

# A Tale Involving the Magic Kingdom, Pirates, and a Court's Broad Interpretation of Common Carrier Liability

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## I. INTRODUCTION

California Civil Code § 2168 provides, “[e]very one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he [or she] thus offers to carry.”<sup>1</sup> The common carrier designation carries significant importance because operators are held to a heightened duty of utmost care and diligence rather than the ordinary negligence duty of reasonable care under the circumstances.<sup>2</sup>

This standard, while simple conceptually, has proven difficult in its application. When interpreting this statute, the California courts have struggled with defining a common carrier.<sup>3</sup> Guided by the plain words of the statute, California courts initially interpreted “common carrier” to include railways,<sup>4</sup> steamboats,<sup>5</sup> and stagecoaches.<sup>6</sup> Over time, the common carrier definition expanded to include airplanes,<sup>7</sup> buses,<sup>8</sup> taxicabs,<sup>9</sup> escalators,<sup>10</sup> elevators,<sup>11</sup> mule trains,<sup>12</sup> and ski-lifts.<sup>13</sup> In *Neubauer v. Disneyland, Inc.*,<sup>14</sup> the United States District Court for the Central District of California held that Disneyland amusement park rides fall within Cali-

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1 CAL. CIV. CODE § 2168 (West Supp. 1998).

2 CAL. CIV. CODE § 2100 (West Supp. 1998) (“A carrier of persons for reward must use the utmost care and diligence for their safe carriage . . .”).

3 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, vol. 6, §§ 767-773 (9th ed. 1988). See also, *Webster v. Ebright*, 4 Cal. Rptr. 2d 714 (Ct. App. 1992) (operator of horseback rides held to a duty of ordinary care); *McIntyre v. Smoke Tree Ranch Stables*, 23 Cal. Rptr. 339 (Ct. App. 1962) (operator of a mule train held to a duty of utmost care and diligence).

4 *Kerigan v. Southern Pac. R. Co.*, 22 P. 677 (Cal. 1889); *Cowden v. Pacific Coast S. S. Co.*, 29 P. 873 (Cal. 1892).

5 See generally *Metz v. California South R. Co.*, 24 P. 610 (Cal. 1890).

6 *Fairchild v. Stage Co.*, 13 Cal. 599 (1859).

7 *Smith v. O'Donnell*, 12 P.2d 933 (Cal. 1932).

8 *Lopez v. Southern Calif. Rapid Transit Dist.*, 710 P.2d 907 (Cal. 1985).

9 *Larson v. Blue & White Cab Co.*, 75 P.2d 612 (Cal. Ct. App. 1938).

10 *Hendershott v. Macy's*, 322 P.2d 596 (Cal. Ct. App. 1958).

11 *Parker v. Manchester Hotel Co.*, 85 P.2d 152 (Cal. Ct. App. 1938).

12 *McIntyre v. Smoke Tree Ranch Stables*, 23 Cal. Rptr. 339 (Ct. App. 1962).

13 *Squaw Valley Ski Corp. v. Superior Court*, 3 Cal. Rptr. 2d 897 (Ct. App. 1992).

14 875 F. Supp. 672 (C.D. Cal. 1995).

fornia's statutory definition of common carriers, thereby imposing a heightened duty of care in transporting the public.

This note explains why the federal court in *Neubauer* interprets California's common carrier statute too broadly. In doing so, the court fails to adequately address California's common law and the principles set forth in other jurisdictions relating to amusement park rides and common carrier liability. Section I discusses common carrier liability in other jurisdictions, and then focuses on California case law addressing this issue. Section II examines the facts and decision rendered in *Neubauer*. In Section III, the *Neubauer* opinion is compared to cases in other jurisdictions which have established common law tests for determining whether amusement rides are common carriers.

Section IV of this note concludes that existing case law does not support the *Neubauer* court's overly formalistic interpretation of California's common carrier statute. Moreover, under the court's reasoning, the "common carrier" status may be applied to virtually any amusement ride or device. Thus, *Neubauer* significantly impacts the interests of owners and operators of amusement rides in California in terms of their exposure to common carrier liability.

## II. TRADITIONAL COMMON CARRIER LIABILITY

### A. Across the Nation

Several jurisdictions define the duty of care owed by operators of amusement park rides.<sup>15</sup> Generally, amusement ride operators are required to exercise a level of reasonable and ordinary care under the circumstances.<sup>16</sup> However, a few jurisdictions demand a

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<sup>15</sup> See, e.g., John Kimpflen, *Duties and Liabilities as to Amusement Rides and Devices*, 27A AM. JUR. 2d *Entertainment and Sports Law* § 90 et seq. (1996); Annotation, *Liability of Owner, Lessee, or Operator for Injury or Death on or near Loop-o-plane, Ferris Wheel, Miniature Car, or Similar Rides*, 86 A.L.R. 2d 350 (1962); Annotation, *Liability to Patron of Scenic Railway, Roller Coaster, or Miniature Railway*, 66 A.L.R.2d 689 (1959).

