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# First Aid to Passengers: Good Samaritan Statutes and Contractual Releases from Liability

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# COMMENTS

## FIRST AID TO PASSENGERS: GOOD SAMARITAN STATUTES AND CONTRACTUAL RELEASES FROM LIABILITY

*by Michael D. Wortley*

There are now professional groups that engage in the business of training persons to render first aid. Potential trainees include the common carrier ("carrier") employees who must deal with passengers becoming sick en route. These professional training groups encourage carriers to undertake such training as a service to their passengers and for the advertising value to the carrier of such training. Placing aside the potential value of public service and good will which might emanate from first aid training programs, this Comment explores the extent of the liability for negligence which a carrier might incur by rendering first aid following participation in such programs.[1] To analyze the potential liability, several legal aspects of liability must be examined: the degree of care owed to passengers; the duty to render aid; and any liability exemption mechanisms.

This Comment contends that common carriers, despite owing a duty of a high degree of care in transporting and setting down passengers,[2] are not under any *duty*[3] to render first aid to passengers. This position is in direct conflict with the *Restatement (Second) of Torts* which states that a common carrier is under a duty to give first aid to ill passengers.[4] Without a duty to render first aid, common carriers that do undertake to render first aid to sick passengers should be exempt from liability for ordinary negligence[5] in rendering such aid through two legal mechanisms: Good Samaritan statutes and releases from liability signed by passengers prior to boarding the vehicle. The legal efficacy of these two mechanisms is so uncertain,[6] however, that

1. Although the employees of a carrier would actually render the first aid, this Comment assumes that carrier liability would be determined by general agency principles. *See generally* W. SELL, AGENCY (1975).

2. Little v. Los Angeles Ry. Corp., 94 Cal. App. 303, 271 P. 134 (1928). For further discussion see cases cited in 13 C.J.S. *Carriers* § 677 (1939).

3. The word "duty" means that the person who is sought to be held liable is under a legal requirement to have done or not to have done an act which would have prevented the injury in question. Steuer, *The Conception of Duty in Personal Injury Cases in New York*, 18 CORNELL L.Q. 51 (1932). Where there is no legal duty, there can be no negligence, and consequently no liability for action or inaction. Webb v. City of Lubbock, 380 S.W.2d 135, 136 (Tex. Civ. App.—Amarillo 1964, writ ref'd n.r.e.); Thompson v. Graham, 333 S.W.2d 663 (Tex. Civ. App.—Eastland 1960, writ ref'd n.r.e.); City of Wichita Falls v. Swartz, 57 S.W.2d 236 (Tex. Civ. App.—Fort Worth 1932, no writ).

4. RESTATEMENT (SECOND) OF TORTS § 314A(1)(b) (1965).

5. Throughout this Comment "negligence" and "ordinary negligence" are used interchangeably but are distinguished from "gross negligence" or "reckless conduct." *See* notes 125-30 *infra* and accompanying text.

6. See notes 78-165 *infra* and accompanying text for discussion of the proposition that the principal uncertainty in the area of the application of Good Samaritan statutes and exemptions

reliance on either is not recommended. A carrier's attempt to avoid liability for negligence in rendering first aid should be directed towards amending the current Good Samaritan statutes. Until some statutory protection is afforded, carriers are urged to proceed cautiously, if at all, in training their employees to render first aid.

As the term "first aid" often is used rather loosely, its parameters must be defined. The analysis below focuses on the legal aspects of carrier liability for negligence of its employees in rendering first aid after *formal training*[7] in such aid. The basic elements of first-aid training would include, *inter alia*, maintenance and restoration of breathing, control of bleeding, administration of oxgyen, bandaging and splinting, and treatment of unconsciousness.[8] The present state of the law unnecessarily inhibits such formal first-aid training to the disadvantage of passengers who suddenly become ill.

By way of further delineating the scope of this discussion, it should be noted that the liability concerned with is the liability for rendering first aid negligently to a passenger who becomes ill through no fault of the carrier or its employees. Also, the assumption is made that the carrier has had no notice of illness until the vehicle is underway.

## I. BACKGROUND

*Common Carrier.* The definition of a common carrier[9] includes not only railroads, buses, and airplanes, but also such diverse "vehicles" as escalators and elevators,[10] taxis,[11] street cars,[12] and ski lifts.[13] With such a variety of modes of common carrier transportation available,[14] the question of liability in rendering first aid negligently to ill passengers is a significant one. Only airlines presently provide a formal first aid training program for their personnel.[15] The question is whether the other carriers should follow the trend of the airlines by preparing their employees to render first aid to ill passengers.

*Common Law.* According to the common law rule of rescue, if there is no contractual relation between two persons, there is no duty on the part of one

from liability to carriers that render first aid results from the fifty states deciding the issue as a matter of first impression. Consequently, divergence in interpretation is probable.

7. Frequently, the term "first aid" is used to mean any immediate assistance given during a sudden illness by a bystander or other lay person before the arrival of persons formally trained to render aid. Miles, *Aspects of Emergancy Care: First-aid Training*, 4 BRIT. MED. J. 485 (1969).

8. *Id.* at 486.

9. A common carrier has been defined as one who carries passengers indiscriminately (invites the public) for consideration. *See* Note, *Negligence—Store Escalators as "Common Carrier,"* 8 B.U.L. REV. 162 (1928).

10. *Id.*

11. *See, e.g.*, Taylor v. Luxor Cab Co., 112 Cal. App. 2d 46, 246 P.2d 45 (1952).

12. *See, e.g.*, Finley v. City & County of San Francisco, 115 Cal. App. 2d 116, 251 P.2d 687 (1952).

13. *See, e.g.*, Grauer v. State, 15 Misc. 2d 471, 181 N.Y.S.2d 994, *aff'd*, 9 App. Div. 2d 829, 192 N.Y.S.2d 647 (1959). The New York Legislature subsequently defined ski lifts not to be common carriers. N.Y. PUB. SERV. LAW § 2(9) (McKinney 1965).

14. This Comment will not discuss maritime carriers since the law of negligence has been pre-empted by federal legislation and is a unique closed system inapplicable to land and air carriers. *See* 46 U.S.C. § 183 (1970).

15. Telephone interview with Ronny Verbus, Director of Flight Attendant Training, American Airlines, in Dallas, Texas, Aug. 18, 1976.

person to rescue or assist another person in peril or distress.[16] Although the common law developed techniques to encourage bystanders to rescue,[17] the law simultaneously deterred rescue by its mandate that once the rescue operation begins the rescuer is under a duty to use reasonable care in effecting the rescue.[18] Under the common law rescue doctrine, the legal duty to use reasonable care is imposed only when one citizen voluntarily attempts to aid another;[19] however, prior to the voluntary aid, there is no legal duty to aid those in peril.[20] Against this background, Good Samaritan statutes, protecting the volunteer, were enacted.[21]

## II. DUTY OF COMMON CARRIERS TO RENDER FIRST AID

The analysis of the duty, if one exists, of a carrier to render first aid is complicated by the fact that a duty may arise out of (1) a relation between a carrier and its passengers,[22] (2) a contract between the parties,[23] or (3) a state or federal statute.[24] Examination of these three potential sources of a duty to render first aid is necessary before determining whether common carriers may avoid liability for negligence in rendering first aid, since the application of the two liability exemption mechanisms, Good Samaritan statutes and releases, is predicated upon the absence of a duty to render aid. Before these potential sources are analyzed, however, the standard of care generally required of a carrier is compared with the standard of care required when passengers become ill.

### A. *Standard of Care of Common Carrier Generally Required*

That common carriers owe passengers the duty to exercise the highest degree of care[25] in the operation of the conveyance[26] and in the boarding and alighting of passengers[27] is a well-settled rule. Although this affirmative duty

16. *See, e.g.*, Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301 (1928) (defendant who failed to respond to intestate's cries for help over a half-hour period infringed no legal right of intestate). *See also* Allen v. Hixson, 111 Ga. 460, 36 S.E. 810 (1900); Griswold v. Boston & Me. R.R., 183 Mass. 434, 67 N.E. 354 (1903); Yania v. Bigan, 397 Pa. 316, 155 A.2d 343 (1959); Note, *Duty to Assist Person in Peril*, 12 MINN. L. REV. 765 (1928).

17. These techniques include allowing injured rescuers to recover, Wagner v. Int'l Ry., 232 N.Y. 176, 133 N.E. 437 (1921), and an unwillingness to find that a rescuer has been contributorily negligent, Eckert v. Long Island R.R., 43 N.Y. 502 (1871).

