PLAINTIFF'S MEDIATION BRIEF

JOHN DOE ET AL. V. ROE DEFENDANT, ET AL.

MEDIATOR:
DATE: TBA
TIME: TBA

I. INTRODUCTION

On April 17, 2000, a crowded airport shuttle bus slammed into the back of a taxi which had stopped abruptly on a freeway on-ramp just outside of San Francisco International Airport. The collision threw the shuttle bus passengers to the ground. Some escaped relatively unharmed. Others were not so lucky. This brief and its companion briefs tell the story of what happened and how the collision threw the lives of John Doe and the other plaintiffs into turmoil.

II. ENTITIES

A. Plaintiff John Doe

John Doe is a thirty-eight year old man who was born and raised in San Francisco. He received a B.S. in Industrial Technology from San Francisco State University. John Doe's skills and abilities have always rested in building, designing, and mechanical work. He is a dynamic individual who has had ongoing projects throughout the course of his life, including restoring cars, working on his house, and building furniture. These skills served him well in his work as an aircraft mechanic for United Airlines, a job he had held for eleven years before the accident. John Doe excelled in his work at United and took pride in what he did

He and his wife, Josephine, live in San Francisco in a house they had purchased prior to the accident and were in the course of remodeling together as a "contractor's special." This was something the John Does did both as an investment and as recreation. As a result of this accident, most of the creative skills John Doe possesses have been bottled up, as he has been unable to perform the tasks associated with his creations. The kitchen in the John Doe house has remained in a state of disrepair, as John Doe was part-way through this project when the collision occurred.

Josephine Doe, a full-time nanny, is originally from England. Her family continues to reside there. The John Does used to make great use of the United employee benefit of free or nearly free travel. As a result of John Doe's inability to ever work as an aircraft mechanic again, he has had to leave United Airlines and has lost this benefit.

John Doe is represented by Cynthia McGuinn, and Miles B. Cooper.

B. Roe Defendant and Steve Driver

Roe Defendant was the owner and operator of the shuttle bus the plaintiffs were riding in when they were injured. Steve Driver was Roe Defendant's employee and the driver of the bus involved in the collision. Steve Driver had been a driver for Roe Defendant approximately two and a half years at the time of the accident. (Exhibit 1, Driver Deposition 8:18-20.) Prior to that time, he had driven airport shuttle buses for Budget and National car rental companies at San Francisco International Airport for a total of three years. (Exhibit 1, Driver Deposition 8:23-9:20.)

From 1990 through the date of the accident, Steve Driver had numerous traffic infractions, violations, and collisions—including a suspended license and termination from his employment as a professional driver. These infractions included five tickets for illegal u-turns and red light violations, one speeding ticket, one seat belt violation, and one collision. (Exhibit 1, Driver Deposition 13:14-20; 13:23-14:4; 15:11-12; 16:5-12.) Steve Driver's license was suspended while he was working as a professional driver for Tricor Courier and resulted in his termination of employment. (Exhibit 1,

Driver Deposition 14:10-12; 15:1-2). Roe Defendant, as an employer of a professional driver, would or should have had notice regarding Steve Driver's less than stellar record as a professional driver. As such, any motion to exclude this information at trial will fail given Roe Defendant's utmost duty of care as a common carrier. Additionally, the information is relevant and admissible to evaluate Roe Defendant's negligent entrustment of a dangerous instrumentality to an individual unfit to operate such an instrumentality.

Roe Defendant carries a general liability policy of insurance through Lancer Insurance Company with policy limits of $5 million. No further umbrella policy exists. Roe Defendant has adequate liquidity, including its rolling stock and cash flow, to satisfy a judgment in excess of $5,000,000.

Roe Defendant and Steve Driver are represented by counsel.

C. Defendants Roe Cab and Ken Taxidriver

Roe Cab, a California corporation, owned and operated the taxicab involved in the collision which resulted in plaintiff's injuries. Ken Taxidriver was the driver of the cab. Taxidriver was sixty-three years old on the date of the accident. (Exhibit 2, Taxidriver Deposition 9:5-7.) A successful Chinese immigrant and United States citizen, he has been a cab driver for thirty years and owns his own taxi cab medallion. (Exhibit 2, Taxidriver Deposition 9:8-14; 11:1-3; 12:3-5.) For the purposes of this litigation, Roe Cab has stipulated to *respondeat superior* status in regard to Taxidriver, i.e. that Taxidriver was an agent of Roe Cab within the course and scope of his employment with Roe Cab at the time of the accident. (Exhibit 3, Stipulation Regarding Course and Scope of Employment; *Yellow Cab Cooperative, Inc. v. Workers' Comp. Appeals Bd.* (1991) 226 Cal.App.3d 1288; and Exhibit 4, *Nelson v. Yellow Cab* (2002) 564 S.E.2d 110.)

Roe Cab carries a general automotive liability policy of insurance through Transamerica Insurance Company with policy limits of $900,000 over and above a $100,000 self-insured retention. No further umbrella policy exists. Roe Cab has adequate liquidity to satisfy a judgment in excess of $1,000,000.