<sup>16</sup> See, e.g., *Wright v. Midwest Old Settlers and Threshers Ass'n*, 556 N.W.2d 808 (Iowa 1996) (train ride at an annual reunion event held not a common carrier); *Deutsch v. Chubb Group of Insurance Companies*, 1995 WL 584394 (D. Colo. 1995) (white water rafting operator held not a common carrier); *Bregel v. Busch Entertainment Corp.*, 444 S.E.2d 718 (Va. 1994) (gondola ride, which carried passengers high above the amusement park, held not a common carrier); *Beavers v. Federal Insurance Co.*, 437 S.E.2d 881 (N.C. Ct. App. 1994) (white water rafting operator held not a common carrier); *Lamb v. B & B Amusement Corp.*, 869 P.2d 926 (Utah 1993) (court held no error in jury instructions in refusing to instruct a roller coaster ride was subject to the duty of a common carrier); *Gunther v. Smith*, 553 A.2d 1314 (Md. Ct. Spec. App. 1989) (hayride held not a common carrier); *Harlan v. Six Flags over Georgia, Inc.*, 297 S.E.2d 468 (Ga. 1982) (vertical-type merry-go-round held not a common carrier); *Sergermeister v. Recreation Corp. of America*, 314 So. 2d 626 (Fla. Dist. Ct. App. 1975) ("Lover's Coach" ride was not equated to a common carrier); *Eliason v. United Amusement Co.*, 504 P.2d 94 (Or. 1972) (merry-go-round operator held not bound by a heightened degree of care); *U.S. Fidelity & Guaranty Co. v. Brian*, 337 F.2d 881 (5th Cir. 1964) (amusement park ride named the "Whizzer" held not a common carrier); *Firszt v. Capital Park Realty Co.*, 120 A. 300 (Conn. 1923) ("aeroplane swing"

higher duty of care comparable to that owed by a common carrier.<sup>17</sup>

Expounding on the breadth of the common carrier duty of care, courts describe this duty as “the utmost caution characteristic of very careful prudent men,”<sup>18</sup> and “the highest degree of vigilance, care, and precaution.”<sup>19</sup> As Prosser and Keaton state, “[C]ommon carriers, who enter into an understanding toward the public for the benefit of all those who wish to make use of their services, must use great caution to protect passengers entrusted to their care. . . .”<sup>20</sup>

The rationale behind imposing a heightened duty of care on common carriers involves several factors. First, those who travel on common carriers essentially surrender themselves to the carrier’s care and custody.<sup>21</sup> Secondly, these patrons waive their freedom of movement and actions while in the custody of a common carrier.<sup>22</sup> As these carriers have the exclusive control of their devices, courts have held common carriers to a higher standard than a mere duty of ordinary care under the circumstances.<sup>23</sup>

## B. California

California Civil Code § 2100 mandates that a common carrier “use the utmost care and diligence for [a passenger’s] safe carriage, must provide everything necessary for that purpose, and

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ride held not a common carrier); *Brennan v. Ocean View Amusement Co.*, 194 N.E. 911 (Mass. 1935) (roller coaster held not a common carrier).

17 *See, e.g.*, *Lyons v. Wagers*, 404 S.W.2d 270 (Tenn. Ct. App. 1966) (operator of amusement ride known as the “Merry Mixer” held to highest degree of care equivalent to that of a common carrier); *Lewis v. Buckskin Joe’s, Inc.*, 396 P.2d 933 (Colo. 1964) (operator of amusement park’s stage-coach ride held to the highest duty of care—court did not determine if ride was a common carrier); *Coaster Amusement Co. v. Smith*, 194 So. 336 (Fla. 1940) (operator of roller coaster held to highest degree of care equivalent to that of a common carrier); *Bibeau v. Fred W. Pearce Corp.*, 217 N.W. 374 (Minn. 1928) (operator of roller coaster held to highest degree of care equivalent to that of a common carrier); *Cooper v. Winnwood Amusement Co.*, 55 S.W.2d 737 (Mo. Ct. App. 1932) (operator of a roller coaster held to the highest degree of care for passenger safety); *Sands Springs Park v. Schrader*, 198 P. 983 (Okla. 1921) (operator of a scenic railway held to the duty of highest care, skill and diligence—court did not determine if ride was a common carrier).

18 *Pennsylvania Co. v. Roy*, 102 U.S. 451, 456 (1880).

19 *Orr v. New Orleans Public Service, Inc.*, 349 So. 2d 417, 419 (La. Ct. App. 1977).

20 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 209 (5th ed. 1984).

21 *See, e.g.*, *Lewis*, 396 P.2d at 939 (passengers of stage-coach ride “had surrendered themselves to the care and custody of the defendants; they had given up their freedom of movement and actions; there was nothing they could do to cause or prevent the accident”); *Lopez v. Southern Calif. Rapid Transit Dist.*, 710 P.2d 907, 912 (Cal. 1985) (passengers on a transit bus are “forced into very close physical contact with one another . . . the means of entering and exiting the bus are limited and under the exclusive control of the bus driver . . . passengers have no control over who is admitted on the bus and, if trouble arises, are wholly dependent upon the bus driver to summon help or provide a means of escape”).

22 *Lewis*, 396 P.2d at 939; *Lopez*, 710 P.2d at 912.

23 *Id.*

must exercise to that end a reasonable degree of skill."<sup>24</sup> This higher standard of care imposes additional duties on the carrier. For example, common carriers have the added burden of protecting passengers against assaults by fellow passengers, employees, and other third persons,<sup>25</sup> of collecting information after a mishap in anticipation of litigation,<sup>26</sup> and a greater duty of inspecting and warning passengers of dangers.<sup>27</sup>

In *Lopez v. Southern Calif. Rapid Transit Dist.*,<sup>28</sup> the California Supreme Court held that Civil Code § 2100 imposes a duty on a common carrier "to do all that human care, vigilance, and foresight reasonably can do under the circumstances."<sup>29</sup> In *Lopez*, the plaintiffs were injured after a group of juveniles engaged in a fight on a transit bus. The plaintiffs alleged that the defendant bus company failed to take affirmative measures to protect passengers from assaults by fellow passengers, especially since it had knowledge of the potential for assaults on its buses.