18. *See, e.g.*, Devlin v. Safeway Stores, 235 F. Supp. 882 (S.D.N.Y. 1964); Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51, 52 (1972).

19. *See* United States v. DeVane, 306 F.2d 182 (5th Cir. 1962); Nelson v. Chicago M., St. P. & Pac. Ry., 252 Wis. 585, 32 N.W.2d 340 (1948); Note, *The Duty to Aid One in Peril: Good Samaritan Laws*, 15 HOW. L.J. 672, 673 (1969).

20. Gordon, *Moral Challenge to the Legal Doctrine of Rescue*, 14 CLEV.-MAR. L. REV. 334 (1965); Comment, *The Good Samaritan and the Law*, 32 TENN. L. REV. 288 (1965).

21. *See* notes 78-130 *infra* and accompanying text.

22. Comment, *Duty of a Railway Company to Care for a Person It Has Without Fault Rendered Helpless*, 7 CALIF. L. REV. 312 (1919).

23. *See* Steuer, *supra* note 3, at 51.

24. *Id.*

25. Ortiz v. Greyhound Corp., 275 F.2d 770, 773 (4th Cir. 1960); Doss v. Southwestern Transp. Co., 89 S.W.2d 1092, 1093 (Tex. Civ. App.—Texarkana 1935, writ ref'd); Bragg v. Houston Elec. Co., 264 S.W. 245, 249 (Tex. Civ. App.—Beaumont 1924), *aff'd*, 276 S.W. 641 (Tex. Comm'n App. 1925, jdgmt adopted); Note, *Negligence—Common Carriers—Degrees of Care*, 39 N.C.L. REV. 294, 295 n.5 (1961).

26. Little v. Los Angeles Ry., 94 Cal. App. 303, 271 P. 134 (1928). For a further discussion see cases cited in 13 C.J.S. *Carriers* § 677 (1939).

27. 13 C.J.S. *Carriers* § 677 (1939).

has been expressed in a variety of ways,[28] courts agree that the carrier is not an absolute insurer of the safety of a passenger.[29] In contrast to this duty of a high degree of care in the transportation of passengers is the lower standard of care required when passengers become ill. Without exception, the fifteen states and three federal courts applying state law which have considered the scope of a carrier's duty to a sick passenger have held that the duty owed is to provide reasonable care under the circumstances.[30] As none of the circumstances in these cases involved the rendering of first aid, the question is reduced to whether the duty to exercise reasonable care under the circumstances includes a duty to render first aid with reasonable care.

### B. *Possible Sources of the Duty to Render First Aid*

*Relation Between Carrier and Passenger.* Certain relations give rise to duties that are not dependent upon a contract between the parties.[31] The relation between a carrier and its passengers is an excellent example of a relation which generates duties independent of the contract of carriage. As explained by the Supreme Court of Texas,[32] the relation of a passenger and carrier is created by contract,[33] but the common law, not the contract, has attached duties to the relation[34] because of the public concern for safe transportation. Safety of passenger travel is a matter of public policy and cannot be left to individual contract between carrier and passenger.[35] This public policy aspect may so affect the relation between carrier and passenger as to create a duty to render first aid.

Carriers are clearly under a general duty to provide reasonable care and attention to sick passengers.[36] In addition, several courts have held that a carrier is under a duty of reasonable care to secure medical assistance for an ill passenger. For example, in *Livingston v. Seaboard Air Line Railroad*,[37] where the conductor of defendant's train knew that a passenger was seriously ill, the court held that the conductor acted reasonably in arranging for the

28. Livingston v. Seaboard Air Line R.R., 106 F. Supp. 886 (E.D.S.C. 1952) ("the highest degree of practical care in the circumstances"); St. Louis, S. F. & T. Ry. v. Gore, 69 S.W.2d 186 (Tex. Civ. App.—Dallas 1934, writ dism'd) ("a high degree of care"); St. Louis Sw. Ry. v. Adams, 163 S.W. 1029, 1033 (Tex. Civ. App.—Dallas 1914, writ ref'd) (the care of "a very cautious and prudent person"). *See also* Note, *Torts—Negligence—Common Carriers—Degree of Care Owed Passengers*, 17 N.C.L. REV. 453 (1939).

29. Alabama Great S.R.R. v. Alsup, 101 F.2d 175 (5th Cir. 1939).

30. *See, e.g.*, Continental S. Lines, Inc. v. Robertson, 241 Miss. 796, 133 So. 2d 543 (1961). For further general discussion see cases cited in Annot., 92 A.L.R.2d 656, 659 (1963). The courts do not impose the highest degree of care because illness, unlike the conveyance of passengers, is not within the control of the carrier.

31. Winn v. Holmes, 143 Cal. App. 2d 501, 299 P.2d 994 (1956) (public/visitor relation); McFadden v. Bancroft Hotel Corp., 313 Mass. 56, 46 N.E.2d 573 (1943) (innkeeper/guest relation).

32. Gulf, C. & S.F. Ry. v. McGown, 65 Tex. 640 (1886).

33. *Id.* at 646.

34. *Id.* The court said:

> These duties attach as a matter of law, and without regard to the will or wish of the . . . person who transacts business with him . . . and this is so, for the public good. Duties thus imposed are not the subject of contract . . . . The violation of the duty is a tort. The law declares that it is the duty of a public carrier of passengers to use the highest degree of care, to insure their safety.

35. *Id.*

36. Jacob v. Pennsylvania R.R., 203 F.2d 290 (6th Cir. 1953); Middleton v. Whitridge, 213 N.Y. 499, 108 N.E. 192 (1915); Lake Shore & M.S. Ry. v. Salzman, 52 Ohio St. 558, 40 N.E. 891 (1895).

37. 106 F. Supp. 886 (E.D.S.C. 1952).

removal of the passenger from the train and delivering the passenger to a doctor. In *Jacob v. Pennsylvania Railroad*[38] the court held that when the carrier's employee knows that a passenger is ill, a duty exists to remove the passenger from the train, if practicable, and to place him under medical care. Thus, in *Continental Southern Lines, Inc. v. Robertson*[39] a bus company was held liable for a bus driver's failure to secure medical attention for a passenger who, through no fault of the carrier, had injured her knee while on the bus.[40]

Although a carrier appears to be under a duty to secure medical assistance, when practicable, for a passenger who becomes ill, no case has held that the carrier itself must provide medical services.[41] In fact, some cases have expressly stated that a carrier is under no duty to turn its vehicles into hospitals or its employees into nurses.[42] Moreover, a carrier's employees are not empowered to diagnose an illness. In *Livingston v. Seaboard Air Line Railroad*[43] the train conductor, knowing the plaintiff was ill, was under a duty to render extra care and attention to the passenger and to arrange for a doctor. In finding no negligence for removing the passenger from the train, however, the court noted that the conductor could not, and properly did not, attempt to diagnose the illness.[44] In *Middleton v. Whitridge*[45] a street car conductor was found negligent for failing to secure medical aid for a passenger he believed to be drunk but who in reality was suffering from a stroke. The court stated that "[t]he fault of the conductor was not in making a wrong diagnosis, but in rashly assuming that he was competent to make any diagnosis at all."[46]

Case law, therefore, indicates a duty of reasonable care to *secure* medical aid for sick passengers and to give special attention to sick passengers. There is, however, no duty on the part of a carrier or its employees actually to *render* medical aid or attempt to diagnose the problem.

