carriers are not bound to carry for any person unless they enter into a special agreement so to do. 4 Cal. Juris., 815. This same principle is enunciated in the case of *Associated Pipe Line Co. v. R. R. Com.*, 176 Cal. 518. In that case this court said, quoting in part from the case of *Munn v. Illinois*, 94 U. S. 113: “When, therefore, one devotes his property to a use in which the public has an interest, he, in effect grants to the public an

interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. But so long as he uses his property for private use, and in the absence of devoting it to public use, the public has no interest therein which entitles it to a voice in its control. (*Forsyth v. San Joaquin Light & Power Corp.* (1929) 208 Cal. 397, 405.)

A review of the case law reveals the type of transportation relationships which have been held to be private carriage.

PRIVATE CARRIES (I.E., NOT COMMON CARRIERS)

School Buses Carrying Students Pursuant to Contract with a Single School:

Since a school bus is operated for the sole convenience of the pupils of a particular school and there is no legal obligation for it to carry passengers generally or even to carry the pupils of other schools, it may not be deemed to be a common carrier of passengers, and the highest degree of care and diligence in its operation is therefore not required. (*Shannon v. Central-Gaither Union School Dist.* (1933) 13 Cal. App. 124, 129.)

Shuttle Buses for Corporate Use:

A corporation carrying its own employees, their families, and persons doing business with it is not “common carrier.” (*Forsyth v. San Joaquin Light & Power Corp.* (1929) 208 Cal. 397 [stage operated to transport employees, their families, and those doing business with company only – no public transport].)

Vehicle Hired for Incidental Transportation of Passengers on Rare Occasion:

In *Gornstein v. Priver* (1923) 64 Cal.App 249, the court held that a truck, used primarily for the conduct of non-passenger business, rented on weekend to carry passengers to a picnic is not a “common carrier” but was held to ordinary negligence standards. Given the scope of regulation concerning the transportation of passengers which has developed since the 1920’s, including regulations concerning transporting farm workers, passengers for

hire (through the PUC) etc., there may be other grounds to establish negligence per se should such an unlikely set of facts present themselves. (These regulations are not covered in this article.)

WHEN AND UNDER WHAT CIRCUMSTANCES THE COMMON CARRIER DUTY COMMENCES

If the conveyance is subject to being considered a common carrier, the next step is determining when and if the common carrier relationship has commenced. The commencement of the common carrier relationship is a matter of law generally. The facts used in determining whether a common carrier relationship has been established focus on the relationship of the parties and the locus of the injury *vis-a-vis* the act of transportation, i.e., did the injury occur in some manner directly connected with the act of transportation.

Gratuitous Carriers

Under the Civil Code, a gratuitous carrier, not receiving payment, and yet to commence carriage, has no obligation to provide passage or provide a heightened degree of care. (Civ. Code § 2096.) However, once a passenger is accepted by a common carrier, that carrier must complete the transport of the passenger as if they had received a reward.

A carrier without reward, who has begun to perform his undertaking, must complete it in like manner as if he had received a reward, unless he restores the person or thing carried to as favorable a position as before he commenced the carriage. (Civ. Code § 2090.)

Status of the Relationship Where Passenger Relationship Disputed

The Book of California Approved Civil Jury Instructions provides guidance to a jury when the status of the relationship is in dispute.

CACI 907. Status Of Passenger Disputed

A common carrier owes the highest care and vigilance to persons only while they are passengers. [*Name of plaintiff*] claims that [he/she] was [*name of defendant*]'s passenger at the time of the incident. To establish that [*name of plaintiff*] was a passenger, [he/she] must prove all of the following:

1. That [*name of plaintiff*] intended to become a passenger;

2. That [*name of plaintiff*] was accepted as a passenger by [*name of defendant*]; and

3. That [*name of plaintiff*] placed [himself/herself] under the control of [*name of defendant*]

To be a passenger, it is not necessary for the person to actually enter the carrier's vehicle [or name mode of travel, e.g., bus, train]; however, the carrier must have taken some action indicating acceptance of the person as a passenger. A person continues to be a passenger until he or she safely leaves the carrier's vehicle [or equipment].