The court found the argument persuasive and held that common carrier employees have an affirmative duty to use due care to aid passengers who become ill or who are attacked by third parties.<sup>30</sup> The court reasoned that large numbers of strangers are forced into close physical contact. Furthermore, the means of entering and exiting a bus are limited and under the exclusive control of the driver. When trouble arises, the passengers are wholly dependent on the driver to summon help or provide a means of escape.<sup>31</sup>

Under California law, common carriers are thereby responsible for even the slightest degree of negligence. Prosser and Keaton define this duty as "an absence of that degree of care and vigilance which persons of extraordinary prudence and foresight are accustomed to use, or in other words, a failure to exercise great care."<sup>32</sup> This heightened duty of care standard makes a common carrier vulnerable to negligence suits for which noncarriers, under a duty of ordinary care, would not be held liable.

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<sup>24</sup> CAL. CIV. CODE § 2100 (West Supp 1998).

<sup>25</sup> See, e.g., *Berger v. Southern Pac. Co.*, 300 P.2d 170, 173-74 (Cal. Ct. App. 1956) (operator of train held to a duty to protect its passengers from assaults by its employees); *Lopez*, 710 P.2d 907 (operator of transit bus held to a duty to protect passengers from assaults by fellow passengers or third parties).

<sup>26</sup> *De Vera v. Long Beach Pub. Transp. Co.*, 225 Cal. Rptr. 789 (Ct. App. 1986) (bus company held to a duty to collect and preserve accident-related information for use in future civil litigation).

<sup>27</sup> *Gray v. San Francisco*, 20 Cal. Rptr. 894 (Ct. App. 1962) (operator of streetcar held under a duty to inspect for potential dangers to passengers).

<sup>28</sup> *Lopez*, 710 P.2d at 907.

<sup>29</sup> *Id.* at 909.

<sup>30</sup> *Id.* at 912.

<sup>31</sup> *Id.*

<sup>32</sup> PROSSER AND KEATON ON THE LAW OF TORTS § 34, at 211.

III. *NEUBAUER V. DISNEYLAND, INC.*

## A. The Alleged Facts and Procedural History

"Pirates of the Caribbean" is an underground flume-type boat ride located in the New Orleans Square area of the Disneyland theme park in Anaheim, California. Approximately forty guests are loaded into each boat at a loading dock. The boats float along a flume through the attraction. The boats travel down two short, steep waterfall-type drops which take the boats from the loading dock area at ground level, to the studio level underground. When the guests arrive underground, they travel past a ghost ship and a treasure lair, and then are treated to a show of audio-animatronic pirates attacking a fort, pillaging a Caribbean town, chasing women with food,<sup>33</sup> enjoying a drunken celebration, and burning the town to ashes. At the end of the ride, the boats are transported back to ground level via a belt lift. Guests exit the ride at the unloading dock which is directly across from the loading area.

One afternoon in June 1995, Gary and Donna Neubauer boarded the Pirates of the Caribbean boat ride.<sup>34</sup> The ride attendants seated Gary and Donna in the rear seat of one of the boats.<sup>35</sup> While proceeding through the attraction, their boat slid down the first waterfall drop and collided with another boat which was situated immediately in front of their boat.<sup>36</sup> After the collision, their boat came to a stop near the bottom of the waterfall.<sup>37</sup> Before their boat had a chance to move forward, the next boat in line on the attraction slid down the waterfall and collided with the Neubauer boat from behind.<sup>38</sup> The rear boat climbed onto the back of the Neubauer boat, creating a substantial impact and splintering the rear of the Neubauer boat.<sup>39</sup> As a consequence of the two collisions, the couple sustained serious injuries.<sup>40</sup>

The Neubauer's filed suit against Disneyland, alleging negligence as well as common carrier liability. Disneyland moved to

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<sup>33</sup> Prior to 1997, Disneyland's audio-animatronic pirates chased women. In response to growing public concern, Disney modified the ride so that the pirates are now chasing women with plates of food. In this age of political correctness, pirates are depicted in "hot pursuit of a good meal rather than terrified village maidens." Marla Dickerson, *Flap Over 'Pirates' Proves a Treasure Trove for Disney*, L.A. TIMES, Metro Desk, Mar. 8, 1997 (1997 WL 2189333).

<sup>34</sup> Complaint for Damages, *Neubauer v. Disneyland, Inc.*, No. SACV94-841-GLT (C.D. Cal. filed Sept. 16, 1994), at 3.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 4.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> The details of the injuries are not available. However, in their Complaint for Damages, the Neubauers prayed for \$1,200,000.00 in general and special damages. They alleged "great mental, physical and nervous strain, pain and suffering . . . [E]ach of them, were required to and did employ physicians and surgeons to examine, treat and care for [them] . . . ." *Id.* at 5, 9.

dismiss the common carrier claim contending that, as a matter of law, the Pirates of the Caribbean is not a common carrier.