It is within this framework that the *Restatement (Second) of Torts* § 314A(1)(b) must be tested.[47] *Middleton v. Whitridge*[48] is the primary authori-

38. 203 F.2d 290 (6th Cir. 1953).
39. 241 Miss. 796, 133 So. 2d 543 (1961).
40. *See also* Korn v. Tamiami Trail Tours, Inc., 108 Ga. App. 510, 133 S.E.2d 616 (1963); Hughes v. Gregory Bus Lines, Inc., 157 Miss. 374, 128 So. 96 (1930); San Antonio Pub. Serv. Co. v. Wellman, 288 S.W. 582 (Tex. Civ. App.—San Antonio 1926, no writ).
41. Cases have arisen where an injured passenger of a common carrier apparently had the opportunity to sue the carrier for negligence in failing to provide first-aid services. For example, in Grauer v. State, 15 Misc. 2d 471, 181 N.Y.S.2d 994, *aff'd*, 9 App. Div. 2d 829, 192 N.Y.S.2d 647 (1959), plaintiff was injured by a chair lift operated by the state as a "common carrier." The court noted that the state had not furnished a first-aid station, but negligence was not predicated on that fact.
42. Livingston v. Seaboard Air Line R.R., 106 F. Supp. 886, 890 (E.D.S.C. 1952); Korn v. Tamiami Trial Tours, Inc., 108 Ga. App. 510, 133 S.E.2d 616, 621 (1963).
43. 106 F. Supp. 886 (E.D.S.C. 1952).
44. *Id.* at 889-90.
45. 213 N.Y. 499, 108 N.E. 192 (1915).
46. 108 N.E. at 197. The danger involved in trying to diagnose illnesses has been recognized by the airlines. Flight attendants are carefully trained to treat symptoms (choking, unconsciousness, chest pain, etc.), and never to diagnose the problem. No medicine may be given by a flight attendant, even if a passenger requests the flight attendant to give him his own medicine, and oxygen and smelling salts are the only stimulants that may be used. No mechanical equipment (*e.g.*, tourniquets) is used other than temporary splints and slings. Interview with Lucky Kroney, former flight attendant trainer for American Airlines, in Dallas, Texas, Aug. 2, 1976.
47. *See* note 4 *supra* and accompanying text.
48. 213 N.Y. 499, 108 N.E. 192 (1915).

ty used by the *Restatement* to support the proposition that a common carrier is under a duty "to give" passengers first aid after the carrier knows or has reason to know that a passenger is ill or injured. In expressing the duty the conductor owes to a passenger who becomes ill, the court said "it was [the carrier's] duty, if practicable, to remove [the ill passenger] and put him in custody of an officer or someone who could look after him."[49] There is no language in the case that says a carrier is under a duty to render first aid. In the subsequent retrial of the same case[50] the lower court interpreted the New York court of appeals' standard by finding that the court of appeals had held only that a conductor must use reasonable care, upon discovering an apparent illness, to determine that the passenger is in the need of medical attention; if it is known or reasonably should have been known that the passenger is too ill to remain in the car, then it is the duty of the carrier to remove the passenger and put him in custody of an officer.[51] Thus, *Middleton* does not support the *Restatement*'s assertion that there is a duty to render first aid.[52] The extent of the duty seems to be to provide a passenger with care and comfort as reasonably practicable under the circumstances and to get the passenger to a place where competent medical aid is available.[53] No case has extended the duty to demand that carriers formally train their employees to render first aid.

The fact that no case has ever held that a carrier is under a duty to render first aid to sick passengers is not surprising. The carrier holds itself out to the public as having expertise in the operation of the vehicle, and for this reason the carrier must exercise the highest degree of care for the safety of passengers in such operation.[54] When, however, a passenger suddenly becomes ill, the carrier's employee is no different from the other passengers in that he is a layman with regard to the infirmities of passengers.[55] To force upon a carrier a duty which is unrelated to its expertise and undertaken task, the safe conveyance of passengers, would be unreasonable. Even the cases which impose the highest degree of care on a carrier in the operation of its

49. 108 N.E. at 197.

50. Middleton v. Third Ave. Ry., 192 App. Div. 172, 182 N.Y.S. 598 (1920).

51. 182 N.Y.S. at 600.

52. The other three cases cited as authority by the *Restatement* also are not on point. In Yu v. New York, N.H. & H.R.R., 145 Conn. 451, 144 A.2d 56 (1958), defendant carrier was found negligent for injuries suffered while alighting from defendant's train by plaintiff who walked with a limp. The surrounding circumstances were such that the carrier's duty to guard passengers against all dangers which might reasonably be expected to occur required the carrier to assist the passenger in alighting. The case, however, had nothing whatsoever to do with a duty to render first aid. In Jones v. New York Cent. R.R., 4 App. Div. 2d 967, 168 N.Y.S.2d 927 (1957), *aff'd*, 4 N.Y.2d 963, 152 N.E.2d 519, 177 N.Y.S.2d 492 (1958), the passenger recovered damages for injuries sustained by him when he attempted to jump aboard defendant's train. Again, there was no mention of a duty to render first aid. Finally, in Kambour v. Boston & Me. R.R., 77 N.H. 33, 86 A. 624 (1913), defendant railroad was found negligent for knowingly permitting plaintiff, a 14-year-old boy, to jump off the train. Again, no issue of a carrier's duty to render first aid was before the court.

53. McCann v. Newark & S.O. Ry., 58 N.J.L. 642, 34 A. 1052 (1896); 2 R. HUTCHINSON, LAW OF CARRIERS § 992 (1906).

54. Southeastern Greyhound Lines v. Burris, 309 Ky. 150, 216 S.W.2d 920 (1949); Southeastern Greyhound Lines v. Davis, 290 Ky. 362, 160 S.W.2d 625 (1942).

55. Gray v. Seattle, 29 Wash. 2d 428, 187 P.2d 310 (1947).

vehicles impose such care only when the dangerous condition giving rise to the injury was one capable of control by the carrier.[56] Certainly, the carrier has no control over a passenger's illness and cannot prevent the illness even by exercising the highest degree of care.[57] Thus, to place a duty upon the carrier to render first aid would not seem to be in accord with the policies underlying the imposition of a high degree of care in the transportation of passengers. The finding of a duty to secure aid is as far as the courts have gone in an area which is totally outside the control of the carrier, despite the *Restatement*'s failure to make the critical distinction between *rendering* and *securing* first aid.

*Contractual Duty.* A second possible source of a duty of a carrier to render first aid is the contract of carriage between the carrier and passenger.[58] A contract of carriage implies that the carrier will use the highest degree of care and diligence in transporting the passenger to his destination safely.[59] The source of the contractual duty is mutual consent of the parties, either expressed or implied.[60] Besides the duty to carry safely,[61] the contract of carriage has been held to create the duty to protect passengers from personal violence,[62] and to provide medical treatment to an injured passenger where a doctor was available and the passenger requested such treatment.[63] On the other hand, *Hanlon v. Central Railroad*[64] held that the contract of carriage did not impose a duty upon the carrier to furnish a passenger personal assistance in leaving the railroad car.[65] The court found negligence on the part of the conductor, but this negligence was predicated

56. Bragg v. Houston Elec. Co., 264 S.W. 245 (Tex. Civ. App.—Beaumont 1924), *aff'd*, 276 S.W. 641 (Tex. Comm'n App. 1925, jdgmt adopted) (carrier under duty to keep aisle free of baggage).

57. In Davis v. Public Serv. Coordinated Transp., 113 N.J.L. 427, 174 A. 540 (1934), the court said that a common carrier is under a duty to exercise the highest degree of care to protect passengers from dangers that foresight could predict. But in explaining "foresight" and duty of care the court said "[b]y 'foresight' is meant, not foreknowledge absolute, nor that exactly such an accident as has happened was expected or apprehended; but rather that the characteristics of the accident are such that it can be classified among events that, without due care, are likely to occur, and that due care would prevent." 174 A. at 541. Due care will not prevent a passenger's illness.

58. Courts have long recognized that a contract can create a legal duty to perform work in a non-negligent manner. Jones v. Otis Elevator Co., 234 N.C. 512, 67 S.E.2d 492 (1951). *See also* Montgomery Ward & Co. v. Scharrenbeck, 146 Tex. 153, 204 S.W.2d 508 (1947); Palestine Contractors, Inc. v. Roach, 517 S.W.2d 30 (Tex. Civ. App.—Waco 1974, writ dism'd); Exxon Corp. v. Butler Drilling Co., 508 S.W.2d 901 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).

59. Birmingham Ry. & Elec. Co. v. Baird, 130 Ala. 334, 30 So. 456 (1901); Clark v. Tarr, 75 Idaho 251, 270 P.2d 1016 (1954); Prospert v. Rhode Island Suburban Ry., 28 R.I. 367, 67 A. 522 (1907). For further general discussion see 14 AM. JUR. 2d *Carriers* § 737 (1964).

60. Note, *Negligence—Duty—Creation of Duty by Contract*, 27 S. CAL. L. REV. 216, 217 (1954).

61. Note, *Torts—Breach of Contractual Duty as Negligence*, 34 N.C.L. REV. 253, 256 (1956); *see* note 59 *supra*.

62. Birmingham Ry. & Elec. Co. v. Baird, 130 Ala. 334, 30 So. 456 (1901).

63. The Korea Maru, 254 F. 397 (9th Cir. 1918).

64. 187 N.Y. 73, 79 N.E. 846 (1907).

