



9-1-2006

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Recommended Citation

Jeffrey S. Goodfried, *Back on Track: How the California Supreme Court Got It Wrong, and What Legislature Can Do to Fix It*, 27 Loy. L.A. Ent. L. Rev. 1 (2006).

Available at: <https://digitalcommons.lmu.edu/elr/vol27/iss1/1>

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BACK ON TRACK: HOW THE CALIFORNIA SUPREME COURT GOT IT WRONG, AND WHAT LEGISLATURE CAN DO TO FIX IT

I. ALL ABOARD — INTRODUCTION

According to the California Supreme Court, operators of roller coasters and similar amusement park rides should be held to the same safety standards that apply to buses, planes, and other modes of public transportation.¹ The court's dubious 4-3 decision in *Gomez v. Disney* means that when a lower court adjudicates negligence claims against an amusement park, it will have to hold thrill rides to an *utmost safety standard*, rather than the reasonable care standard, which would likely be *extraordinary diligence*.² On first impression, one might find little difference between *utmost care* and *extraordinary diligence*. However, the two standards significantly impact the level of liability for amusement park operators. While *extraordinary diligence* holds amusement parks liable for damages, the *utmost care* standard unjustly transforms these parks into insurers of all their patrons.³

Given these two standards, amusement park visitors might initially agree with the court's decision to elevate the safety standard; those who engage in thrill rides would most likely prefer an amusement park to conduct its rides with utmost safety. However, the inherent problems caused by classifying thrill rides as common carriers outweigh any perceived benefits of raising the safety standard beyond extraordinary diligence. First, amusement park rides meet neither the statutory definition set forth in California's Civil Code sections 2100 and 2101, nor its accompanying legislative intent.⁴ Second, the court ignored California case law by expressly stating that amusement park operators are not common carriers.⁵ Instead, the court mistakenly relied on cases that focused on recreational forms of transportation, such as mule train rides and ski lifts,

1. *Gomez v. Super. Ct. (Walt Disney Co.)*, 35 Cal. 4th 1125, 1136 (2005).

2. *See id.*; text accompanying note 8.

3. *Id.* at 1129 n.1 (stating that a common carrier is liable for "loss or injury thereof from any case whatever," with few exceptions).

4. *See CAL. CIV. CODE* §§ 2100–01 (2006).

5. *Simon v. Walt Disney World Co.*, 114 Cal. App. 4th 1162, 1162 (Ct. App. 2004).

that are clearly not analogous to roller coasters.⁶ While these recreational forms of transportation should provide calm and uneventful transportation from one place to another, a roller coaster should provide hidden thrills and jaw-dropping scares. Third, the court did not take into account that ordinary negligence law already accommodates for the increased risk inherent in thrill rides.⁷ For amusement parks, ordinary and reasonable negligence should start at the heightened standard of *extraordinary diligence*. This standard would meet the duty requirement that a park exercise the degree of care in operating its thrill rides that is commensurate with the dangers and risks created by that ride.⁸ Fourth, the common carrier classification creates an unfair burden on California commerce. Fifth, the vast majority of jurisdictions have adamantly opposed classifying thrill rides as common carriers.⁹ Additionally, the court erroneously cites to other jurisdictions it claims have agreed with California's stance on the issue.¹⁰

Since accidents commonly occur at theme parks, amusement park liability is a timely issue.¹¹ Although accidents in amusement parks are as common as cotton candy, serious injuries are rare.¹² In fact, no serious injuries were reported in 2004 at amusement park sites in California, with more than 110 million rides given.¹³ In the United States, the Consumer Product Safety Commission ("CPSC") estimates 3,400 people were brought to emergency rooms last year as a result of injuries sustained from riding a fixed-site amusement park ride.¹⁴ However, since accidents do

6. *McIntyre v. Smoke Tree Ranch Stables*, 205 Cal. App. 2d 489, 492 (Ct. App. 1962) (finding common carrier status in a guided tour mule ride carrying sightseeing passengers over a designated route between fixed points for a roundtrip fare); *see also Squaw Valley Ski Corp. v. Super. Ct.*, 2 Cal. App. 4th 1499, 1505 (Ct. App. 1992) (imposing common carrier status on a chair lift carrying skiers at a fixed rate from the bottom to the top of the ski run).

7. *See Hawk v. Wil-Mar, Inc.*, 123 A.2d 328, 330 (Md. 1956); *Brennan v. Ocean View Amusement Co.*, 194 N.E. 911, 913 (Mass. 1935); *see generally Lausterer v. Dorney Park Coaster Co.*, 100 Pa. Super. Ct. 33 (1930).

8. *Gomez*, 35 Cal. 4th at 1158 (Chin, J. dissenting).