## B. The Court's Decision

Judge Taylor held in a short one-page opinion that the amusement park boat ride fell within California's statutory definition of a common carrier.<sup>41</sup> Consequently, the court held, pursuant to the plaintiff's allegations and California Civil Code § 2100, "the duty of utmost care and diligence would apply to Disneyland."<sup>42</sup> As a result, Disneyland's motion to dismiss the common carrier claim was denied.<sup>43</sup>

The court elaborated on the broad scope of California Civil Code § 2168 and concluded that this statutory definition includes the broad category of amusement park rides.<sup>44</sup> The court conceded a reasonable argument could be made that the common carrier status should not apply to amusement park rides.<sup>45</sup> However, the court reasoned it is the legislature's role to narrow the statute's breadth, not the court's.<sup>46</sup>

In analyzing the scope of California's common carrier statute, the court faced an issue of first impression. While the court stated that courts nationwide have struggled with the degree of care owed by amusement park operators,<sup>47</sup> it noted that no California court had directly ruled whether amusement rides are common carriers pursuant to California's common carrier statute.<sup>48</sup> In its analysis, the court analogized the facts of *Neubauer* to two earlier rulings involving a ski-lift and a mule train.<sup>49</sup>

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41 *Neubauer v. Disneyland, Inc.*, 875 F. Supp. 672, 673 (C.D. Cal. 1995).

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 The court stated, "Some [jurisdictions] have held that common carrier liability is appropriate, while others have concluded that a lesser standard of ordinary care is owed." *Neubauer*, 875 F. Supp. at 673.

48 In *Barr v. Venice Giant Dipper Co.*, 32 P.2d 980 (Cal. Ct. App. 1934), the court held, after examining case law in other jurisdictions, there was no error in the jury instructions charging the operator of a miniature scenic railway with the utmost care and diligence required of a common carrier. In *Davidson v. Long Beach Pleasure Pier Co.*, 221 P.2d 1005 (Cal. Ct. App. 1950), the court held the operator of a tilt-a-whirl, described as a "merry-go-round with a college education," was under a ordinary duty of reasonable care under the circumstances in the maintenance, inspection, and supervision of the premises and amusements. The issue of common carrier liability was not addressed by the court. In *Pontecorvo v. Clark*, 272 P. 591 (Cal. Ct. App. 1928), defense counsel conceded their roller coaster was a common carrier without a decision by the court on this issue. And in *Kohl v. Disneyland*, 20 Cal. Rptr. 367 (Ct. App. 1962) the court merely described the "passenger-carrier" relationship when discussing *res ipsa loquitur* principles. At issue before the court was the sufficiency of the evidence to support a finding, there was no negligence. The court did not define the relationship of the parties involved in the case.

49 *Neubauer*, 875 F. Supp. at 673.

The California Court of Appeal, in *McIntyre v. Smoke Tree Ranch Stables*,<sup>50</sup> held a guided mule train, which carried passengers along a fixed route from Palm Springs to Tahquitz Falls, was a carrier.<sup>51</sup> The court held the passengers paid a fare for a trip by mule and the defendant stables offered to carry such passengers for hire. Therefore, "the transaction between [the parties] constituted an agreement of carriage."<sup>52</sup> Thus, the court ruled that jury instructions charging the stables with the utmost care and diligence should not have been refused.<sup>53</sup>

Similarly, in *Squaw Valley Ski Corp. v. Superior Court*,<sup>54</sup> the California Court of Appeal held a chair lift at a skiing resort was a carrier.<sup>55</sup> The court noted that a common carrier is "any entity which holds itself out to the public generally and indifferently to transport goods or patrons from place to place for profit."<sup>56</sup> The court held because the Squaw Valley Ski Corporation indiscriminately offered to carry skiers from the bottom to the top of the mountain, the lift should be treated as a common carrier.<sup>57</sup>

#### IV. ANALYSIS OF *NEUBAUER*

The short, one-page opinion is too concise. The opinion fails to address several major issues and distinctions that have developed in determining what activities constitute a common carrier. The court does not expound on the various tests used by other jurisdictions in classifying common carriers. For example, the opinion does not discuss the important distinction between common and private carriers as discussed by *Webster v. Ebright*,<sup>58</sup> a California case decided just twenty-one days after *Squaw Valley*.<sup>59</sup> Nor does the court lend significant weight to the legislative intent of the common carrier statute enacted back in the days of horse and steam locomotion.<sup>60</sup> Instead, the court allows the "common carrier" status to be conferred upon a wide variety of activities that

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<sup>50</sup> 23 Cal. Rptr. 339 (Ct. App. 1962).

<sup>51</sup> *Id.* at 341.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 342

<sup>54</sup> 3 Cal. Rptr. 2d 897 (Ct. App. 1992).

<sup>55</sup> *Id.* at 902.

<sup>56</sup> *Id.* at 900.

<sup>57</sup> *Id.*

<sup>58</sup> 4 Cal. Rptr. 2d 714 (Ct. App. 1992).

<sup>59</sup> In *Webster v. Ebright*, 4 Cal. Rptr. 2d at 714, 717-20 (Ct. App. 1992), the court held an operator of horseback rides, as a private carrier, was not subject to the heightened duty of utmost care and diligence. The court distinguished between a common carrier and a private carrier.