Roe Cab and Taxidriver are represented counsel.

Ms. Bussey is represented by Robert B. Abel Jr.

Ms. Valencia is represented by David J. Millstein of Millstein & Associates. It is this firm's understanding that Ms. Valencia has settled with defendant Roe Defendant.

Mr. Cacucciolo and Mr. Wong are represented by John J. Garvey III.

D. Plaintiff Steve Driver

As noted above, Steve Driver was the driver of the shuttle bus involved in the collision. He also sustained injuries in the crash. He has his own action against Roe Cab.

In his capacity as plaintiff, Steve Driver is represented by counsel.

III. FACTS GIVING RISE TO THE INCIDENT

A. Events leading up to the collision

1. Taxidriver starts his shift with Roe Cab

On Monday, April 17, 2000, Ken Taxidriver started his twelve-hour shift as a taxi driver for Roe Cab at 5:00 p.m. (Exhibit 2, Taxidriver Deposition 12:2-10). He was given a minivan for the shift. (Exhibit 2, Taxidriver Deposition 24:9-11.) During his shift, around 9:00 – 10:00 p.m., he picked up a passenger who needed to go to the San Francisco airport. (Exhibit 2, Taxidriver Deposition 18:18-24.) Taxidriver took him to the airport and dropped him off. Taxidriver then determined not to pick up a passenger from the airport for the return trip back to San Francisco. The reason for this was two-fold. First, it was getting late for passenger traffic at the airport. (Exhibit 2, Taxidriver Deposition 20:2-8.) Second, the passenger had paid Taxidriver to drop a painting off in San Francisco. (Exhibit 2, Taxidriver Deposition 20:2-12; 21:1-2.) Taxidriver left the airport, on his way to the location of the impending collision.

2. Steve Driver starts his shift with Roe Defendant

Steve Driver started his workday as a shuttle bus driver for Roe Defendant around 9:30 p.m. (Exhibit 1, Driver Deposition, 20:1-3.) It was the last shift of his five-day work week. (Exhibit 1, Driver Deposition, 20:6-10.) He worked the graveyard shifts from 9:30 p.m. to 6:00 a.m. and would have the next two days off to rest. (Exhibit 1, Driver Deposition, 20:1-5; 20:10.) Steve Driver drove the same type of bus everyday. (Exhibit 1, Driver Deposition 21:3-10.) On this particular day, he was given shuttle bus no. 707. (Exhibit 1, Driver Deposition 20:20-21.) The shuttle bus he drove weighed approximately 32,000 pounds empty and 40,000 pounds when loaded with passengers. (Exhibit 1, Driver Deposition Vol. II 14:12-23.)

Steve Driver performed his beginning-of-shift inspection, which took about ten minutes. (Exhibit 1, Driver Deposition 21:11-24.) During this time, he checked for damage, mechanical problems, tire pressure, and tested the air brakes. (Exhibit 1, Driver Deposition 21:17-22:17.) Following the inspection, Steve Driver found the shuttle bus to be in good condition and he took it out to begin his route. (Exhibit 1, Driver Deposition 23:1-3.)

3. The United International Terminal employees finish their shifts and head for the shuttle bus

Norm Doe, an aircraft mechanic with United Airlines, came in on April 17, 2000 to work an overtime shift. (Exhibit 5, Norm Doe Deposition 13:1-17; 15:1-16.) John Doe had also come in to work an overtime day. (Exhibit 6, John Doe Deposition 17:5-13.) Larry Moe had just gotten off his regular shift as a lead mechanic. (Exhibit 7, Moe Deposition 9:6-7; 19:13-14.) At about 10:30 p.m., as they finished their shifts, they proceeded to the front of the old international terminal to board a shuttle bus to the employee parking area. (Exhibit 5, Norm Doe Deposition 16:2-17:5; 26:13-24.) The three were joined by a co-worker. (Exhibit 6, John Doe Deposition 19:9-19.)

The four individuals waited briefly before the shuttle bus arrived. The shuttle buses alternatively operated as express buses and local buses. (Exhibit 6, John Doe Deposition 22:19-23:26.) The express bus took the freeway, while the local bus took surface streets. (Exhibit 6, John

Doe Deposition 22:19-23:26.) The particular bus which picked them up was an express bus, which took the freeway. (Exhibit 6, John Doe Deposition 24:1-3.)

4. The United International Terminal employees board and take their places on the shuttle bus

As is the practice of the shuttle service, John Doe, Moe, Norm Doe, and a coworker boarded the bus through the back door. (Exhibit 6, John Doe Deposition 25:19-24.) When they got on, the bus was crowded with no available seats. (Exhibit 6, John Doe Deposition 20:22-21:2.) This crowding was a common occurrence. (Exhibit 6, John Doe Deposition 20:22-24.) There was no prohibition in place by Roe Defendant against standing on the bus, as the bus allowed a 55-person capacity but had only 25 seats (Exhibit 1, Driver Deposition 27:18-28:7.) Since there were no available seats, they stood near the luggage rack. (Exhibit 6, John Doe Deposition 25:26-26:3.) There were already 10-15 people standing on the bus. (Exhibit 6, John Doe Deposition 26:21-25.)