65. The court, finding that the contract of carriage did, however, impose certain duties, stated that "[t]he contract implied the supply of proper agencies for its performance, in engines and cars for conveyance and in engineers, conductors, and brakemen to control and regulate

solely on the fact that once he did volunteer to assist the passenger, he was under a duty to use reasonable care.[66]

No case has ever directly addressed the question of whether a duty to render first aid is implied from the contract of carriage. As the tort remedy has advantages over the contract remedy,[67] the issue probably will not arise. It is probable, however, that a court would find an implied promise to render first aid in the contract[68] if the carrier had formally trained its drivers or other employees to render first aid, especially if that fact were publicized as part of the carrier's service to its passengers.

*Statutory Duty.* A third potential source of the duty of a carrier to render first aid is that of statutes or ordiances. Generally an act or failure to act in accordance with a statutory standard is negligence as a matter of law.[69] No statute or ordiance has been found, either federal, state, or local, that requires carriers to train their employees to render first aid. This writer believes, however, that a source of the duty to render first aid for the airlines is found in the Federal Aviation Act of 1958,[70] which imposes a duty upon an air carrier to operate with the highest degree of care and safety,[71] and creates a cause of action in favor of the injured party.[72] The Act itself

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the movements of the train . . . . It was not bound to furnish her any personal assistance in leaving the car, for she was . . . in the possession of her faculties and of good health, and was capable of moving about alone." *Id.*

66. *Id.* at 847. This is the same type of analysis which is applied to the bystander who voluntarily attempts to aid a person in distress—absent a contractual relation one person is under no duty to aid another in distress, but once aid is rendered it must be undertaken with reasonable care. *See* notes 16-21 *supra* and accompanying text.

67. First, if the plaintiff-passenger can show that he received the injury without fault on his part from an instrument or appliance under the control of the carrier, then the plaintiff has presented a prima facie case. *See, e.g.*, Humphries v. Queen City Coach Co., 228 N.C. 399, 45 S.E.2d 546 (1947). Secondly, a tort action generally will allow greater recovery for the passenger. Breach of contract damages are tempered by the requirement that they be reasonably within the comtemplation of the parties at the time the contract is made. *See, e.g.*, Perkins v. Langdon, 237 N.C. 159, 74 S.E.2d 634 (1953). In an action for tort, however, the plaintiff is allowed to recover damages for all injuries sustained irrespective of the parties' intent. *See, e.g.*, Mintz v. Atlantic Coast Line R.R., 233 N.C. 607, 65 S.E.2d 120 (1951). Additionally, damages for mental anguish may be recovered in certain tort actions, while such recovery in a breach of contract action is unusual. *Compare* Britt v. N. Carolina R.R., 148 N.C. 37, 61 S.E. 601 (1908), *with* Lamm v. Shingleton, 231 N.C. 10, 55 S.E.2d 810 (1949).

68. Ironically, Middleton v. Whitridge, 213 N.Y. 499, 108 N.E. 192 (1915), the case cited as the primary authority for the proposition in RESTATEMENT (SECOND) OF TORTS § 314A (1965) that carriers are under a duty to render first aid, is grounded in contract, not tort, theory. The court explained that the duty to secure aid for sick passengers "springs from the contract to carry safely." 108 N.E. at 197. Only one more step is required for a court to hold that a carrier employee has a duty to render first aid which also "springs from the contract to carry safely."

69. Satterlee v. Orange Glenn School Dist., 29 Cal. 2d 581, 177 P.2d 279 (1947) (statute); Greyhound Terminal v. Thomas, 307 Ky. 44, 209 S.W.2d 478 (1948) (ordinance). In stating the reasoning behind negligence per se, Mr. Justice Cardozo said that "[b]y the very terms of the hypothesis, to omit, wilfully or heedlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life or limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform." Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814, 815 (1920). *See also* Kennedy, *Safety Statutes and Ordinances—Their Application and Construction*, 19 TRIAL LAW. GUIDE 323 (1975); Note, *Negligence—Actions—Violation of Statute or Ordinance*, 26 J.B.A. KAN. 118 (1957).

70. 49 U.S.C. §§ 1301-1542 (1970); *see* Note, *The Applicability of Federal Common Law to Aviation Tort Litigation*, 63 GEO. L.J. 1083 (1975).

71. Gabel v. Hughes Air Corp., 350 F. Supp. 612 (C.D. Cal. 1972).

72. *Id.* at 614-15. Whether a federal common law remedy exists or individual state remedies in tort exist is arguable, but the important point is the creation of a duty by the federal statute.

does not specifically demand first aid training for airline employees, but the Act does impose a duty on the Federal Aviation Administrator to issue regulations to implement the Act.[73] Pursuant to this mandate, the Administrator has issued regulations pertaining to crew member emergency training[74] which require instruction in the use of first aid equipment[75] and in handling of illness or injury of passengers.[76]

No case has been reported which construes the emergency training regulations in the first aid context. The breach of other Federal Aviation Regulations, however, is negligence per se.[77] Thus, it is likely that a court presented with the issue would hold that there is an affirmative duty on the airlines to render first aid to passengers, and any breach of this duty would establish negligence per se.

## III. EXEMPTION OF COMMON CARRIERS FROM LIABILITY FOR NEGLIGENCE IN RENDERING FIRST AID: TWO MECHANISMS

### A. *Good Samaritan Statutes*

*General.* All fifty states and the District of Columbia have adopted some form of a Good Samaritan statute.[78] These statutes exempt the volunteer from tort liability for ordinary negligence in rendering emergency aid to one in peril.[79] The rationale for the statutes stems from an accommodation of the common law's refusal to recognize a legal duty of a bystander to assist a stranger in peril[80] and the requirement that once voluntary aid has begun reasonable care must be exercised.[81] These statutes are premised on the belief that by removing the fear of liability for negligence, doctors, nurses, and laymen will be encouraged to aid persons who are in need of assistance.[82]

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*See* Note, *supra* note 70, at 1108. Common law remedies have not been abridged. 49 U.S.C. § 1506 (1970). A common carrier owes the highest degree of care with respect to the operation and maintenance of the vehicle and equipment, and such duty has not been changed by the Federal Aviation Act; state common law is still applicable. Southeastern Aviation, Inc. v. Hurd, 209 Tenn. 639, 355 S.W.2d 436, *appeal dismissed*, 371 U.S. 21 (1962).

73. 49 U.S.C. § 1421(a) (1970); *see* Rapp v. Eastern Airlines, Inc., 264 F. Supp. 673 (E.D. Pa. 1967), *aff'd*, 399 F.2d 14 (3d Cir.), *cert. denied*, 393 U.S. 979 (1968).

74. 14 C.F.R. § 121.417 (1977).

75. *Id.* § 121.417(b)(2)(ii).

76. *Id.* § 121.417(b)(3)(iv).

77. Pilgrim Aviation & Airlines, Inc. v. Northeast Airlines, Inc., 13 Av. L. REP. (CCH) ¶ 17,458 (S.D.N.Y 1975) (failure to determine whether the aircraft was in safe condition for flight violated an FAA regulation and constituted negligence per se).

78. *See* notes 86-87 *infra* for the citation to the statutes. No source has made a complete compilation of the statutes.

79. *See generally* Weigel, *Texas Law and Emergency Medicine*, 15 S. TEX. L.J. 133 (1974); Note, *Good Samaritans and Liability for Medical Malpractice*, 64 COLUM. L. REV. 1301 (1964); Note, *Good Samaritan Legislation: An Analysis and A Proposal*, 38 TEMP. L.Q. 418 (1964-65).

80. *See* notes 16-21 *supra* and accompanying text. *See also* 2 D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE ¶ 21.35 (1975).

81. As Dean Prosser stated, "[t]he result of all this is that the Good Samaritan who tries to help may find himself mulcted in damages, while the priest and the Levite who pass by on the other side go on their cheerful way rejoicing. It has been pointed out often enough that this in fact operates as a real, and serious, deterrent to the giving of needed aid." W. PROSSER, LAW OF TORTS 344 (4th ed. 1971).