A common carrier must use the highest care and vigilance in providing its passengers with a safe place to get on and off its vehicles [or equipment]. (CACI 907.)

An individual need not have actually entered the conveyance for the heightened duty to apply.

"It is not necessary, in order to create the relation of carrier and passenger, that the passenger should have actually entered the vehicle, much less that the vehicle should have started on the journey with him. The relation begins as soon as one, intending in good faith to become a passenger, enters in a lawful manner upon the carrier's premises to engage passage; and the carrier's responsibility dates from that time." *Shearman & Redfield on Negligence*, vol. 2, Sec. 490. (*Riley v. Vallejo Ferry Co. (D.C. Cal. 1909)* 173 F. 331, 333 [woman drowns while on gangplank boarding ship].)

That a passenger should have actually entered the vehicle is not a necessary prerequisite to the establishment of the relation of carrier and passenger. Such relationship is established when a person who intends in good faith to become a passenger goes to a depot, waiting room or other place designated as the site of departure, and by some action taken by the carrier, the latter indicates acceptance of the passenger as a traveler. (*Sanchez v. Pacific Auto Stages*, 116 Cal.App. 392, 396 [bus service liable for injuries to plaintiff as she was struck by car walking to bus stop where bus company agent driver (who had sold her ticket)

walked with and directed customer intending to travel in bus across street to vehicle].)

If a carrier assumes the responsibility of conducting a person, who has become a passenger, to the point of departure of the transporting vehicle, then the relation of passenger and carrier exists during such period. (*Grier v. Ferrant* (1944) 62 Cal. App.2d 306 [taxicab operator who was directing plaintiff to his vehicle, parked remote from cab station, liable for injuries suffered by plaintiff as she slipped on sidewalk between station and cab].)

The *Sanchez* and *Grier* cases demonstrate that physical distance from the conveyance is not determinative if the carrier's agent is directing and/or leading the passenger to the conveyance.

However, if a passenger is at a remote location where a conveyance does not normally stop unless flagged to stop, without any agent of the carrier present or involved, the relationship may not arise until the passenger actually boards the carrier. (*Falls v. San Francisco & N.P.R. Co.* (1893) 87 Cal. 114 [reasonableness standard applied to remote flag station without station or station agent].)

The care required of the carrier for the protection of a passenger on its premises involves reasonable care to provide and maintain safe and adequate stations, platforms, walks, steps, and landings for use in waiting for, approaching, and leaving trains or other means of conveyance in which the transportation is to be, or has been, furnished; and it is liable for injuries caused by defects which are known, or ought to be known, but not for those caused by mere depressions or irregularities of which it has no knowledge as being of a dangerous character. (*Robinson v. Union Pac. R. Co.* (1945) 70 Cal.App.2d 759, 761 [chipped tile in front of entrance of station].)

Likewise, it has been held that an airport screening/inspection as part of a safety program is not part of the common carriage where the passenger's ticket has yet to be taken. (*Orr v. Pacific Southwest Airlines* (1989) 208 Cal.App.3d 1467 [passenger struck at metal detector – ordinary negligence standard applied].)

Streetcars vs. Railcars

The extent to which a common carrier may be held liable depends on the nature of its physical plant and/or operations attendant to the services provided. For example, the law treats a street car operation, which discharges and picks up passengers in the street, differently than a railroad that has a station and specially-constructed platforms.

Courts have differentiated between the duties of a street car company to its passengers and a commercial railway in so far as a duty rests upon them to furnish safe passage to and from a car. From the nature of things a street car company cannot discharge those duties with respect to passengers. It has no control over the streets or traffic upon the streets; it has no stations or platforms and can erect none upon the street. From the curb to the car is a public place open to travel by all, and over it the company has no control or jurisdiction. (*Choquette v. Key System, etc.* (1931) 118 Cal.App. 643, 655 [pedestrians, crossing from bench on sidewalk (at trolley stop) into roadway at location of trolley stop, hit by car using roadway].)