5. The United Domestic Terminal employees board and take their places on the shuttle bus

After John Doe, Moe, and Norm Doe boarded, the bus made one more stop before leaving the airport, at the domestic terminal. (Exhibit 6, John Doe Deposition 22:5-11.) The stop at the domestic terminal was where the United customer service employees boarded, including Liz McDoe, a supervisor, and Jane Doe. This was the last stop before the bus got on the freeway. (Exhibit 8, McDoe Deposition 31:11-25.) Jane Doe was fortunate enough to get a seat, and was sitting in the back half of the bus along the luggage rack. (Exhibit 8, McDoe Deposition 21:7-10.) The shuttle bus then left the airport and headed toward the on-ramp entrance to northbound U.S. 101, a distance of about one mile.

B. The Collision

At the northbound on-ramp, the shuttle bus was following a Roe Cab taxi, driven by Ken Taxidriver. The cab was traveling 20 to 30 miles per hour as it traveled on the on-ramp. (Exhibit 2, Taxidriver Deposition 24:16-22; Exhibit 1, Driver Deposition 33:8-11.)[1] The shuttle bus was traveling 30 to 40 miles per hour. (Exhibit 1, Driver Deposition 33:12-14; 39:18-20.) Prior to any slowing of either vehicle, the two vehicles were approximately 9 to 10 car lengths apart.[2] (Exhibit 1, Driver Deposition 33:20-22.)

Approximately 20 feet to 100 yards before the freeway itself, Taxidriver saw a woman standing on the right shoulder of the on-ramp. (Exhibit 7, Moe Deposition 23:20-24:5; Exhibit 2,

[1] The low end and high end testimony for speeds and distances have been provided for an evaluation of the outside parameters for this collision. At the time of trial, plaintiffs' accident reconstructionist will provide his opinion of the most accurate speeds and distances based on witness testimony, measurements, and evidence. Plaintiffs' comparative fault analysis for defendants in this brief, given the totality of the circumstances, is consistent with the low end testimony and evidence, the high end testimony and evidence, or any combination thereof. It is also important to note that as both defendants have denied any responsibility for the collision in responses to plaintiffs' Requests for Admission, defendants will have to pay the cost of proof for liability in this action when plaintiffs prevail at trial on liability.

[2] For the purposes of Mr. Driver's testimony, his references to car length distance are based on the size of a "traditional passenger car." Exhibit 1, Driver Deposition Vol. II 12:17-20.)

Taxidriver Deposition 26:1-4; 26:21-27:5.) The presence of this woman was confirmed by a shuttle bus passenger, Liz McDoe. (Exhibit 8, McDoe Deposition 37:19-38:9.) The woman, a potential fare, was waving her arms. (Exhibit 2, Taxidriver Deposition 26:21-27:5.) Taxidriver determined that he would pick her up as a fare. At this location, there was ongoing construction work with Jersey barriers in place, narrowing the ramp down so that only one vehicle could get through the area at a time. (Exhibit 7, Moe Deposition 22:5-16; Exhibit 1, Driver Deposition 31:19-32:2; Exhibit 2,Taxidriver Deposition 23:9-18.) Taxidriver slowed down and pulled to the right to pick up the woman. Taxidriver does not recall if there was anyone behind him at the time because, in his words, "I don't recall because I don't see it. *When I see the passenger, I just fix on the passenger want a cab. I never look back in the rearview mirror.*" (Exhibit 2, Taxidriver Deposition 24:2-8, emphasis added.)

Steve Driver's shuttle bus was still approximately 9 to 10 car lengths behind the taxi at this point. (Exhibit 1, Driver Deposition 33:20-22.) A shuttle bus passenger stated that there was a woman off to the right of the ramp. (Exhibit 1, Driver Deposition 37:12-15.) Steve Driver turned his head to the right to look for the woman. (Exhibit 1, Driver Deposition 37:12-15.) Steve Driver then looked back to the roadway and saw that the taxi's brake lights were on. (Exhibit 1, Driver Deposition 34:10-17.) At this point, Steve Driver was 3 – 4 car lengths or 6 – 7 car lengths behind the taxi. (Exhibit 1, Driver Deposition 34:10-17; 40:15-18.) Steve Driver had already started to apply his brakes slightly because of the passenger's statement that a pedestrian was near the roadway. (Exhibit 1, Driver Deposition 40:19-25.) When the shuttle bus was 3 – 4 car lengths behind the taxi, Steve Driver realized the taxi had come to a complete stop and Steve Driver slammed on the brakes. (Exhibit 1, Driver Deposition Vol. II 13:4-16.) It was too late. According to John Doe, he felt the bus slow down, he next heard a skid and felt the bus wheels "chattering" as the wheels locked up just before impact. (Exhibit 6, John Doe Deposition 29:1-7.) The shuttle bus then slammed into the back of the taxi cab, pushing the stopped taxi cab forward 3 – 4 feet. (Exhibit 1, Driver Deposition Vol. II 27:17-22.)