<sup>60</sup> "When legislative intent cannot be discerned directly from the statutory language, courts may look to a variety of extrinsic aids, including the objects the statute seeks to achieve or the evils it attempts to remedy, the legislative history, public policy, and the statutory scheme of which the statute is a part." *People v. Woodhead*, 239 Cal. Rptr. 656 (Cal. 1987).

do not readily appear to be common carriers. Under the *Neubauer* court's broad interpretation, an owner or operator of every amusement device from a pair of roller blades to a slide at a neighborhood playground could conceivably be treated as a common carrier.

As a case of first impression, the court should have relied more on the principles set forth not only in California but in jurisdictions across the country. A majority of jurisdictions deciding the issue have determined amusement rides are not carriers of any kind,<sup>61</sup> and thus should not be held to the ordinary negligence duty of reasonable care under the circumstances.<sup>62</sup> While a few jurisdictions have held amusement ride operators to a heightened duty of care, most courts have not gone so far as to define amusement park rides as common carriers.<sup>63</sup> Several tests have evolved for determining whether an amusement ride or device rises to the level of a common carrier. An examination of these tests, and the principles underlying them, is instructive.

#### A. Carriage v. Entertainment

The Virginia Supreme Court, in *Bregel v. Busch Entertainment Corp.*,<sup>64</sup> considered the level of care an amusement park operator owes its patrons. The amusement park ride in question was the Skyride, a mono-cable gondola which traveled high above the park.<sup>65</sup> The court held an amusement park is not a common carrier "because it does not, as a regular business, undertake for hire to transport persons from place to place."<sup>66</sup> The court further stated the Skyride, "is for entertainment purposes, and the transportation function is incidental to the entertainment function. Busch Entertainment's 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."<sup>67</sup> The court distinguished amusement rides and devices from traditional common carriers such as elevators. Unlike elevators, "Busch Entertainment's Skyride is used to entertain patrons at the amusement park, and any transportation function is purely incidental to

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61 A "carrier" is one who undertakes to transport persons from place to place. See generally *Carriers*, 13 Am. Jur. 2d § 1 et seq. (1964).

62 See cases cited *supra* note 16.

63 See cases cited *supra* note 17.

64 444 S.E.2d 718 (Va. 1994).

65 A patron was injured when her elbow, which was extended outside of the gondola's cabin, was pinned between two gondolas that made contact. *Bregel*, 444 S.E.2d at 719.

66 *Id.*

67 *Id.*



the amusement function."<sup>68</sup> Thus, the court held the duty of ordinary care applied to operators of the Skyride.<sup>69</sup>

Similarly, in *Harlan v. Six Flags over Georgia*,<sup>70</sup> the Georgia Supreme Court distinguished between traditional common carriers and "The Wheelie,"<sup>71</sup> an amusement ride at a Six Flags amusement park. Georgia had a broad common carrier statute comparable to California's.<sup>72</sup> The court reasoned that persons utilizing common carriers do so for transportation needs.<sup>73</sup> On the other hand, riders of "The Wheelie" "seek a sensation of speed and movement for the sake of entertainment and thrills."<sup>74</sup> The court stated:

We find it easy to distinguish between operation of elevators, taxicabs, buses, and railroads, which are instruments of transportation that must be used by people to travel from one place to another, and operation of "The Wheelie" and similar instruments, which are not. Passengers board elevators and amusement rides with dissimilar expectations. Persons using ordinary transportation devices, such as elevators and buses, normally expect to be carried safely, securely, and without incident to their destination. Amusement ride passengers intend to be conveyed thrillingly to a place at, or near to, the point they originally boarded, so the carriage is incidental. There is no transport involved with "The Wheelie."<sup>75</sup>

The Supreme Court of Connecticut, in *Firszt v. Capital Park Realty Co.*,<sup>76</sup> also held the duty of ordinary care applied to an amusement park ride known as the "aeroplane swing."<sup>77</sup> Once again, a clear distinction was drawn between common carriage

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> 297 S.E.2d 468 (Ga. 1982)

<sup>71</sup> "The Wheelie' is an amusement device consisting of 21 cars mounted on the sprockets of a wheel attached to a mechanical support arm, which is mounted in a concrete and steel base. Patrons ride two or three to a car, and after the patrons are seated and the cars are locked, the cars begin rotating on the wheel in a horizontal manner. As the rotational speed increases, the support arm rises from its base and lifts the cars, still rotating, into a near vertical position. In this position as the cars reach the top of the wheel, the cars and riders are upside down, but held in position by centrifugal force. The wheel continues to rotate in a near vertical position for a few seconds, and then the arm returns to a horizontal position . . ." *Id.* at 468.

<sup>72</sup> GA. CODE ANN. § 18-204 provided "passengers [of common carriers] are those persons who travel in some public conveyance by virtue of a contract, expressed or implied, with the carrier as to the payment of the fare."

<sup>73</sup> *Harlan*, 297 S.E.2d at 469.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 468.

<sup>76</sup> *Firszt v. Capital Park Realty Co.*, 120 A. 300 (Conn. 1923).