DUTY OF A COMMON CARRIER

CACI 902. Duty Of Common Carrier

Common carriers must carry passengers [or property] safely. Common carriers must use the highest care and the vigilance of a very cautious person. They must do all that human care, vigilance, and foresight reasonably can do under the circumstances to avoid harm to passengers [or property].

While a common carrier does not guarantee the safety of its passengers [or property that it transports], it must use reasonable skill to provide everything necessary for safe transportation, in view of the transportation used and the practical operation of the business. (CACI 902.)

The legal standard applied above is beneficial to any plaintiff seeking to prove the negligence of a common carrier. The public policy rational behind the common carrier standard is to actively prevent injury. (They must do all that human care, vigilance, and foresight reasonably can do under the circumstances to avoid harm to passengers.) Clearly, it is appropriate, and

helpful, to require this higher standard, as this heightened duty will reduce the number and severity of injuries which frequently occur to unsuspecting passengers using poorly maintained and operated mass transportation/common carriage systems. Often overlooked is the heightened duty to have qualified employees, as well as policies and practices in place which will advance the goals and legal requirements of this heightened duty. A litigant advancing a common carrier case should examine the training given to the operator of a vehicle to determine if the highest degree of care was used in training that driver and/or shaping that driver's conduct.

It can even be successfully argued to a jury that the failure to have inspection and cleaning policies and practices documented, and to have drivers trained on these policies, falls below the standard of care required of a common carrier.

EMPLOYEES OF COMMON CARRIERS MUST MEET THE HEIGHTENED DUTY

California law is clear that "Employees operating a street car must exercise the same degree of care as that to which the street railroad company is held in order to secure performance of duty imposed on common carrier by this section since company could only operate street car by its employees." (*Moeller v. Market Street Railway Company* (App. Dist. 1, 1938) 27 Cal.App.2d 562.) Principles of *respondeat superior* apply to common carriers.

STATUS OF PASSENGER MAY HEIGHTEN COMMON CARRIER DUTY

Disabled Passengers

If the common carrier voluntarily accepts a disabled and/or infirm passenger, and is aware of that passenger's condition, the carrier must exercise as much care as is reasonably necessary to ensure the safety of the passenger, in view of their mental and physical condition. (*McBride v. Atchinson, Topeka & Santa Fe Ry. Co.* (1955) 44 Cal.2d 113, 119-120 [passenger using crutches slipped on cigar as he was alighting from vehicle as porter stood idly by offering no assistance]; CACI 904.)

Minor Passengers

A common carrier owes a greater duty of care to a passenger that is a minor. "It is settled law that a carrier owes a greater quantum of care to a child of tender years accepted by it as a passenger than it would to an adult." (*Brizzolari v. Market St. Ry. Co.* (1935) 7 Cal. App.2d 246 [minor child slipped from steps of streetcar as it passed by her stop (children are recognized to be excitable if conveyance passes their destination so that it is foreseeable they may dart-out, jump off, etc.)].)

PASSENGERS' DUTY

While a common carrier must use the highest degree of care for its passengers' safety, passengers need only use reasonable care for their own safety. (CACI 906; see e.g., *Ingham v. Luxor Cab Co.* (2001) 93 Cal.App.4th 1045; *Dayton v. Yellow Cab Co. of San Francisco* (1948) 85 Cal.App.2d 740.)

Passengers, by law, have the right to expect certain conduct from a common carrier. Passengers have the right to act without anticipating negligence of the carrier. (*Babcock v. Los Angeles Traction Co.* (1900) 128 Cal. 173, 176.)

It is not, as a matter of law, negligent for a passenger, in anticipation of their imminent exit at their intended destination, to stand up before a conveyance has come to a complete stop.