1. The Effect of the Impact on John Doe

John Doe was facing out the driver's side holding on to the rack just before the accident. (Exhibit 6, John Doe Deposition 33:11-12.) The bus suddenly came to a stop and the people on the bus continued in motion. (Exhibit 6, John Doe Deposition 35:18-25.) John Doe felt like he was falling, so he let go of the rack with his left hand to push away anything that might be flying at him and to hold onto his twenty-pound backpack which was slung over his left arm. (Exhibit 6, John Doe Deposition 35:25-36:6.) He was thrown to the ground and landed on his rear-end. (Exhibit 6, John Doe Deposition 36:26-37:4.) John Doe realized he was injured when he got up from the fall on the bus. (Exhibit 6, John Doe Deposition 45:7-13.) He felt tightness in his muscles and soreness in his right hip, knee, elbow, and shoulder. (Exhibit 6, John Doe Deposition 45:7-13.) John Doe's damages are further discussed in the damages section of this brief.

2. The Effect of the Impact on Norm Doe

Norm Doe was facing the left side of the bus on the driver's side, holding on to the handrail with both hands. He felt the bus come to a sudden stop, and he was thrown to the floor. A fellow passenger landed on Norm Doe's ankle. (Exhibit 5, Norm Doe Deposition 40:9-47:9.) Norm Doe immediately felt that something was wrong with his ankle. Upon the arrival of an ambulance crew, Norm Doe was given first aid and then was transported to Peninsula Hospital's emergency room. Norm Doe's damages are further discussed in the damages section of the Norm Doe brief.

3. The Effect of the Impact on Larry Moe

At the moment of impact, Moe was holding onto the luggage rack with his left hand on the vertical bar and his right hand on the horizontal bar just prior to the accident. (Exhibit 7, Moe Deposition 25:22-26:10.) He was hit by many people when the accident happened. (Exhibit 7, Moe Deposition 26:11-14.) When the bus stopped, he was still holding on with his right arm. (Exhibit 7, Moe Deposition 26:21-24.) His left arm was sore and had bruises that took 3-4 days to go away. (Exhibit 7, Moe Deposition 28:1-7.) Within a half hour of the accident, he was sore in his upper back and back of his neck extending into his shoulders on both sides. (Exhibit 7, Moe Deposition 31:15-18.) He tried to work through it but then went to see the United doctor 3-4 days after the accident. (Exhibit 7, Moe Deposition 33:11-16.) Moe's damages are further discussed in the damages section of the Moe brief.

4. The Effect of the Impact on Jane Doe

As the bus came to a sudden stop, Jane Doe experienced a harsh braking feeling, flew out of her seat, and landed on her left shoulder. (Exhibit 9, Jane Doe Deposition 41:14.) *Three* people land on top of her. (Exhibit 9, Jane Doe Deposition 41:14.) As Liz McDoe, a United supervisor who was on the bus, went around to see how people were, Jane Doe told Ms. McDoe that her shoulder was in pain. (Exhibit 8, McDoe Deposition 22:2-5.) McDoe was worried about Jane Doe because she did not look well. (Exhibit 8, McDoe Deposition 21:11-25.) Jane Doe's damages are further discussed in the damages section of the Jane Doe brief.

C. After the Collision

After the accident, several of the passengers got off the bus. (Exhibit 6, John Doe Deposition 42:18-21.) The CHP arrived about fifteen minutes after the accident and put everyone back on the bus. (Exhibit 6, John Doe Deposition 43:16-21.) Four passengers, including Norm Doe, were taken by ambulance to the emergency at Peninsula Hospital. (Exhibit 10, Traffic Collision Report.) The other passengers were forced to stay at the scene for about an hour while the CHP conducted its inquiry. (Exhibit 6, John Doe Deposition 43:22-44:1.) When these remaining passengers were finally able to leave, they were put on a car rental bus which took them to the corner of San Bruno and South Airport Boulevard, where the passengers had to walk the remaining distance to the parking lot. (Exhibit 6, John Doe Deposition 44:2-9; 44:25-45:4.)

IV. LEGAL ANALYSIS

A. Defendant Roe Defendant's Liability

1. Liability of a Common Carrier

The rule that common carriers engaged in the carriage of passengers are required to exercise the highest degree of practical care and skill is one that has been in effect in California since the days of the stagecoach. (*Fairchild v. California Stage Co.* (1859) 13 Cal. 599.) This maxim was recently reaffirmed in a more modern context by the Court of Appeal. (*Ingham v. Luxor Cab Co.* (2001) 93 Cal.App.4th 1045.)

This high standard for the conduct of common carriers is demonstrated by BAJI 6.51, which will be read to the jury. That instruction provides in pertinent part:

> A common carrier of persons for hire must use the utmost care and diligence for their safe carriage and must exercise a reasonable degree of skill to provide everything necessary for that purpose. The care required of a common carrier is the highest that reasonably can be exercised consistent with the mode of transportation used and the practical operation of its business as a carrier. This requirement must be measured in the light of the best precautions which, at the time of the accident in question, were in common, practical use in the same business and had been proved to be effective. Failure on the part of such carrier to meet the foregoing standard of conduct is negligence.