82. The need for Good Samaritan statutes has been attacked on several fronts. First, no reported case has reached the appellate level of any court in the United States where a doctor or layman has been sued for rendering emergency aid. Heck, *Emergency Care and Good Samaritan Legislation*, 68 J. KAN. MED. SOC'Y 15, 16 (1967); Note, *The Not-So-Good Samaritan Laws*, 270 NEW ENG. J. MED. 1003 (1964). In fact, a commission convened to examine the

Early statutes[83] protected only physicians, nurses, and other medical or rescue personnel such as firemen, policemen, rescue squad members, and ambulance drivers,[84] but later statutes were broadened to protect any person from liability for ordinary negligence in rendering emergency aid.[85] Currently, nineteen states and the District of Columbia protect only physicians and other licensed medical personnel,[86] while the remaining thirty-one states protect everyone from such liability.[87] The following discussion pertains to only this latter group of statutes which have possible application to the employees of common carriers who render first aid to ill passengers.[88]

The Texas Good Samaritan statute,[89] which is representative of most of the statutes that protect laymen and medical personnel, provides:

> No person shall be liable in civil damages who administers emergency care in good faith at the scene of an emergency for acts performed during the emergency unless such acts are wilfuly or wantonly negli-

problem of medical malpractice in the United States had only "heard" of one such case in a trial court, and, furthermore, the commission had no information about out-of-court settlements arising out of emergency care. U.S. DEP'T OF HEALTH, EDUC. & WELFARE, REPORT OF THE SECRETARY'S COMM'N ON MEDICAL MALPRACTICE 15 (1973); Note, *Risks of the Good Samaritan*, 2 BRIT. MED. J. 613 (1973). Apparently, injured or ill persons who receive assistance do not sue those who have assisted them. The second problem is that the psychology of responding to persons in peril is quite complicated; thus, a statutory approach is not likely to affect responses one way or the other. *See, e.g.*, Latane & Darley, *Group Inhibition of Bystander Intervention in Emergencies*, 10 J. PERSONALITY & SOC. PSYCH. 215 (1968); Piliavin, Piliavin & Rodin, *Good Samaritanism: An Underground Phenomenon*?, 13 J. PERSONALITY & SOC. PSYCH. 289 (1969).

83. The first Good Samaritan statute was adopted in California in 1959. The catalyst for this statute is traceable to an incident where physicians left an injured woman unattended on a ski slope. Note, *California Good Samaritan Legislation: Exemptions from Civil Liability While Rendering Emergency Medical Aid*, 51 CALIF. L. REV. 816, 818 (1963).

84. *See* Weigel, *supra* note 79, at 138.

85. In 1969 thirty-seven states had Good Samaritan statutes, twenty-four of which protected only physicians and other licensed medical personnel. *See* Note, *supra* note 19, at 677-78. Now there are fifty-one Good Samaritan statutes, of which twenty protect only physicans and other licensed medical personnel. *See* note 86 *infra*.

86. ALA. CODE tit. 7, § 121(1) (Supp. 1973); CAL. BUS. & PROF. CODE §§ 2144, 2727.5 (West Supp. 1976); COLO. REV. STAT. § 13-21-108 (Supp. 1976); CONN. GEN. STAT. § 52-5766 (1975); D.C. CODE § 2-142 (1973); ILL. ANN. STAT. ch. 91, § 2a (Smith-Hurd Supp. 1976); KAN. STAT. § 65-2891 (Supp. 1976); KY. REV. STAT. § 411.148 (Supp. 1974); LA. REV. STAT. ANN. §§ 37:1731-:1732 (West 1974); MD. ANN. CODE art. 43, § 132 (Supp. 1976); MASS. ANN. LAWS ch. 112, § 12B (Michie/Law. Co-op 1975); MICH. COMP. LAWS ANN. § 691.1501 (1968), § 41.711a (Supp. 1977); MISS. CODE ANN. § 73-25-37 (Supp. 1975); NEB. REV. STAT. § 25-1152 (1975), § 37-107 (Supp. 1974); N.Y.EDUC. LAW § 6527 (McKinney 1972 & Supp. 1975-76); N.D. CENT. CODE §§ 43-17-37, -38 (Supp. 1975); PA. STAT. ANN. tit.12, §§ 1641-1643 (Pardon Supp. 1977); R.I. GEN. LAWS § 5-37-14 (1975); UTAH CODE ANN. § 58-12-23 (1974); WIS. STAT. ANN. §§ 441.06, 448.06 (West 1974).

87. ALAS. STAT. § 09.65.090 (1973); ARIZ. REV. STAT. ANN. § 32-1471 (West Supp. 1975); ARK. STAT. ANN. § 72-624 (Supp. 1975); DEL. CODE tit. 16, § 6801 (Supp. 1976); FLA. STAT. ANN. § 768.13 (West Supp. 1976); GA. CODE ANN. § 84-930 (1975); HAWAII REV. STAT. § 663-1.5 (Supp. 1975); IDAHO CODE § 5-330 (Supp. 1976); IND. CODE ANN. § 34-4-12-1 (Burns 1973), § 34-4-12-2 (Burns Supp. 1975); IOWA CODE ANN. § 613.17 (West Supp. 1977); ME. REV. STAT. ANN. tit. 14, § 164 (West Supp. 1976); MINN. STAT. ANN. § 604.05 (West Supp. 1976); MO. ANN. STAT. § 190.195 (Vernon Supp. 1976); MONT. REV. CODES ANN. § 17-410 (1967); NEV. REV. STAT. §§ 41.500, .505 (1975); N.H. REV. STAT. ANN. § 508.12 (1973); N.J. STAT. ANN. § 2A:62A-1 (West Supp. 1977); N.M. STAT. ANN. §§ 12-25-3, -4 (1976); N.C. GEN. STAT. § 20-166(d) (1975); OHIO REV. CODE ANN. § 2305.23 (Page Supp. 1976); OKLA. STAT. ANN. tit. 76, § 5 (West 1976); ORE. REV. STAT. § 30.800 (1975); S.C. CODE § 46-803 (Supp. 1976); TEX. REV. CIV. STAT. ANN. art. 1a (Vernon 1969); VT. STAT. ANN. tit. 12, § 519 (1973); VA. CODE § 54-276.9 (Supp. 1976); WASH. REV. CODE ANN. § 4.24.300 (Supp. 1976); W. VA. CODE § 55-7-15 (1976); WYO. STAT. § 33-343.1 (Supp. 1975).

88. With approximately 40% of the jurisdictions protecting only physicians, the usefulness to carriers of Good Samaritan statutes is immediately suspect.

89. TEX. REV. CIV. STAT. ANN. art. 1a (Vernon 1969).

> gent; provided that nothing herein shall apply to the administering of such care where the same is rendered for remuneration or with the expectation of remuneration or is rendered by any person or agent of a principal who was at the scene of the accident or emergency because he or his principal was soliciting business or seeking to perform such services for remuneration.[90]

Several points particularly relevant to carriers should be noted. First, the statute makes no distinction between voluntary aid rendered by a bystander and aid rendered by a person under an antecedent legal duty to aid.[91] Secondly, the statute requires that emergency care must not be rendered for remuneration.[92] Thirdly, the care rendered must be emergency care.[93] The definition of an emergency to a carrier employee may be less than clear. Finally, the care must be rendered at the scene of an accident or emergency.[94] Before analyzing the implications to carriers of such statutory language, it must be noted that case law interpreting Good Samaritan statutes is scarce.[95]

*Antecedent Duty to Aid.* The Texas Good Samaritan statute and other similar statutes do not directly address the issue of the statute's applicability when the one rendering aid is under an antecedent duty to so do.[96] Addressing this issue in *Lee v. State*,[97] however, the Alaska Supreme Court held that the Alaska Good Samaritan statute[98] is inapplicable when a duty to rescue pre-exists a rescue attempt. In *Lee* a state trooper accidentally shot a person whom he was attempting to rescue from a lion. In the negligence action the court did not allow the trooper to use the Good Samaritan statute as a defense against his negligent firing. The court found that the purpose of the Good Samaritan statute is to encourage voluntary rescue by removing

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90. *Id.*
91. *See* notes 96-104 *infra* and accompanying text.
92. *See* notes 101-04 *infra* and accompanying text.
93. *See* notes 105-14 *infra* and accompanying text.
94. *See* notes 115-19 *infra* and accompanying text.
95. Dahl v. Turner, 80 N.M. 564, 458 P.2d 816 (Ct. App.), *cert. denied*, 80 N.M. 608, 458 P.2d 860 (1969). For further general discussion see cases cited in Annot., 39 A.L.R.3d 222 (1971). No case has been reported where a person has been sued for rendering first aid. *See* note 82 *supra*. Besides *Dahl v. Turner*, only one other case has been reported in all fifty states and the District of Columbia in which a Good Samaritan statute was construed. *See* Lee v. State, 490 P.2d 1206 (Alas. 1971).
96. The Vermont Good Samaritan statute, however, imposes an affirmative duty on all persons to render aid to those exposed to grave physical harm. Those persons rendering aid are protected from liability for ordinary negligence, but those who do not aid are subject to a fine. VT. STAT. ANN. tit. 12, § 519 (1973). *See also* Note, *Good Samaritan Not Liable for Negligent Emergency Care Unless Willfully or Wantonly Negligent*, 40 TEXAS L. REV. 909, 914 (1962).
97. 490 P.2d 1206 (Alas. 1971).
98. The Alaska statute is similar to the Texas statute in that antecedent duty is not mentioned, the care must be in an emergency, and the care may not be for compensation:

> (a) A person who, without expecting compensation, renders care to an injured or sick person, or gives counseling or advice to a person in a condition of emotional crisis, who appears to be in an immediate need of aid is not liable for civil damages as a result of an act or omission in rendering emergency care, counseling or advice or as a result of an act or failure to act to provide or arrange for further medical treatment or care for the injured person or further counseling or care for the person in a condition of emotional crisis.
> (b) This section shall not preclude liability for civil damages as a result of gross negligence or intentional misconduct. Gross negligence means reckless, wilful, or wanton misconduct.