9. *See, e.g., Harlan v. Six Flags Over Georgia, Inc.*, 297 S.E.2d 468, 469 (Ga. 1982); *Lamb v. B & B Amusements Corp.*, 869 P.2d 926, 931 (Ut. 1993); *Bregel v. Busch Entm't Corp.*, 444 S.E.2d 718, 719 (Va. 1994).

10. *Gomez*, 35 Cal. 4th at 1125 (2005).

11. Safe Kids USA, http://www.usa.safekids.org/tier3_cd.cfm?content_item_id=22791&folder_id=301 (last visited Oct. 14, 2006).

12. *See id.*

13. Cal. Attractions & Parks Ass'n, *Common Carrier Case Before State Supreme Court*, http://www.capalink.org/news/common_carrier.html (last visited Oct. 23, 2006) [hereinafter CAPA].

14. MARK S. LEVENSON, CONSUMER PROD. SAFETY COMM'N, AMUSEMENT RIDE-RELATED INJURIES AND DEATHS IN THE UNITED STATES: 2005 UPDATE 13 (2005), available at

happen in amusement parks, the new utmost safety standard will have a dramatic effect on the twenty billion dollars that amusement parks generate in the state of California each year.¹⁵

Before deconstructing the Supreme Court's decision, Part II of this commentary offers a brief background on the theme park industry. Then, Part III provides history and background on California's common carrier laws, Civil Code sections 2100 and 2101, including a brief examination of the legislatures' intent. Part IV presents the factual and procedural history of *Gomez v. Disney*, the case that brought this issue to the forefront. Part IV will also explain how the California Supreme Court's erroneous decision will impact the parties in this case, and the twenty billion dollars generated each year for the state by the amusement park industry.

Part V analyzes the court's flawed opinion in *Gomez v. Disney*. This commentary will assert that the court erred when it classified thrill rides as common carriers for the reasons explained above. Finally, Part VI will suggest a remedy to the problem created by the court and will offer a legislative solution through which legislatures could amend the statute to exclude thrill rides from common carrier classification. This solution would rectify the court's ruling, protect patrons of thrill rides, and prevent the suppression of California's businesses.

II. AMUSEMENT PARK INDUSTRY

The amusement park industry consists entirely of *fixed-site* locations.¹⁶ Patrons pay an admission fee to the park and then have mostly unbridled access to permanent rides, defined as attractions that are permanently affixed to the site.¹⁷ Most often, the amusement parks have one or more themes, hence the term "theme parks."¹⁸ An amusement park's attractions may range from bloodcurdling roller coasters with 200-foot drops, to children's rides that slowly move passengers through rooms filled with singing animatronics. Also included in the amusement park category are water parks and fixed waterfront amusement centers.¹⁹

Mobile sites contain mobile rides, which are attractions that vendors

<http://www.cpsc.gov/library/amus2005.pdf> (stating that although the CPSC does not regulate fixed-site amusement parks, it gathers statistics in an appendix to provide continuity with past reports).

15. Cal. Attractions & Parks Ass'n, <http://www.capalink.org> (last visited Oct. 23, 2006).

16. See LEVENSON, *supra* note 14, at 4.

17. See *id.*

18. See *Amusement Parks*, WIKIPEDIA, http://en.wikipedia.org/wiki/Amusement_parks (last visited Oct. 10, 2006).

19. *Id.*

move from location to location usually as part of a carnival, county fair, street party, or other event.²⁰ Mobile sites and mobile rides are not synonymous with amusement parks, because mobile sites and mobile rides face heavy regulation by the CPSC, which lacks jurisdiction over the fixed-site amusement parks.²¹ Although the federal government currently lacks jurisdiction over amusement park regulation, many states, including California, have established their own regulations.²²

The amusement park industry is shockingly massive. In 2004 alone, 169.1 million guests entered the gates of the top fifty parks in North America.²³ The United States remains the largest market in the world for amusement parks, with over ten billion dollars in revenue in 2004.²⁴ According to a PricewaterhouseCoopers report, those revenues are expected to increase to nearly thirteen billion dollars by 2009.²⁵

The State of California is home to three of the top ten amusement parks in North America, including the second most visited park in the world—Disneyland, which has an estimated annual attendance of 13,360,000.²⁶ Other large California theme parks include Disney's California Adventure, which draws 5,600,000 guests per year, and Universal Studios Hollywood, which brings in about 5,000,000 visitors per year.²⁷ The California Attractions and Parks Association ("CAPA"), an organization representing amusement, water, and family entertainment parks throughout California, estimates the state's parks generate twenty billion dollars in commerce each year.²⁸

While an accident at a theme park garners much media attention, it rarely results in anything more than minor injuries.²⁹ For example, in California, the most recent large-scale accident occurred at Disney's California Adventure on July 29, 2005, when twenty-five passengers

20. Levenson, *supra* note 14, at 2.

21. *Id.*

22. See CAL. CODE REGS. tit. 8, § 344.5(a) (2001).

23. James Zoltak, *After Two-Year Slump, North American Parks Up 4%*, AMUSEMENT BUSINESS, Dec. 13, 2004, at 14, available at http://www.amusementbusiness.com/amusementbusiness/search/article_display.jsp?vnu_content_id=1000736332.