Roe Defendant failed to meet this high standard. The profoundly flawed driver it selected, Steve Driver, operating a fully-loaded bus crammed with standing passengers, was traveling 40 miles per hour and maintaining an inadequate separation distance when he rear-ended a taxi. Faced with this overwhelming and persuasive evidence, a jury will conclude that Roe Defendant was negligent under any negligence standard, let alone the "utmost care" standard imposed on common carriers by California case law and BAJI 6.51.

It is anticipated that defendant Roe Defendant may try to argue that it was not a common carrier. This argument is without merit.

> [C]ourts have determined that common carriers include a variety of similar operations which hold themselves out to the public to transport persons from one location to another. For example, a cable car company which, for a fee, shuttles sightseers up the snowless slopes of San Francisco is a common carrier. (Citation) Even stores which operate elevators and escalators to propel patrons to the peaks of purchasing paradise have been deemed to be common carriers. (Citation) Although a store does not charge for use of its elevators or escalators, it profits from the utilization of these devices to assist customers in shopping at the store. (Citation) *Hence, a common carrier within the meaning of Civil Code section 2168 is any entity which holds itself out to the public generally and indifferently to transport goods or persons from place to place for profit.* (Citation)
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> [T]he "public" does not mean everyone all of the time; naturally, passengers are restricted by the type of transportation the carrier affords. (Citation) "One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population." (Citation) To be a common carrier, the entity merely must be of the character that members of the general public may, if they choose, avail themselves of it. (Citation)

(*Squaw Valley Ski Corp. v. Superior Court*, (1992) 2 Cal.App. 4th 1499, 1508, 1510 (emphasis added, internal citations omitted).)

In the instant action, Roe Defendant transported individuals from one location, the airport terminal, to another, the employee parking area. There will be testimony at the time of trial that Roe Defendant as a custom and practice did not require airport employee identification to be shown, allowed individuals to board through the rear doors, and that as a result, *any* member of the public could board the shuttle. This will be sufficient to get this issue, as well as Steve Driver's driving history, before a jury, since the determination as to whether a carrier is common or private is primarily a *question of fact* in each case. (*People v. Duntley* (1932) 217 Cal. 150.)

Defendant Roe Defendant may additionally argue that as plaintiffs were not required to pay a fare, Roe Defendant was a carrier of passengers without reward under Civil Code § 2096. Under Civil Code § 2096, Roe Defendant would only be required to exercise "ordinary care and diligence," not "utmost care." Such an argument is misplaced. In *Smith v. O'Donnell* (1932) 215 Cal. 714, 721, the Court set forth the following regarding a common carrier's duty toward a passenger:

> But on whatever terms a common carrier of persons voluntarily receives and carries a person, the relation of common carrier and passenger exists. This is recognized by some of the authorities upholding the exemption from liability for negligence provision in the case of a passenger carried gratuitously. (See *Rogers v. Kennebec Steamboat Co.*, 86 Me. 261.) The sole inquiry in this regard is, as has been said, whether the person was lawfully on the vehicle (see *Ohio & Miss. R. Co. v. Muhling*, 30 Ill. 9), has been voluntarily received by the common carrier on any terms for the purpose of carriage, and is not, as was the case in *Sessions v. Southern Pac. Co.*, 159 Cal. 599, a mere trespasser on the vehicle.

It is undisputed that the passengers on the Roe Defendant at the time of the incident were (1) lawfully on the vehicle and (2) had been voluntarily received by Roe Defendant. The common carrier—passenger relationship therefore exists for these passengers, and Roe Defendant owed them an utmost duty of care.

2. Negligence per se

Vehicle Code § 21703 provides that a "driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon, and the condition of, the roadway." The jury will be instructed per BAJI 3.45 as follows:

> If you find that a party to this action violated Vehicle Code § 21703, the statute just read to you, and that such violation was a cause of injury to another, you will find that such violation was negligence.

The facts and circumstances concerning the collision itself, namely that Steve Driver slammed into the back of the Roe Cab, will lead any reasonable jury to conclude that Steve Driver violated Vehicle Code § 21703, rendering Roe Defendant negligent per se. Roe Defendant will be held liable under a theory of negligence per se for causing plaintiffs' injuries.

3. Negligent Entrustment

Plaintiffs have alleged a negligent entrustment element in their complaint against defendant Roe Defendant. As such, the competency of the driver, Steve Driver, is at issue. Steve Driver's prior driving record will be both relevant and admissible to this issue pursuant to *Syah v. Johnson* (1966) 247 Cal.App.2d 534, 537. In *Syah*, defendant auto sales agency employed an individual as a pick-up and delivery man. The agency was made aware of two dizzy spells but continued to allow the individual to drive. A subsequent dizzy spell resulted in a collision and death. In the instant action, defendant Roe Defendant is a common carrier. As set forth in BAJI 6.51:

> The care required of a common carrier is the highest that reasonably can be exercised consistent with the mode of transportation used and the practical operation of its business as a carrier. This requirement must be measured in the light of the best precautions which, at the time of the accident in question, were in common, practical use in the same business and had been proved to be effective.