ALAS. STAT. § 09.65.090 (1973).

the threat of liability. A person under a pre-existing duty needs no added inducement, and, thus, such persons do not fall within the purview of the purpose of the statute.[99] The court found that an obligation to care for the plaintiff arose out of the customary role played by police officers in emergencies.[100]

Although the Alaska case is the only one to hold that Good Samaritan statutes apply only in the absence of a pre-existing duty, the Alaska statute is quite similar to those of other states, and similar construction would not be surprising. For example, the Alaska statute requires the person to render aid "without expecting compensation" before the statute's protection will apply.[101] Similarly, twenty-four other statutes require aid to be rendered "gratuitously" or "without compensation."[102] Only six statutes do not require the aid to be voluntary aid.[103]

If the states which require aid to be gratuitous follow the Alaska court's analysis, then persons who are rendering aid under a pre-existing duty will not be within the statutes' purview. Although neither the relation between carrier and passenger, nor the contract, nor a statute has ever been held to create a pre-existing duty to render first aid,[104] courts in the future might impose such a duty under any of the three theories. If a pre-existing duty to render first aid were found to arise from the relation, the contract, or a statute, the carrier would not be protected by Good Samaritan statutes, assuming the Alaska court's analysis is followed. With the several potential sources of pre-existing duty and the traditional "high degree of care" required from carriers, the duty question alone is enough to dissuade carriers from relying on Good Samaritan statutes. Additional problems with the statutes exist which should also give carriers second thoughts about training employees to render first aid.

*Emergency Care.* Under Good Samaritan statutes a person must render "emergency" care to assume the role of a Good Samaritan. While a few are more explicit, many states do not define emergency in their Good Samaritan statutes. For example, New Mexico defines emergency as "an unexpected occurrence involving injury or illness to persons, including motor vehicle accidents and collisions, disasters, and other accidents and events of similar nature occurring in public or private places."[105] Oklahoma permits a layman to provide only limited emergency care: artificial respiration, prevention of

99. 490 P.2d at 1209 & n.7.
100. *Id.* at 1209-10, *citing* Wood v. Morris, 109 Ga. App. 148, 135 S.E.2d 484 (1964).
101. *See* note 98 *supra*.
102. Arizona, Arkansas, Delaware, Florida, Georgia, Hawaii, Indiana, Iowa, Maine (additionally requires the aid to be "voluntary"), Montana, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma ("no prior contractual relation"), Oregon (additionally requires the aid to be "voluntary"), South Carolina, Tennessee, Texas, Vermont (an affirmative duty to act, but cannot receive remuneration to be protected from liability for negligence), Virginia, Washington, West Virginia, and Wyoming. *See* note 87 *supra*.
103. Idaho, Minnesota (but the statute requires reasonable care which would seem to negate totally the usefulness of the statute), Missouri, New Jersey, North Carolina, and South Dakota. *See* note 87 *supra*.
104. *See* notes 31-77 *supra* and accompanying text.
105. N.M. STAT. ANN. § 12-25-4 (1976).

blood loss, or restoration of heart or blood circulation.[106] Oregon limits care to "emergency circumstances that suggest that giving of assistance is the only alternative to death or serious physical after effects."[107] Thus, whether or not the situation is an emergency is a key factor in determining if a Good Samaritan statute applies. Since most states have not defined emergency, however, resort to case law in each state is necessary to find applicable definitions. In Texas, for example, an emergency has been defined to mean a "condition arising suddenly or unexpectedly and not proximately caused by any negligent act of the person in question, and which calls for immediate action on his part without time for deliberation."[108]

Whether emergency is defined by statute or by case law, emergency will be a question of fact for a jury applying the standard of a reasonable man acting in the particular situation rather than the subjective standard of any particular carrier employee who decides to render first aid.[109] If a carrier employee renders first aid negligently and the jury finds there was no emergency, then the carrier will be liable for ordinary negligence.[110] The courts, however, have offered some relief to persons who act in an emergency by not requiring the actor to make the best or most reasonable choice among alternative courses of action.[111] This relief would be particularly important to a carrier employee such as a bus driver who may be held to simultaneous and mutually exclusive duties to secure medical aid and to render first aid to an ill passenger.[112] The driver is not required by a court to make the "better" choice in an emergency.

The importance of acting only in an emergency is indicated by *Dahl v. Turner*.[113] In that case defendant aided plaintiff, who had been slightly injured in an automobile accident, by driving him to a motel. En route, defendant was involved in an automobile accident. Plaintiff sued. The court, holding that defendant was not rendering emergency care to plaintiff, found the Good Samaritan statute inapplicable as a defense. The implication this case has for carrier first-aid training programs is significant because the employees must be trained to be extremely sensitive to whether or not a situation is an emergency. Without unambiguous definitions of an emergency and cases as precedent, the training will be a difficult task and must be oriented to each particular state law.[114]

106. OKLA. STAT. ANN. tit. 76, § 5 (West 1976).
107. ORE. REV. STAT. § 30.800 (1975).
108. Goolsbee v. Tex. & N.O.R.R., 150 Tex. 528, 532, 243 S.W.2d 386, 388 (1951).
109. *See* D. LOUISELL & H. WILLIAMS, *supra* note 80, ¶ 21.318.
110. This situation exists, notwithstanding any pre-existing duty problem.
111. *See, e.g.*, Del Bosque v. Heitman Bering-Cortes Co., 474 S.W.2d 450 (Tex. 1971); Yarborough v. Berner, 467 S.W.2d 188 (Tex. 1971); Evans, *The Standard of Care in Emergencies*, 31 KY. L.J. 207 (1943); Note, *The Effect of An "Emergency" in the Requirement of Ordinary Care in the Law of Negligence*, 9 NOTRE DAME LAW. 244 (1934); Note, *Acting in Emergency*, 27 YALE L.J. 959 (1918).
112. An interesting predicament could occur when a passenger gets sick in a bus or taxi. The cases concerned with the relation between a carrier and its passengers hold that a carrier is under a duty to *secure* medical aid for an ill passenger. *See* notes 31-57 *supra* and accompanying text. If, however, a court found that a driver trained in first aid also had a duty to *render* first aid to an ill passenger, which duty would prevail? The sole bus driver would be confronted simultaneously with two conflicting duties.
113. 80 N.M. 564, 458 P.2d 816 (Ct. App.), *cert. denied*, 80 N.M. 608, 458 P.2d 860 (1969).
114. See, *e.g.*, notes 105-07 *supra* and accompanying text for language of the New Mexico, Oklahoma, and Oregon statutes.

*Scene of an Emergency.* A third statutory element which makes Good Samaritan statutes less than useful to carriers is the varying definition of "scene of an emergency." Most statutes leave the physical place of the emergency wholly unrestricted by allowing emergency care "at the scene of an emergency" or "at the scene of an emergency or accident." Five states, however, use the phrase "at the scene of an accident" rather than the term emergency: Idaho,[115] Indiana,[116] North Carolina,[117] Tennessee,[118] and West Virginia.[119] As used in these five states, the term "accident" is not defined. As no case constructions of the phrases are available, a determination of whether the term "accident" would include sudden illness to passengers is not possible. If not so included, then the thirty-one Good Samaritan statutes applicable to carriers may, for all practical purposes, be reduced to twenty-six. Thus, even if the pre-existing duty and emergency definition problems are overcome—only one-half of the states provide potential protection from negligence liability to carrier employees who render first aid.