There is no rule of law which requires a passenger in a street-car to retain his seat or other position until the car has actually stopped, and it is a matter of universal observation that thousands every day leave their seats to get off before the car has stopped, without sustaining any injury. (*Nichols v. Sixth Ave. R. R. Co.* 38 N. Y. 131, 97 Am. Dec. 780; *Whalen v. Consolidated Traction Co.* 61 N. J. L. 608; *Consolidated Traction Co. v. Thalheimer*, 59 N. J. L. 474.) (*Babcock v. Los Angeles Traction Co.*, *supra*, 128 Cal. at 178.)

A passenger has the right to expect that a car will stop at its usual stopping place, as requested. Preparations for alighting after signaling a car to stop are proper, and not negligent. (*Id.* at 177, citations omitted.)

DUTY OF COMMON CARRIER TO PROVIDE SAFE AND FIT VEHICLES

A carrier of persons for reward is bound to provide vehicles safe and fit for the purposes to which they are put, and is not excused for default in this respect by any degree of care. (Civ. Code § 2103.)

Common carriers must use the highest degree of care in constructing, servicing, inspecting, and maintaining their vehicles and equipment for transporting passengers [or property].

A common carrier is responsible for a defect in its vehicles and equipment used for transporting passengers [or property] if the common carrier;

- (a) Created the defect; or
- (b) Knew of the defect; or
- (c) Would have known of the defect if it had used the highest care.

Common carriers must keep up with modern improvements in transportation. While they are not required to seek out and use every new invention, they must adopt commonly accepted safety designs and devices in the vehicles and equipment they use for transporting passengers [or property]. (CACI 903.)

This obligation requires common carriers to not only provide equipment that, at the time of purchase or introduction, was considered safe; carriers must keep pace with science and art and modern improvement in their application to carriage of passengers. (*Greyhound Lines, Inc. v. Superior Court In and For Shasta County* (1970) 3 Cal.App.3d 356, *certiorari den.*, 400 U.S. 868; CACI 903; *Treadwell v. Whittier* (1889) 80 Cal. 574 [elevators need to be upgraded].)

Likewise, the obligation imposes upon the carrier a duty to construct, operate, and maintain the equipment so as to prevent injury. (*Vandagriff v. J.C. Penney* (1964) 228 Cal.App.2d 579.)

The employment of a contractor to inspect and/or maintain the conveyance does not relieve the owner/operator from liability. It is non-delegable. (*McKeon v. Lissner* (1924) 193 Cal. 297.)

It is a jury question as to whether a bus/train operator must provide seatbelts as part of its obligation under Section 2101. (*Greyhound Lines, Inc. v. Superior Court In and For Shasta County* (1970) 3 Cal.App.3d 356, *certiorari den.*, 400 U.S. 868.)

HEIGHTENED DUTY EXTENDS TO BOARDING AND ALIGHTING

“[A] carrier must exercise as high a degree of care in affording passenger a reasonable opportunity to alight in safety as in carrying safely.” (*Fitzgerald v. Southern Pacific Company* (1918) 36 Cal.App. 660.) Further, “[a]s to the duty of a railroad company to take every reasonable precaution for the safety and comfort of its passengers in alighting from and boarding its cars, of course, there is no controversy.” (*Sellars v. Southern Pacific Company* (1917) 33 Cal.App. 701.) “Railway companies are under the legal obligation to furnish safe and proper means of ingress and egress to and from trains, platforms, station approaches.” (*Peniston v. Chicago R. Co.* (1882) 34 La. Ann. 777, 44 Am. Rep. 444.)

DUTY TO PROVIDE SEATING; PROHIBITION AGAINST OVERLOADING; EVEN GREATER HEIGHTENED DUTY WHEN OVERLOADED

Civil Code § 2185 requires that every common carrier provide every passenger with a seat (the exception being municipal transit agencies) as follows:

A common carrier of persons must provide every passenger with a seat. He must not overload his vehicle by receiving and carrying more passengers than its rated capacity allows. This section shall not apply, however, to any city, county, city and county that operates a transportation system, or to any passenger stage corporation or street railroad corporation, as defined in Sections 226 and 232, respectively, of the Public Utilities Code, which is subject to the jurisdiction of the Public Utilities Commission. (Civ. Code § 2185.)