In the instant action, defendant Roe Defendant chose to hire an individual with a history of problems, including termination as a professional driver for a suspended license. Subsequent to this, Steve Driver's aggressive driving—of which defendant Roe Defendant knew or should have known—resulted in harm yet again. Juxtaposed against defendant Roe Defendant's duty to use "utmost care" as a common carrier, this issue will provide devastating evidence of Roe Defendant's culpability in this matter.

B. Defendant Roe Cab's Liability

1. Liability as a Common Carrier

Roe Cab, in addition to defendant Roe Defendant, is also liable for plaintiff's injuries. As noted above, for the purpose of this litigation, Ken Taxidriver was in the course and scope of employment with defendant Roe Cab. A taxicab falls within the category of common carriers who must select a reasonably safe place to receive or discharge passengers. *Bua v. G.I. Taxi Co.* (1960) 186 Cal.App.2d 612, 615. The jury will hear BAJI 6.53 regarding this issue, which reads:

> It is the duty of a common carrier to select a reasonably safe place to receive or discharge passengers.

It is a given that the jury in this case will *not* find a narrow freeway on-ramp, let alone a freeway on-ramp in a construction zone, to be a "reasonably safe place to receive" a passenger. Any argument to the contrary will only serve to damage defendant's credibility with the jury. As such, Roe Cab will be found liable for this incident.

2. Negligence per se

The jury will also receive BAJI 3.45, the negligence per se instruction, based on Vehicle Code § 22400(a), which reads:

> No person shall drive upon a highway at such a slow speed as to impede or block the normal and reasonable movement of traffic

> unless the reduced speed is necessary for safe operation, because of a grade, or in compliance with law. No person shall bring a vehicle to a complete stop upon a highway so as to impede or block the normal and reasonable movement of traffic unless the stop is necessary for safe operation or in compliance with law.

The witness testimony, as well as the facts and circumstances concerning the collision itself, will lead a jury to conclude that Ken Taxidriver violated Vehicle Code § 22400(a), rendering Roe Cab negligent per se. As such, Roe Cab will be held liable for this incident.

C. Comparative Fault Analysis Will Render Roe Defendant More Responsible for the Collision than Roe Cab

While both Roe Defendant and Roe Cab are jointly and severally liable for plaintiff's special damages, an analysis of their respective liabilities with respect to non-economic damages will be governed by the principle of comparative fault. Civil Code § 1431.2 provides in pertinent part:

> In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

Both defendants' negligent actions are necessary elements comprising the proximate cause of the accident. Plaintiffs' counsel believes however that several factors will lead the jury to the conclusion that Roe Defendant is more responsible for the collision than Roe Cab. First, as a common carrier entrusted with the safety of its passengers, and actually in the course of transporting a large number of passengers, Roe Defendant was under a duty to exercise the utmost care for their safety. Thus, Steve Driver's failures and Roe Defendant's failures by employing Steve Driver are more egregious than Ken Taxidriver's violations. Second, plaintiffs' counsel's evaluation of the credibility and demeanor of the two drivers, gleaned from the contradictory testimony given by Steve Driver as well as the witnesses' performances at their respective depositions, leads to the conclusion that the jury will be inclined to support Ken Taxidriver's version of events. Finally, the likely introduction of Steve Driver's driving history juxtaposed against Roe Defendant's duty of "utmost care" and Roe Defendant's entrustment of Steve Driver with a passenger bus will not resonate positively with a jury.

Based on the foregoing information as well as focus group jury analysis, plaintiffs' counsel estimates that the foregoing factors will lead a jury to conclude that Roe Defendant bears 70% of the fault for the accident, and Roe Cab bears responsibility for the remaining 30% when determining dollar responsibility for general damages.

V. DAMAGES

A. Economic Damages

1. Past Medical Damages

Before the accident, John Doe was a healthy man working without limitation. He was thrown to the floor of the bus in the April 17, 2000 collision. As he was healthy and without injury during the course of his life prior to the accident, he expected that the pain he was experiencing in his back and shoulder would subside. That did not happen. He reported to the United medical clinic on April 20, and was provided with conservative care, including physical therapy through July 2000. John Doe was eager to return to work, which was permitted by his doctor.

From July through October, John Doe experienced an increasing loss of strength in his right arm. Accordingly, United referred him to orthopedist James D. Bonecutter, M.D. Dr. Bonecutter diagnosed right shoulder biceps tendonitis, right shoulder impingement syndrome, and a possible rotator cuff tear. After an MRI confirmed Dr. Bonecutter's findings, John Doe was scheduled for what would prove to be his first of three shoulder surgeries. On December 26, John Doe underwent a capsulorrhaphy Bankart-type operation for his rotator cuff, consisting of a right shoulder SLAP repair, and arthroscopy with extensive debridement of the chondral lesion and synovitis. Images taken by the arthroscopic camera from this procedure are attached as Exhibit 12.