*Constitutionality.* A final problem in relying on Good Samaritan statutes by carriers which are contemplating first aid training programs for their employees is that some state constitutions require that every person be entitled to a legal remedy for all injuries or wrongs inflicted upon his person, property, or character.[120] Although no Good Samaritan statute has been constitutionally challenged, a total abrogation of common law rights of action in some states may be unconstitutional.[121]

On the other hand, statutes which eliminate liability for ordinary negligence, but do not restrict liability for higher degrees of misconduct, have been upheld as only restrictions of remedies, rather than total abrogations.[122] The upholding of statutes which restrict liability should be compared to the striking down of statutes which are total abrogations of remedies such as an abrogation of the remedy for alienation of affections[123] and an abrogation of municipal liability for injuries suffered on streets and sidewalks.[124]

Analyzing Good Samaritan statutes applicable to "any person" shows that twenty-one statutes preclude immunity when there has been gross negligence or wilful or wanton conduct.[125] Of the remaining ten statutes, nine require "good faith" in rendering aid,[126] and the remaining statute

115. IDAHO CODE § 5-330 (Supp. 1976) ("at the scene of an accident").
116. IND. CODE ANN. § 34-4-12-1 (Burns 1973) ("at the scene of an accident or emergency care to the victim thereof").
117. N.C. GEN. STAT. § 20-166(d) (1975) ("at the scene of a motor vehicle accident").
118. TENN. CODE ANN. § 63-622 (Supp. 1975) ("at the scene of an accident and/or disaster").
119. W. VA. CODE § 55-7-15 (Supp. 1975) ("at the scene of an accident").
120. *See, e.g.*, N.C. CONST. art. I, § 18; TEX. CONST. art. I, § 13; WIS. CONST. art. I, § 9.
121. *See* D. LOUISELL & H. WILLIAMS, *supra* note 80, ¶ 21.36; Note, *North Carolina's* "Good Samaritan" Statute, 44 N.C.L. REV. 508 (1966).
122. *See, e.g.*, Emberson v. Buffington, 228 Ark. 120, 306 S.W.2d 326 (1957).
123. Heck v. Schupp, 394 Ill. 296, 68 N.E.2d 464 (1946).
124. Lebohm v. Galveston, 154 Tex. 192, 275 S.W.2d 951 (1955).
125. Alaska, Arizona, Delaware, Hawaii, Idaho, Indiana, Iowa, Maine, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, South Carolina, South Dakota, Tennessee, Texas, Vermont, and Washington. *See* note 87 *supra*.
126. Arkansas, Florida, Georgia, Minnesota, New Jersey, Oklahoma, Virginia, West Virginia, and Wyoming. *See* note 87 *supra*.

requires a standard of reasonable care under the circumstances.[127] In terms of definitions, again the statutes are found wanting. Gross negligence is generally something less than a reckless disregard and differs from negligence in degree only, but not kind.[128] On the other hand, the existence of wilful, wanton, or reckless conduct usually indicates the actor has intentionally done an unreasonable act in disregard of a known risk or a risk that was so obvious it should have been known.[129] Good faith, on the other hand, defies definition as courts have given it both a subjective and objective meaning.[130]

Regardless of the definitional problems and the variations in statutory language, Good Samaritan statutes do not appear to be complete abrogations of remedies for harm to persons. Some type of conduct is apparently outside the protection of each of the statutes. Thus, of the shortcomings mentioned, the constitutionality of Good Samaritan statutes is the least of the troubles likely to be faced by a carrier that attempts to rely on them for protection from liability in rendering first aid negligently to ill passengers.

Given the facts that (1) twenty Good Samaritan statutes protect physicians only, (2) much of the language of the statutes is ambiguous, and (3) there is a high probability that a carrier, despite a lack of authority, will be found to have a duty to render first aid, thus making the statute inapplicable vis-à-vis the thinking of the Alaska Supreme Court, a second mechanism must be explored to determine whether carriers may train their personnel to render first aid without undue fear of liability.

### B. *Antecedent Releases from Liability*

*Generally.* A second mechanism to exempt[131] carriers from liability for ordinary negligence in rendering first aid is the execution of an antecedent release from liability in the form of either statements on the ticket signed by the passenger before boarding the vehicle or a contract separate from the ticket, also signed before boarding. The validity of these two forms of contractual provisions is the issue to be discussed below.

The majority rule of law in the United States, which is also the common law rule, is that no contract, condition, or limitation will release a carrier from liability to a full-fare passenger for consequences of negligence on the part of the carrier or its employees.[132] The rule is grounded in public policy: first, the courts believe that passengers and carrier are not on equal footing

127. ORE. REV. STAT. § 30.800 (1975).
128. *See* W. PROSSER, *supra* note 81, at 183.
129. *Id.* at 185.
130. *See, e.g.*, Siano v. Helvering, 13 F. Supp. 776, 780 (D.N.J. 1936). *See also* Note, *supra* note 83, at 819.
131. This Comment is not concerned with the feasibility of liability *limitation* to certain damage amounts. Rather, the issue addressed is the feasibility of a complete *exemption* or *exculpation* from negligence liability. *See* Note, *Contractual Limitation of Liability for Negligence*, 6 J. AIR LAW 284 (1935).
132. The RESTATEMENT OF CONTRACTS § 575(1)(b) (1932) says:
> (1) . . . a bargain for exemption from liability for the consequences of negligence is illegal if . . . (b) one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation.

in terms of bargaining power;[133] and secondly, there is a fear that any release from liability might encourage a carrier to relax its diligence in caring for the passengers' safety.[134] The attitude of most courts toward carrier exemptions from liability is summed up by the Supreme Court's terse conclusions in *Railroad Co. v. Lockwood*:[135]

> First. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eyes of the law.
> Secondly. That it is not just and reasonable in the eyes of the law for a common carrier to stipulate for exemption from responsibility for negligence of himself or his servants.
> Thirdly. That these rules apply both to carriers of goods and carriers of passengers for hire, and with a special force to the latter.[136]

Whether carrier exemption from liability in rendering first aid is "just and reasonable" has not been addressed by any court.

Interpretation of this common law nonexemption rule and its application to carrier first-aid training programs is complicated by several factors. First, the general rule has developed in cases dealing with particular legal distinctions and fact situations which are not directly relevant to the first-aid problem.[137] For example, most of the cases concerning the release of carriers from liability have dealt with either free passes in exchange for a release[138] or the distinction between common and private carriers.[139] Secondly, most of the case law is old and developed in the context of railroad litigation.[140] The rules developed for railroads, however, are probably applicable to all carriers as the courts, in the past, have applied these rules to other carriers.[141] Thirdly, a carrier's negligence with respect to a paying passenger is controlled by state law when the carrier is a railroad, bus company,[142] or non-international air carrier.[143] Federal law, however, con-

133. *See* Philippine Air Lines, Inc. v. Texas Eng'r & Mfg. Co., 181 F.2d 923, 925 (5th Cir. 1950) (no public interest where bargaining is at arm's length); Rittenberg, *Limitation of Airline Passenger Liability*, 6 J. AIR LAW 365, 377-78 (1935); Note, *Contractual Exculpation from Tort Liability in California—The "True Rule" Steps Forward*, 52 CALIF. L. REV. 350 (1964).

134. *See, e.g.*, N.Y.C.R.R. v. Lockwood, 84 U.S. (17 Wall.) 357, 377-79 (1873) (person riding on free pass defined to be passenger for hire; release invalid as matter of law); Herzog, *Validity of Contracts Exempting Carriers in Interstate and Foreign Commerce From Liability*, 11 SYRACUSE L. REV. 171 (1960).

135. 84 U.S. (17 Wall.) 357 (1873).

136. *Id.* at 384.

137. Surprisingly, very little litigation has arisen on the issue of exempting carriers from liability to full-fare passengers. *See* Herzog, *supra* note 134, at 179. For a rare case involving exemptions and a full-fare passenger, see Horelick v. Pennsylvania R.R., 13 N.J. 349, 99 A.2d 652 (1953).

138. Grand Trunk R.R. v. Stevens, 95 U.S. 655 (1878); Martin v. Greyhound Corp., 277 F.2d 501 (6th Cir. 1955), *cert. denied*, 350 U.S. 1013 (1956); Walther v. Southern Pac. Co., 159 Cal. 769, 116 P. 51 (1911); Clark v. Southern Ry., 69 Ind. App. 697, 119 N.E. 539 (1918). The Interstate Commerce Act now controls the issuance of free passes for railroads. 49 U.S.C. § 1(7) (1970).

139. Common carriers generally cannot be released from liability whereas private carriers (contractors) may be. Unlike the public carrier, the private carrier must compete with numerous other carriers for contract business, thus the courts believe that bargaining power is equal. Pennsylvania R.R. v. Kent, 136 Ind. App. 551, 198 N.E.2d 615 (1964); Vandalia R.R. v. Stevens, 67 Ind. App. 238, 114 N.E. 1001 (1917).