Civil Code § 2102 prohibits overcrowding: “A carrier of persons for reward must not overcrowd or overload his vehicle.” (Civ. Code § 2101.)

A common carrier accepting a passenger, who can’t make sure all passengers have a seat, has a heightened duty to those who remain standing:

An injury resulting from an overcrowded condition of a car, causing

passengers to stand, is chargeable to the carrier. [Citations omitted.] Overcrowding a car greatly increases the measure of the duty and care of the carrier to the passengers. (*Lynn v. Southern Pac. Co.* (1894) 103 Cal. 7; *Stanford v. Hestonville Ry. Co.*, 136 Pa. St. 84.) (*Babcock v. Los Angeles Traction Co.* (1990) 128 Cal. 173, 175.)

Where motor carrier accepts passenger’s fare with knowledge of increased danger of position of passenger because all of seats are occupied, carrier is under obligation to use greater precaution in operation of bus for protection of standing passengers than would be necessary if all were seated. (*Sweet v. Los Angeles Ry. Co.* (1947) 79 Cal.App.2d 195.)

A plaintiff is entitled to a negligence per se instruction if there is evidence of overcrowding using the language of section 2102. (*Forbes v. Los Angeles Ry. Corp.* (1945) 69 Cal.App.2d 794.)

It is not contributory negligence if a passenger boards a crowded train if the passenger has not been meaningfully notified or warned of the danger associated with the overcrowding by the carrier or its agent.

A passenger is justified in taking passage on a crowded excursion train where defendant does not warn persons not to do so; and, even though such warning was given, he was not affected by it if he did not hear it. (*Lynn v. Southern Pac. Co.* (1894) 103 Cal. 7.)

If a passenger is thrown from the landing of an overcrowded conveyance while the vehicle makes a rapid turn, the jury is justified in finding that the carrier breached its duty to the passenger. (*Ibid.*)

If a defendant accepts as a passenger for hire a rider who, because of overcrowding, is denied a seat and, instead, stands on the exterior of the vehicle such as a running board, the passenger is not negligent as a matter of law. (*Babcock v. Los Angeles Traction Co.*, *supra*, 128 Cal. at 175; *Einertsen v. United Railroads of San Francisco* (1914) 25 Cal.App. 134.)

ASSAULT OR ATTACK BY OTHER PASSENGERS

CACI 908. Duty To Protect Passen-

gers From Assault

[*Name of plaintiff*] claims that [*name of defendant*] was negligent in failing to prevent an attack by another. To establish this claim, [*name of plaintiff*] must prove both of the following:

1. That [*name of defendant*] knew or, by using the highest care, should have known that a passenger was reasonably likely to attack another passenger; and

2. That by using the highest care, [*name of defendant*] could have prevented or reduced the harm from the attack. (CACI 908.)

It has been held that the duty imposed upon carriers by Civil Code section 2100 includes a duty to protect passengers from assaults by fellow passengers. (*Terrell v. Key System* (1945) 69 Cal.App.2d 682, 686 [carrier made no effort to stop crap game, melee ensued and plaintiff knocked from train]; *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 786, 796 [fight broke out on municipal bus].) This duty extends to governmental common carriers as well as private entities. (*Id.*) For these carriers, there is no immunity provided by Government Code section 845 (failure to provide police protection) or section 820 (discretionary acts). (*Id.* at 792-793.)

EVIDENCE OF PAYMENT OF PASSAGE TO PASSENGER

A common carrier is charged with the highest degree of care and vigilance in making sure that passengers are allowed to continue their journey unabated. In an action to recover for the ejection of the plaintiff from the defendant's passenger train, from which she was expelled because no conductor's check was given her in exchange for her ticket, it was proper to instruct that a conductor who is taking up a passenger's ticket is chargeable with extreme care in seeing that the passenger is provided with means of continuing the journey. (*Sloane v. Southern Cal. Ry. Co.* (1896) 111 Cal. 668.)