John Doe was unable to work following this surgery, and resumed physical therapy in February 2001. This therapeutic regimen was continued through April, when continuing pain prompted Dr. Bonecutter to x-ray John Doe's shoulder. A surgical implant had come loose. Dr. Bonecutter scheduled an immediate further shoulder surgery to repair the damage. This was done on April 6, 2001.

For the next three months, John Doe faithfully continued his physical therapy regimen. However his pain and dysfunction continued. Dr. Bonecutter conducted further tests, and eventually recommended that John Doe consult another orthopedist for a second opinion.

In September 2001, John Doe consulted William H. Bones, M.D. Dr. Bones noted that John Doe's shoulder had been nearly dislocated in the collision. After examining John Doe's shoulder, he determined that he was suffering from underlying multidirectional instability, which was the source of his continuing pain. After further tests and examination, Dr. Bones determined that a third surgery was necessary. In October 2001, Dr. Bones performed a right shoulder arthroscopy, debridement, anterior Bankart repair, and a posterior capsular shift. Images taken by the arthroscopic camera during this procedure, as well as photographs of John Doe's recuperation while wearing the "Gunslinger II" brace, are attached as Exhibit 12.

John Doe resumed physical therapy during his subsequent recuperation. However, despite these three shoulder surgeries and his best effort at rehabilitation, John Doe's shoulder is not and will never be the same as it was prior to the accident. He was declared permanent and stationary on May 21, 2002, with permanent work restrictions which include no overhead activity and no lifting over 20 pounds. As a result, John Doe's days as an aircraft mechanic, a job he enjoyed and at which he excelled, are over.

It is anticipate that defendants will claim that John Doe had a pre-existing shoulder injury that was exacerbated by his fall on the shuttle bus. This claim is belied by his work history and the fact that John Doe worked without limitation prior to the April 17, 2000 collision. Defendants may further argue that John Doe's shoulder was reinjured in some manner prior to October 2000. Again, there is no evidence that this is the case. On the contrary, the evidence is that John Doe, following his doctor's advice, continued to work following physical therapy. He experienced gradual degradation in his shoulder strength until an orthopedic consult and surgical intervention was required.

A detailed medical chronology, including a narrative and relevant records, is attached as Exhibit 11. The cost of his past medical care is approximately $24,286. The medical billing records supporting this total are attached as Exhibit 13.

2. Future Medical Expenses

Dr. Bones reports that he does not anticipate that John Doe will require any further surgery. However, he should have a one-year gym membership for continued strengthening and conditioning, and eight weeks of physical therapy to help with this. Occasional flare-ups might require rest, anti-inflammatory medications, and physical therapy, but otherwise, further treatment is not anticipated. (Exhibit 11, p. 134.) Accordingly, for the purposes of mediation only, no future medical damages are claimed.

3. Defendants' Defense Medical Examiner, Dr. Anthony Expert, M.D., is a liability to defendants' case

Defendants selected Dr. Anthony Expert, M.D., to perform a defense medical examination in this matter. Dr. Expert's reported history demonstrates testifying 94% of the time at trial for the defense. The *only* times he has testified for the plaintiff have been when he was the individual's treator. On rare occasions where he has testified for his patients, his testimony regarding recuperation speed, appropriateness of care, and mechanism of injury completely contradict his defense opinions. Plaintiffs' counsel does not believe Dr. Expert will be an effective witness for defendants' prosecution.

4. Past Wage Loss

Plaintiff's retained economist, Tom Numbercruncher, Ph.D., has analyzed John Doe's wage history and has determined that he suffered a quantifiable loss as a result of the time he lost from work because of the accident. Dr. Numbercruncher projected his wage earnings without injury based on an average of his W-2 earnings for 1998, 1999, and 2000, modified by a union wage increase which went into effect in 2002. For 2000, Dr. Numbercruncher used actual gross pay after the accident, mitigated by his sick pay. (Exhibit 14, Numbercruncher Report, Comments and Assumptions 1; Economic Loss Data Binder, Tab 13.)

John Doe's earnings with injury were set equal to his projected pay minus his sick leave pay, which did not encompass his lost overtime. John Doe has not had any earnings from April 21, 2001 to present because of the accident. (Exhibit 14, Numbercruncher Report, Comments and Assumptions 2.)

Fringe benefits were calculated as a percentage of his W-2 earnings. (Exhibit 14, Numbercruncher Report, Comments and Assumptions 3.)

Based on the foregoing, Dr. Numbercruncher calculated John Doe's past wage loss as $156,757.[3] (Exhibit 14, Numbercruncher Report.) This amount has been entered into the Exposure Table below.