140. *See* Rittenberg, *supra* note 133, at 365.

141. *Id.*

142. *See* Herzog, *supra* note 134, at 189.

143. *Id.* at 192, 195-99.

trols contracts for transportation of passengers on ships.[144]

*Releases in Texas.* Consistent with the majority rule in the United States, the rule in Texas provides that "a railroad company cannot, in any case where it undertakes to carry a person, exempt itself by contract from liability to that person for damages occasioned by the negligence of itself or servants."[145] This rule for railroads is simply the common law rule that a carrier cannot stipulate for exemptions from liability for negligence.[146] By statute, Texas has applied the common law to all carriers[147] and has designated which carriers are to be defined as common carriers.[148] Texas has gone one step further by expressly prohibiting the restriction of a carrier's common law liability.[149]

The critical question in Texas, then, is whether the broad rule of nonexemption applies to first-aid services. Although there are no cases on point, an examination of related cases indicates the stance that probably would be taken by Texas courts toward releases from liability for negligence in rendering first aid. In *G., C. & S.F. Ry. v. McGown*,[150] although the plaintiff-passenger was riding on a free pass, the court undertook an analysis of the relation between passengers and carriers in general. The court said:

> [R]ules have been established, by statute or the common law, whereby *certain duties* have been attached to given relations and employments. These duties attach as a matter of law, and without regard to the will or wish of the party engaged in the employment, or of the person who transacts business with him, in the course thereof; and this is so for the public good. *Duties thus imposed are not the subject of contract. They exist without it, and cannot be dispensed by it.*[151]

The court, applying a duty which arose outside the contract, held the carrier liable for injuries suffered by plaintiff in a derailment, notwithstanding the fact that the pass given to plaintiff released the carrier from liability for negligence and had been signed by plaintiff.

A later case, consistent with *McGown*, has indicated in broad language that a carrier's right to restrict its liability for negligence does not extend to matters that are "within the scope of its business" as a common carrier.[152]

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144. *Id* at 189.

145. Ft. Worth & D.C.R.R. v. Rogers, 53 S.W. 366, 367 (Tex. Civ. App. 1899, no writ) (release signed by passenger on freight train invalid as matter of law; although railroad was not required to carry passengers on freight trains, once passenger was accepted, his status as passenger prevented release of carrier from liability).

146. *Id.* at 368.

147. Tex. Rev. Civ. Stat. Ann. art. 882 (Vernon 1964): "The duties and liabilities of carriers in this State and the remedies against them, shall be the same as those prescribed by the common law except where otherwise provided by this title."

148. *See, e.g., id.* art. 911a, § 2 (bus companies are defined to be common carriers).

149. *Id.* art. 883 (Vernon Supp. 1976-77) (emphasis added):
> Railroad companies, and other carriers of passengers . . . within this state . . . shall not limit or restrict their liability as it exists at common law, by general or special notice, or by inserting exceptions in the bill of lading or memorandum given upon the receipt of the goods for transportation *or in any other manner whatsoever* . . . .

150. 65 Tex. 640 (1886).

151. *Id.* at 646 (emphasis added).

152. International—Great N.R.R. v. Lucas, 70 S.W.2d 226, 230 (Tex. Civ. App.—Texarkana 1934), *rev'd on other grounds*, 128 Tex. 332, 99 S.W.2d 297 (1936) (contractor

The scope of business of a common carrier is to carry passengers and property for hire.[153] Although the scope of business cases deal with the distinction between common and private carriers, these cases are important in that, pursuant to *McGown*, if a carrier is found to be a common carrier, then a release of liability for negligence in the *operation of a vehicle* is void as against public policy.

Texas cases dealing with "free passes" for travel on railroads[154] constitute another line of cases which has dealt with the validity of releases exempting the carrier from liability. Before federal law applied to free passes on railroads, Texas courts held that a common carrier could not be released from liability for negligence whether a passenger was for hire or was riding on a free pass.[155] Again, the negligence involved the duty to operate the vehicle safely, a duty imposed by law which must be carried out with the highest degree of care.[156]

*First Aid and Releases.* The *McGown* case stands for the proposition that a carrier cannot exempt itself from liability if "certain duties" are imposed by public policy. As discussed previously, the duties so imposed seem to involve safety in the transportation[157] and the ingress or egress of the passengers.[158] It has already been shown that no case has ever held a carrier under a duty to render first aid to passengers, although there is a duty to secure medical aid and to comfort. If rendering first aid is not a "certain duty" of a carrier, then language in *McGown* indicates that a carrier can contract against liability.[159] The only impediments to a release or exemption are those duties imposed by public policy;[160] such duties are independent of any contract[161] and, thus, cannot be the subject of a contract of exemption. An action based upon their violation sounds in tort and not in contract.[162]

In the last analysis, we must return to the "just and reasonable" language of the *Lockwood* case.[163] For a carrier to abdicate the "essential duties of his employment" is not just and reasonable.[164] This Comment suggests that rendering first aid is not an essential duty of a carrier. The two best

working for railroad was a passenger for hire, and, consequently, release of carrier from liability for negligence in collision was invalid).

153. *Id.*

154. The use of free passes on railroads is now subject to federal law under the Interstate Commerce Act, 49 U.S.C. § 1(7) (1970).

155. *See, e.g.*, Sullivan-Sanford Lumber Co. v. Watson, 135 S.W. 635 (Tex. Civ. App. 1911), *rev'd*, 106 Tex. 4, 155 S.W. 179 (1913) (held that carrier was not common carrier; therefore, release on pass was valid).

156. *See* notes 25-28 *supra*.

157. *See* note 26 *supra*.

158. *See* note 27 *supra*. *See also* Horelick v. Pennsylvania R.R., 13 N.J. 349, 99 A.2d 652 (1953).

159. The duties imposed by law were held not to be the subject of contract. 65 Tex. at 646. But, by implication, duties not imposed by law could be the subject of contract. A carrier may not avoid the "essential duties of his employment." *Id.* at 647.

160. As indicated in Santa Fe P. & P.R.R. v. Grant Bros. Constr. Co., 228 U.S. 177, 185 (1913) (involving exemption of carrier from liability for property damage), the rule against exemption has no place when a carrier is not performing its duty as a common carrier.

161. Harris v. Howe, 74 Tex. 534, 537, 12 S.W. 224, 225 (1889).

162. Vandalia R.R. v. Stevens, 67 Ind. App. 238, 114 N.E. 1001, 1005 (1917). *See also* notes 31-35 *supra*.

163. *See* note 136 *supra* and accompanying text.

164. 83 U.S. (17 Wall.) at 381.

indicators for this proposition are that no court has held first aid to be a duty, essential or otherwise, and that the carrier is only under a duty of reasonable care to secure medical aid and comfort for an ill passenger, rather than a duty to use the highest degree of care normally associated with carrier activities.[165] Without an essential duty, releases should be valid.

## IV. CONCLUSION

From the viewpoint of liability, common carriers, with the exception of airlines, should not train their employees to render first-aid services to passengers who become ill. The risk of liability to the carrier thus acting outside its scope of expertise would be high. This liability risk could not be ameliorated by two mechanisms available to the average layman who makes a good faith, albeit negligent, attempt to aid a person in peril. Both Good Samaritan statutes and releases from liability are apparently not available to those already under the duty to give aid. The "highest degree of care" requirement, although limited to the duty to operate the vehicle safely, is pervasive in the cases and statutes and would likely influence many courts to find a duty to render first aid once a carrier employee is so trained. Therefore, reliance by a carrier upon Good Samaritan protection or releases from liability would be uncertain at best.

On the other hand, the total absence of appellate cases involving first aid rendered negligently, either by doctors or laymen, indicates either a tendency of people not to sue Good Samaritans or a tendency of juries not to find negligence on the part of those who go to the aid of others. When these facts are coupled with the availability of insurance, the good will and advertising advantages of first aid programs could well outweigh any negative aspects of potential negligence liability.

Finally, the rapid and recent adoption of Good Samaritan statutes protecting "any person," not only doctors, seems to indicate that legislatures are willing to expand the protection provided by these statutes. Carriers should lobby for a change in the existing statutes, because clearly defined statutory protection can eliminate the unpredictability inherent in court-defined "duties" of the common carrier. Until the extent of the duties is known, a carrier cannot rely on either Good Samaritan statutes or releases to protect itself from liability in rendering first aid negligently.

165. *See* note 25 *supra*.