EJECTION OF PASSENGERS: NO EXCESSIVE FORCE MAY BE USED

A passenger who refuses to pay the fare or to conform to any lawful regulation of the

carrier, may be ejected from the vehicle by the carrier. But this must be done with as little violence as possible, and at any usual stopping-place or near some dwelling house. (Civ. Code § 2188.)

A common carrier may eject a passenger who fails to pay or refuses to comply with the carrier's reasonable rules for passage.

A person on a common carrier's conveyance street car must pay the fare or they are subject to ejection by the carrier's agent, by the use of such force only as is reasonably necessary. The carrier, however, has no authority to collect the fare by force or other unlawful means. (*Braly v. Fresno City Ry. Co.* (1908) 9 Cal.App. 417.)

It has been held that a threat of unlawful force, causing a patron to jump from a conveyance, without the actual application of force, is sufficient to constitute employment of actual, excessive force. (*Kline v. Central Pac. R.R.* (1870) 39 Cal. 587, 591.)

Damages for Unlawful Ejection

A railroad company is liable for acts of the conductor, which are performed in the scope and course of employment, without legal justification (*Kline v. Central Pac. R. Co. of Cal.* (1869) 37 Cal. 400), even if the conductor had been expressly forbidden to do so. (*Turner v. North Beach and Mission R. Co.* (1868) 34 Cal. 594.) This is true even if the employee acted with malicious motive and/or unlawful means. (*Trabing v. California Nav. & Imp. Co.* (1898) 121 Cal. 137; but see, *Turner v. North Beach and Mission R. Co.* (1868) 34 Cal. 594.)

A passenger being so ejected, without their luggage, while entitled to compensation for inconvenience and discomfort attendant with not having their clothes is not entitled, as an element of damage, to the cost of replacement clothing. (*Procter v. Southern California Ry. Co.* (1900) 130 Cal. 20, *modified to provide costs.*) However, an exacerbation of a nervous condition, known or unknown to the carrier, is compensable as an element of damages. (*Sloane v. Southern Cal. Ry. Co.* (1896) 111 Cal. 668.) Likewise the jury may consider, and award damages for, injured feelings, the indignity endured, mental suffering and wounded pride. (*Gorman v. Southern Pac. Co.* (1892) 97 Cal. 1.)

WHEN THE COMMON CARRIER DUTY TERMINATES

Relationship Terminates When Both Parties Fulfill Their Obligations to the Other

The general rule concerning the termination of the common carrier relationship is as follows:

"When a passenger steps from the car upon the street, he becomes a traveler upon the highway, and terminates his relations and rights as a passenger, and the railway company is not responsible to him as a carrier for the condition of the street, or for his safe passage from the car to the sidewalk." (*Boa v. San Francisco-Oakland Terminal Rys.* (1920) 182 Cal. 93, 98; *see generally, McAlpine v. Los Angeles Ry. Corp.* (1945) 67 Cal.App.2d 486.)

... Passengers carried for reward owe the carrier an obligation to pay their fare and the carrier owes passengers the utmost care and diligence for their "safe carriage" (Civ. Code § 2100), and also "must give to passengers all such accommodations as are usual and reasonable, and must treat them with civility, and give them a reasonable degree of attention" (Civ. Code § 2103). Such a contract is not at an end until both parties have waived or fully performed their mutual obligations. (*Dayton v. Yellow Cab of San Francisco* (1948) 85 Cal. App.2d 740, 744.)

Duty Requires Discharge in Safe Place

However, a common carrier's duty of due care to a passenger does not necessarily end when the passenger alights safely from the carrier's vehicle. Rather, the passenger must be discharged into a relatively safe space. (See generally, *Ingham v. Luxor Cab Co.* (2001) 93 Cal.App.4th 1045 [disabled passenger, discharged at point other than destination who slipped and fell on steep San Francisco Hill while walking to destination].) A common carrier that ejects a passenger at a place other than the designated destination and in doing so subjects the passenger to reasonably foreseeable injury, violates a common carrier's affirmative duty to prevent harm to its passengers. (*Id.* at 1051.) It has been held that safely alighting is not

enough, common carriers “should not discharge their passengers out in the street where there is danger of their being hit by passing vehicles [citations] nor near known dangers from the condition of the street ...” (*Parker v. City and County of San Francisco* (1958) 158 Cal.App.2d 597, quoting *MacLean v. City & County of San Francisco* (1954) *supra*, 127 Cal.App.2d 263, 272.)