5. Future Wage Loss

John Doe will not be able to return to his position as an aircraft mechanic with United Airlines, a career he excelled in. His skill is reflected in the letters of commendation he has received from United, including appreciation for a rapid repair of an aircraft lavatory system using a tool he designed and built. (Exhibit 15.) A vocational rehabilitation plan has been prepared for John Doe by Jeff Jobs. Per the plan, John Doe will be able to find employment as a building inspector after some retraining. The cost of the retraining is $8000 and will take 4 months, and it will take another 2 months to find a position. Entry level salary is approximately $50,000, with an increase to $61,000 after 4 years. (Exhibit 14, Numbercruncher Report, Comments and Assumptions 2; Jobs Vocational Rehabilitation Report, Economic Loss Data Binder, Tab 16.) His work life expectancy was taken from the Bureau of Labor Statistics table, which indicated a work life expectancy for John Doe to December 2026. (Exhibit 14, Numbercruncher Report, Comments and Assumptions 4.)

Based on the foregoing, Dr. Numbercruncher calculated John Doe's future wage loss as $609,302. (Exhibit 14, Numbercruncher Report.) This amount has been entered into the Exposure Table below.

6. Loss of Household Services

John Doe's injury is projected to have caused a permanent reduction in his ability to contribute household services in the areas of home repair and maintenance, automobile maintenance and housework John Doe performed a great deal of work in this area, including all the work on the John Doe house, restoring cars, and designing and building furniture. Some of the work he has done is reflected in the images attached as Exhibit 16. These images include work he was doing on his house, the before and after pictures of a Ford Mustang he restored, and before and after pictures of a couch he refurbished. In the after picture of the couch, one can also see a coffee table that he designed and built. The final image is the current state of the John Doe kitchen, the way it has existed for more than two years due to John Doe's injury.

The projected decrease in household services is from 45 hours per week to 0 hours per week in the areas of working on his home and cars, and from 5 hours per week to 2 hours per week in the area of housework. (Economic Loss Data Binder, Tab 14.) Dr. Numbercruncher used a research publication entitled *The Dollar Value of a Day (1999 Dollar Valuation)* published by Expectancy Data of Prairie Village, Kansas (2001) to value this lost time. Auto services were weighted at 50%, painting, plastering, and paperhanging, etc. was weighted at 25%, and carpentry was weighted at 25%. Accordingly, Dr. Numbercruncher derived a weighted rate for the value of John Doe's

[3] All amounts calculated by Dr. Numbercruncher have been reduced to present value using a 2.5% discount rate, , which is the 20- to 30-year average of the yearly differences between the compensation increases of the average American worker and the interest rate on 3-year U.S. Treasury bills. (Exhibit 14, Numbercruncher Report, Comments and Assumptions 5.)

household services (exclusive of housework) of $13.94 per hour; the publication estimated a value of $10.86 per hour for housework. These rates were increased based on average American wage increases through 2002, but were then stabilized by Dr. Numbercruncher for his analysis of John Doe's loss through 2033 (life expectancy minus 2 years). (Exhibit 14, Numbercruncher Report, Comments and Assumptions 6-7.)

Dr. Numbercruncher' calculated a past loss of value of household services as $103,889 and a future loss of $979,575. (Exhibit 14, Numbercruncher Report.) These amounts have been entered into the Exposure Table below.

B. General Damages

The element of damages that deserves the most attention in this case is not John Doe's income loss but the effect of this injury on his life. As with any case, the precise amount of general damages is always somewhat open to conjecture. However, the amount of general damages awarded is somewhat dependent on the following circumstances:

1. The sympathetic or non-sympathetic nature of the victim;
2. The status of the defendants and the degree of culpability and financial responsibility to which each defendant is susceptible;
3. The seriousness of the event giving rise to the injury;
4. The nature of the injury itself; and
5. The nature and extent of special damages.

On the one hand we have John Doe, a sympathetic plaintiff. His special damages exceed $1.8 million. Conversely, we have the defendants, whose negligence caused John Doe's life to dramatically change. An intensely physical man, John Doe is no longer able to do the things he loved and got satisfaction from—namely being tremendously creative and skilled with his hands. He lives with ongoing pain which will continue to impact his life. Plaintiff's counsel has seen general damage awards as high as six times the special damages. In this case however, a conservative multiplier of two and one half has been used. Obviously, a jury could well find the general damages to exceed this amount. Plaintiff's general damages, based on this multiplier, are $4,704,522.

C. Total Special & General Damages

The following table sets forth the total special and general damages exposure in this case.

Past Medical Expenses	$24,286
Past Wage Loss	$156,757
Future Wage Loss	$609,302
Vocational Rehabilitation	$8,000
Past Loss of Household Services	$103,889
Future Loss of Household Services	$979,575
Special Damages Total	**$1,881,809**
General Damages	$4,704,522
TOTAL EXPOSURE	**$6,586,331**

VI. DEMAND

Plaintiff understands that the above figure is the amount defendants are exposed to at trial and not the amount demanded for settlement of this matter. The total exposure is significant, however. Given the exposure in this case, plaintiff's injuries, and defendants' liability for the same, plaintiff will accept $4 million as final resolution of this matter. This offer for settlement is open through the end of mediation.

VII. CONCLUSION

John Doe suffered significant injuries as a result of defendants' negligence. This matter should be resolved so that John Doe, while never again being whole, is a at least compensated for the tremendous losses he has suffered.

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