<sup>77</sup> The ride consisted "of cars made to resemble aeroplanes, each of which cars accommodated four persons. Each person riding in one of said cars was charged 10 cents—government tax included. Each car was suspended by four steel cables, each fastened at one end to each of the four corners of each swing respectively and at the other end to steel supports or arms extending out from the top of a steel tower about 60 feet high." *Id.* at 301.

and entertainment. The court stated "one desiring for his delectation to make use of pleasure-giving devices similar to the one in question is under no impulsion of business or personal necessity. He is seeking entertainment, and, when invited . . . he can properly ask only that he be not exposed by the carelessness of those in charge of any given instrumentality . . . ." <sup>78</sup>

In the present case, the sole, objective purpose of the Pirates of the Caribbean and other amusement rides at Disneyland is entertainment. The ride takes Disneyland patrons via boats through an underground studio complete with audio-animatronic pirates and fake treasure. The purpose of the ride is not to transport passengers from place to place; it is to provide entertainment and thrills. Disneyland patrons flock by the millions to the amusement park in search of entertainment and escapism. The *Neubauer* court could easily have applied the carriage versus entertainment test to the facts of its case.

In *Neubauer*, the court cites *Squaw Valley* for the proposition that ski lifts have the status of a common carrier.<sup>79</sup> *Squaw Valley* is distinguishable from the facts of the instant case. The ski lifts in *Squaw Valley* are used to transport skiers from the base of the mountain to the ski areas on top, and occasionally back down the mountain, for a ticket price. The purpose of the lifts are for transportation from point A to point B, and not to entertain the patron during the ascent. In contrast, the Pirates of the Caribbean boats carry passengers along a circular route. The passengers depart from a loading and unloading dock and return to the same dock. These passengers unquestionably are on the boat ride for entertainment, not transportation. Moreover, they do not pay a separate fee for riding Pirates of the Caribbean. As the above-mentioned cases illustrate, amusement park rides are purely entertainment devices and, therefore, should not be treated as carriers.

## B. Private v. Common Carriers

Other jurisdictions distinguish between private and common carriers. For example, the Connecticut Court of Appeals in *Hunt v. Clifford*<sup>80</sup> stated "[a] common carrier of passengers undertakes to carry for hire, indiscriminately, all persons who may apply for passage, provided there is sufficient space or room available and no legal excuse exists for refusing to accept them."<sup>81</sup> A carrier not meeting this criteria is deemed a private carrier for hire.

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<sup>78</sup> *Id.* at 303-4.

<sup>79</sup> *Neubauer v. Disneyland, Inc.*, 875 F. Supp. 672, 673 (C.D. Cal. 1995).

<sup>80</sup> 209 A.2d 182 (Conn. 1965).

<sup>81</sup> *Id.* at 183 (quoting 14 Am. Jur. 2d, *Carriers* § 734).

California likewise distinguishes between common and private carriers.<sup>82</sup> Common carriers are defined as carriers who undertake to carry from one place to another the goods of all persons who apply for carriage.<sup>83</sup> These carriers are legally obliged to carry all who apply and may not arbitrarily refuse to carry a particular passenger.<sup>84</sup> By contrast, private carriers for hire carry goods and passengers on their own terms and do not publicly represent that they will carry all who apply for carriage.<sup>85</sup> In other words, private carriers do not undertake to carry all passengers indiscriminately. This common law distinction is relevant because common carriers are charged with the utmost duty of diligence and care, while private carriers need only meet the ordinary negligence standard of reasonable care.<sup>86</sup> Under this distinction, it is wrong to impute the higher level of care on private carriers. As stated by the California Supreme Court, “[T]he law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons [or businesses] who have not expressly assumed that character . . . .”<sup>87</sup> The *Neubauer* opinion does not mention the traditional common law distinction between common and private carriers.

In *Webster v. Ebright*,<sup>88</sup> the California Court of Appeal held a horse stable which provided horses and guided tours on trails was bound only by the ordinary negligence standard of reasonable care.<sup>89</sup> The court articulated a difference between a common carrier and a private carrier for hire: “A common carrier under

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82 *Webster v. Ebright*, 4 Cal. Rptr. 2d 714, 716-17 (Ct. App. 1992).

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.*, see also *Carpene v. County of Los Angeles*, 7 Cal. Rptr. 889, 891 (Ct. App. 1960) (operator of prison bus was held to be acting at most as a private carrier and “certainly was required to exercise no more than ordinary care and prudence”); *Hopkins v. Yellow Cab Co.*, 114 Cal. App. 2d 394 (1952) (cab company ceased being a common carrier and became a private carrier, held to a duty of ordinary care, when it transported disabled children to and from school at designated hours); *Shannon v. Central-Gaither U. School Dist.*, 133 Cal. App. 124 (1933) (operator of a school bus used by a particular school was held a private carrier under a duty of ordinary prudence); *Gorstein v. Priver*, 64 Cal. App. 249, 254 (1923) (owner of a truck rented out on weekends was held a private carrier and thus bound to a duty of ordinary care). But see *Lopez v. Southern Calif. Rapid Transit Dist.*, 710 P.2d 907 (Cal. 1985). There, the defendant, a municipal transit corporation, argued that even though it was a common carrier, it was nonetheless immune from tort liability under the California Government Code. In the opinion, the court held a duty of utmost care applies to “public carriers as well as private carriers.” *Id.* at 909. However, as *Webster* noted, the *Lopez* court meant “private carriers” in the sense of “nongovernmental common carriers” when it rejected the defendant’s argument that a duty of utmost care should not apply to governmental common carriers. *Webster*, 4 Cal. Rptr. at 719. This intent is evidenced by the court’s own restatement of its holding: “In summary, we hold that Civil Code section 2100 imposes upon all *common carriers*—public or private—a duty of utmost care and diligence . . . .” *Id.* at 914 (emphasis added).