If a passenger, having alighted from a common carrier, before reaching a place of safety, is struck by some portion of the vehicle, as it moves or turns, it has been held that the relationship of passenger/common carrier had yet to terminate. (See *Boa v. San Francisco-Oakland Terminal Rys.* (1920) 182 Cal. 93, 101 [passenger struck by bus she had just exited as it rounded curve, before she got to place of safety].)

DUTY OF INDEPENDENT CONTRACTOR WHO REPAIRS AND MAINTAINS COMMON CARRIER CONVEYANCES

Although the principal for whom the independent contractor/maintenance operator provides services is held to the common carrier standard, should the maintenance provider be sued as well, they are charged with the duty of ordinary care provided for by the negligence standard.

It would seem that the responsibility of [an escalator supplier and/maintenance provider] to respondent is not based on a relationship of carrier to passenger, as is that of [the operator] to respondent, but is founded on the proposition that an independent contractor who engages to supply and keep in repair articles which are reasonably certain to place life and limb in peril if they are negligently prepared or constructed, may be held liable for negligence. (*Dahms v. General Elevator Co.*, 214 Cal. 733.) (*Vandagriff v. J.C. Penney Co.* (1964) 228 Cal.App.2d 579, 582, 583.)

WAIVERS AND/OR CONTRACTS OF EXEMPTION GENERALLY PROHIBITED

A contract exempting a common carrier from liability for negligence causing injury to a passenger carried for any com-

ensation is against public policy, though agreed to by the passenger in consideration of special concessions as to rates or otherwise. (*Walther v. Southern Pac. Co.* (1911) 159 Cal. 769.)

It is almost universally held that any contract purporting to exempt a common carrier of persons from liability for negligence of himself or his servants to a passenger carried for compensation is void, as being against public policy, and it is immaterial in such cases that the attempted limitation on such liability is agreed to by the passenger in consideration of special concessions in the matter of rate of fare or other departure from the rules applicable to passengers paying full fare. It is enough that there is any consideration for the carriage. The person admitted to his vehicle by a common carrier for the purpose of carriage for any compensation is a passenger, with all the rights possessed by any passenger so far as the exercise of care for his safe carriage is concerned. (*Id.* at 773.)

But on whatever terms a common carrier of persons voluntarily receives and carries a person, the relation of common carrier and passenger exists. This is recognized by some of the authorities upholding the exemption from liability for negligence provision in the case of a passenger carried gratuitously. (See *Rogers v. Kennebec Steamboat Co.*, 86 Me. 261 [29 Atl. 1069, 25 L. R. A. 491].) The sole inquiry in this regard is, as has been said, whether the person was lawfully on the vehicle (*see Ohio & Miss. R. Co. v. Muhling*, 30 Ill. 9 [81 Am. Dec. 336]), has been voluntarily received by the common carrier on any terms for the purpose of carriage, and is not, as was the case in *Sessions v. Southern Pacific Co.* ante, p. 599, [114 Pac. 982], a mere trespasser on the vehicle. The voluntary waiver of all claim for compensation for carriage of a person does not take away from the *status* of the carrier as a common carrier so far as the person carried is concerned, any more than would a special reduction in the amount of compensation charged or a special concession as to some other authorized requirement accomplish such effect. The carrier is still a common carrier as to such person, with

all the obligations of a common carrier, except in so far as those obligations are limited by contract provisions which are not inhibited by law. Other sections of our Civil Code permit such limitations as to certain matters not here involved, but section 2175 expressly prohibits limitations of liability for gross negligence on the part of the common carrier or his servants, whatever, as we read the various sections bearing upon this matter, may be the terms upon which it receives and undertakes to carry a passenger. (*Id.* at 775.)

Exception to General Rule Waiver of Simple Negligence for Gratuitous Passage by Contract

The one potential limitation on the prohibition of exemption and/or waiver is the passenger carried gratuitously who specifically (not by some posted general notice) bargains away their right to the application of the negligence standard in exchange for a reduced fare or free pass.

“The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract.” (Civ. Code § 2174.)

“CERTAIN AGREEMENTS VOID. A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or willful wrong of himself or his servants.” (Civ. Code § 2175.)

A common carrier may by contract or agreement limit its exposure for simple negligence to a non fare paying passenger, but it may not limit or restrict its liability for gross negligence, fraud, or wanton conduct. (Civ. Code 2175.) The courts have defined “gross negligence” under section 2175 to be simply “the want of slight care and diligence.” (*Walther v. Southern Pacific Railway Company, supra*, 159 Cal.769, 775; *Pratt v. Western Pac. R. Co.* (1963) 213 Cal.App.2d 573.)¹

APPLICATION OF RES IPSA LOQUITUR

Under the rule of *res ipsa loquitur*, when applicable, upon a showing of the happening of an occurrence resulting in injury to the plaintiff, the law raises a special inference that the proximate cause of the occurrence was some negligent conduct on

the part of the defendant. (*Burr v. Sherwin Williams Co.* (1954) 42 Cal.2d 682, 688; *Zentz v. Coca Cola Bottling Co.* (1952) 39 Cal.2d 436, 440.)

The doctrine has been applied in common carrier cases of a special relationship existing between the plaintiff and defendant, i.e., that of passenger and carrier. (See e.g., *Kohl v. Disneyland* (1962) 201 Cal.App.2d 780 [“Surrey with the Fringe on Top” ride]; *Boyce v. California Stage Co.* (1864) 25 Cal. 460, 467-469 [stage coach]; *Lawrence v. Green* (1886) 70 Cal. 417, 419; *Bush v. Barnett* (1892) 96 Cal. 202, 203 [stage coach]; *Smith v. O’Donnell* (1932) 215 Cal. 714, 721-723 [airplane crash]; *Hardin v. San Jose City Lines, Inc.* (1953) 41 Cal.2d 432, 436 [sudden stop of bus]; *Bourguignon v. Peninsular Ry. Co.* (1919) 40 Cal.App.689 [rail road derailment].)

Likewise the res ipsa doctrine has been applied in Civil Code section 2101 cases involving the provision of safe vehicles. (*Adam v. Los Angeles Transit Lines* (1957) 154 Cal.App.2d 535 [seat collapse].)

The res ipsa standard has also been applied to independent contractors, who are not operators or owners of public conveyances, who provide maintenance, inspection and service to common carrier vehicles. (*Vandagriff v. J.C. Penney Co.* (1964) 228 Cal.App.2d 579, 582, 585.)

The application of contributory negligence does not thwart the application of *res ipsa loquitur*.

Some participation by the plaintiff in the event, not having to do with control of the instrumentality which produces the injury, does not necessarily exclude the application of the doctrine of res ipsa loquitur. The test is not that of contributory negligence. (*Hendershott v. Macys*, 158 Cal.App.2d 324, 328; (*Rollins v. Department of Water & Power*, 209 Cal.App.2d 526.) (*Vandagriff v. J.C. Penney Co.* (1964) 228 Cal.App.2d at 585.)

CONCLUSION

The author hopes that this article assists the practitioner in comprehending the intricate regulations that govern the common carrier relationship. An example of a PowerPoint® presentation used in a successful SF MUNI common carrier closing

argument, as well as an electronic copy of this article, are available upon request to the author at Chris@cbdlaw.com. Please type “ARTICLE REQUEST” in the subject line for prompt response. ■

¹ An improper setting of an open switch was deemed to be gross negligence. (*Donnelly v. Southern Pac. Co.* (1941) 18 Cal.2d 863.)