87 *Samuelson v. Pub. Util. Comm’n*, 227 P.2d 256, 36 Cal. 2d 722, 730 (1951).

88 *Webster*, 4 Cal. Rptr. 2d at 714.

89 *Id.*

§ 2168 is one who offers to the general public to carry goods or persons, and is bound to accept anyone who tenders the price of carriage.<sup>90</sup> Conversely, a private carrier is bound only to carry passengers pursuant to a special agreement.<sup>91</sup> Although the facts of this case are similar to those in *McIntyre*, the court reached an opposite result.<sup>92</sup>

The *Neubauer* court relied on *McIntyre* in ruling amusement park rides are common carriers.<sup>93</sup> However, the *McIntyre* court did not address the issue of private carrier liability.<sup>94</sup> The primary issue considered by the court was whether the mule train constituted a carrier at all.<sup>95</sup> The court narrowly held the ranch stable entered into a contract of carriage and therefore the trial court erred by refusing common carrier jury instructions.<sup>96</sup>

The court in *Neubauer* should have applied the holding of *Webster* to its analysis of common carrier liability in California. Indeed, the court should have addressed the critical distinction between common and private carriers. If these factors had been considered by the court, a different result should have been reached. Disneyland, Inc. is a private corporation which is not legally mandated to indiscriminately carry all public passengers on its rides. Disneyland has the right to refuse carriage, to set height or weight limits, and to displace a passenger from a ride or the entire park at its discretion. When California's common carrier statute is interpreted in light of the traditional California common law, Disneyland should be treated as a private carrier with a duty of ordinary care. Furthermore, unlike a common carrier, many of the rides at Disneyland discriminate based on physical requirements and medical conditions.

### C. Perceived Risk of Danger

In *Lamb v. B & B Amusement Corp.*,<sup>97</sup> the Utah Supreme Court held a roller coaster operator was not subject to common carrier liability. In distinguishing common carriers from amusement rides, the court stated:

Persons using ordinary transportation devices, such as elevators and buses, normally expect to be carried safely, securely, and without incident to their destination . . . . Persons who use

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<sup>90</sup> *Id.* at 715-16.

<sup>91</sup> *Id.* at 716.

<sup>92</sup> *Id.* at 720.

<sup>93</sup> *Neubauer v. Disneyland, Inc.*, 875 F. Supp. 672, 673 (C.D. Cal. 1995).

<sup>94</sup> The ranch stables maintained it was not a "carrier" in the general sense and the issue on appeal was not whether the stable was a private versus a common carrier. *McIntyre v. Smoke Tree Ranch Stables*, 23 Cal. Rptr. 339, 342 (Ct. App. 1962).

<sup>95</sup> *Id.* at 339-42.

<sup>96</sup> *Id.* at 341.

<sup>97</sup> 869 P.2d 926 (Utah 1993).

amusement rides have different expectations. Passengers on many amusement rides expect entertainment in the form of high speeds, steep drops, and tight turns. There are, of course, many kinds of amusement rides, and patrons who use those rides must, to some extent, be aware of their own physical abilities and limitations and exercise some judgment as to their ability to endure the physical and mental stresses encountered on various rides. Amusement rides are not designed to provide comfortable, uneventful transportation, even when the equipment operates without incident and as intended.<sup>98</sup>

Some Disneyland rides have posted signs warning of the inherent risks and patrons must be aware of their own physical limitations and exercise judgment as to their ability to endure the physical and mental stresses potentially encountered. However, the majority of the rides, such as Peter Pan's Flight, It's a Small World, the Haunted Mansion and Pirates of the Caribbean, are innocuous excursions in which persons of every age may ride comfortably. An illogical result would exist if these rides are considered common carriers, while holding the park's roller coasters are not common carriers because of the perceived risks. This variety in the types of amusement rides underscores the problem with *Neubauer's* broad holding that amusement park rides are per se common carriers as defined by California's common carrier statute.

#### D. Legislative Intent

The California Supreme Court has held the "objective of statutory interpretation is to ascertain and effectuate legislative intent."<sup>99</sup> When this intent cannot be discerned directly from the plain language of the statute, or the language is susceptible to more than one reasonable interpretation, courts should "look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy . . . and the statutory scheme of which the statute is a part."<sup>100</sup>

In *Neubauer*, the court stated, "[a] reasonable argument can be made that common carrier status should not apply to an amusement park ride because it is not the traditional kind of 'transportation' historically contemplated by the common carrier theory, with the main purpose being entertainment rather than travel."<sup>101</sup> However, the court made no further attempt to consider extrinsic aids in its analysis.

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<sup>98</sup> *Lamb*, 869 P.2d at 930-31.

<sup>99</sup> *People v. Woodhead*, 239 Cal. Rptr. 656, 658 (Cal. 1987).

<sup>100</sup> *Id.*

<sup>101</sup> *Neubauer v. Disneyland, Inc.*, 875 F. Supp. 672, 673 (C.D. Cal. 1995).

California's common carrier statute was enacted in 1872. At that time, the primary sources of transportation were horses, stagecoaches, steamboats, and railways. Legislation was enacted to regulate the new transportation era. Arguably, the intent was to provide safety in transportation, not entertainment. After all, the first roller coaster in the United States was not in operation until 1884. The first Ferris wheel was introduced in Chicago in 1893.<sup>102</sup> California's first amusement park opened for business at Santa Cruz in 1904.<sup>103</sup> This history bolsters the argument that traditional modes of transportation such as railways and stagecoaches were the intended objects of the common carrier statute,<sup>104</sup> and any problems associated with amusement rides were not the evils to be remedied.

The question that arises is whether it is fair to apply a statute, that has not been amended by the California Legislature since its enactment 125 years ago, to amusement park rides. The judiciary should refrain from expanding a definition to include entertainment devices that were not contemplated by the those who enacted the common carrier statute of 1872. The legislature should widen the door, not the courts.

#### E. Ordinary Negligence Will Suffice

Certainly, a court may feel constrained to impose a high degree of liability upon the operators of roller coasters and similar rides which seemingly defy gravity and centrifugal forces. These rides lunge forward at great speeds maneuvering up, down, over and around as they impose pressure on the body and excite the mind. Yet a court need not use the common carrier status to impose a higher duty of care on amusement park operators.

Ordinary negligence concepts protect the patrons of roller coasters and similar "high risk" amusement rides. There is no need to distort the meaning of "common carrier" to reach such a result. Indeed, the common law recognizes that an operator's duty must be in proportion to the apparent risk.<sup>105</sup> As the risk increases, so does the duty of care.<sup>106</sup> In the words of Prosser and Keaton:

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<sup>102</sup> National Amusement Park Historical Association, <<http://www.napha.org>> (1998).

<sup>103</sup> Charles Hillinger, *Time Warp: Boardwalk Recalls Era when Life Was A Beach*, L.A. TIMES, Aug. 27, 1989, at Metro 1.

<sup>104</sup> See generally *Champagne v. A. Hamburger & Sons*, 147 P. 954 (Cal. 1915) (the California Supreme Court analogized passenger elevators to railways and stagecoaches); *Forsyth v. San Joaquin Light & Power Corp.*, 281 P. 620 (Cal. 1929) (California Supreme Court noted the Auto Stage and Truck Transportation Act of 1917 in which transportation modes covered under the Act were defined as any automobile, jitney bus, auto truck, stage or auto stage).

<sup>105</sup> PROSSER AND KEATON ON THE LAW OF TORTS § 34, at 208.

<sup>106</sup> See John Kimpfen, *Duties and Liabilities as to Amusement Rides and Devices*, 27A Am. Jur. 2d *Entertainment and Sports Law* § 90, at 455 (1996) ("The measure or amount of

If the risk is an appreciable one, and the possible consequences are serious, the question is not one of mathematical probability alone. The odds may be a thousand to one that no train will arrive at the very moment that an automobile is crossing a railway track, but the risk of death is nevertheless sufficiently serious to require the driver to look for the train and the train to signal the approach. It may be highly improbable that lightning will strike at any given place or time; but the possibility is there, and it may require precautions for the protection of inflammables. As the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution.<sup>107</sup>

The duty of care will vary according to the risks inherent in a particular amusement park ride. Operators of such rides will be held liable accordingly. Expanding and stretching the definition of the 1872 common carrier statute is not necessary given the negligence theories already in place. It is patently unfair to hold the operators of amusement rides strictly liable to a heightened duty of utmost care and diligence simply because of a statute written 125 years in the past.

## V. CONCLUSION

The significance of *Neubauer* lies in the broad construction the court attached to the California statute defining common carriers. The court's formalistic, textual interpretation of this statute goes against existing California precedence, case law around the country, and the spirit of statutory interpretation. Moreover, the court's decision was unnecessary given the negligence protections available to potential plaintiffs.

The existing California case law does not support the court's holding in this case. Disneyland, Inc. is a private corporation and is not legally mandated to indiscriminately carry all public passengers on its rides. When California's common carrier statute is interpreted in light of the common law, Disneyland is perhaps a private carrier with a duty of ordinary care, but probably is not a carrier at all.

The *Neubauer* court relied heavily on *McIntyre* and *Squaw Valley* in holding amusement park rides fall within the statutory definition of common carriers. The court's determination that ski-

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care required will vary according to the hazards involved or the dangers inherent in the particular ride or device, for where the operating hazard is considerable, more exact supervision in its use is required than in cases where there is little or no element of danger. The owner or operator of the ride or device must use reasonable care to see that it is properly constructed and designed, maintained, and managed; reasonable care in such respect is that which an ordinarily prudent person would exercise under like circumstances, and in a like situation.").

107 PROSSER AND KEATON ON THE LAW OF TORTS § 31, at 171.

lifts and mule trains are analogous to amusement park rides is ill-suited because *Neubauer* is factually distinguishable from both *McIntyre* and *Squaw Valley*, which involved persons paying a fare for carriage to a fixed destination.

By way of contrast, Disneyland charges an admission price pursuant to which a patron may enter the park and engage in a wide variety of activities ranging from parade and show watching to riding on roller coasters, all without paying a fee for any specific ride. Disneyland does not transport its patrons to destinations. The only thing Disneyland undertakes to do is stimulate imaginations and inspire dreams. Disneyland is in the business of entertainment, and claims to be the happiest place on earth.

Under the court's blanket holding, common carrier status may be applied to any amusement ride or device. Owners or operators of train rides at kiddy zoos, and playground slides are conceivably common carriers.

California case law has not yet defined "common carrier" in light of late twentieth century developments, much less those reaching into the twenty-first century. As technology speeds along and new devices are created, the California courts or legislature may one day draw a line in the sand, limiting the reaches of a common carrier statute enacted back in the stagecoach era.