24. Kevin Zimmerman, *PWC: Theme Park Revenue to Grow by More Than 4%*, AMUSEMENT BUSINESS, Oct. 12, 2005, available at http://amusementbusiness.com/amusementbusiness/_search/article_display.jsp?vnu_content_id=1001304651.

25. *Id.*

26. Zoltak, *supra* note 23, at 14.

27. *Id.* at 16.

28. CAPA, *supra* note 13.

29. Levenson, *supra* note 14, at 8 (citing results of in-depth investigations of accidents of particular concerns to CPSC staff members. While these accidents are presumably more serious, the typical injuries were cuts, bruises, and broken bones).

sustained injuries after two roller coaster trains collided.³⁰ The passengers were transported to a nearby hospital, where they were all treated for minor injuries and released.³¹

With any recreational activity, from daredevil extreme skiing to a seemingly languid game of golf, there is always some risk of serious injury or fatality. In 2004, four people died as a result of accidents at fixed-site amusement parks.³² Later in this commentary, it will be proffered that these four deaths would have occurred regardless of amusement parks' common carrier classification. Four fatalities out of 169,100,000 visitors is a ratio of *one out of every 42,275,000*, which makes the act of driving your own car to an amusement park far more dangerous than embarking on a ride once at the park.³³ Understandably, some argue that four fatalities a year are still four too many. However, raising the safety standard is not the answer. Heightened standards will allow more lawsuits, but will not decrease the number of fatalities. California amusement parks are heavily committed to safety,³⁴ and currently do enough to keep their rides safe.

III. BACKGROUND ON COMMON CARRIER LAW

Those engaged in the business of transporting passengers for profit have long been subject to a higher duty of care.³⁵ This policy stems from an old English rule that held carriers of goods absolutely liable for the loss or damage of such goods.³⁶ In 1680, an English court expanded this rule from carriers of personal property to carriers of passengers when it held a stagecoach driver liable for not delivering a passenger to his final destination as promised.³⁷

As for American courts, legal scholars often credit *Stokes v.*

30. David Haldane & Dave McKibben, *Brake Is Faulted in Park Crash*, L.A. TIMES, Oct. 14, 2005, at B3.

31. *Id.*

32. Levenson, *supra* note 14, at 8.

33. Nat'l Safety Council, *What Are the Odds of Dying?*, <http://www.nsc.org/lrs/statinfo/odds.htm> (last visited Sept. 13, 2006) (stating the odds of dying in 2004 as a result of an auto accident were one in 18,412).

34. James B. Kelleher, *Theme Parks' Liability Clarified*, O.C. REGISTER, Jun. 17, 2005, at 10.

35. 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 16.14 (2d ed. 1986).

36. Joseph Henry Beale, Jr., *The History of the Carrier's Liability*, SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 148, 148 (Comm. of the Am. Law Schools ed. 1909).

37. Lovett v. Hobbs, 89 Eng. Rep. 836, 837 (1680).

*Saltonstall*³⁸ as the seminal case that extended the heightened duty of care from carriers of personal property to carriers of people.³⁹ In *Stokes*, the court held that a carrier of goods was absolutely liable for the loss or damage of such goods, but also recognized that carriers should owe a heightened duty when transporting people.⁴⁰ The court wrote: “But although he does not warrant the safety of the passengers, . . . [the driver] shall possess competent skill; and that as far as human care and foresight can go, he will transport them safely.”⁴¹

Two decades later, in 1859, the California Supreme Court established that a carrier of persons for reward must exercise the highest possible duty of care.⁴² In *Fairchild v. California Stage Company*, a stagecoach overturned, causing injury to a passenger.⁴³ The court classified the stagecoach as a common carrier, and held that the operator owed a duty of utmost safety to all of its passengers.⁴⁴

As the use of carriages increased, so too did the number of accidents.⁴⁵ In 1872, the California Legislature responded by creating a comprehensive statutory scheme governing carriages, which remains unchanged today.⁴⁶ Section 2100 states: “[a] carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.”⁴⁷ Section 2101 further imposes a duty on common carriers to provide safe vehicles: “[a] carrier of persons for reward is bound to provide vehicles safe and fit for the purpose to which they are put, and is not excused for default in this respect by any degree of care.”⁴⁸

While California courts have expanded the term “carrier of persons” over time, they have always limited the expansion to modes of carrying people for transportation purposes.⁴⁹ For example, in *Treadwell v.*

38. *Stokes v. Saltonstall*, 38 U.S. 181 (1839).

39. HARPER ET AL., *supra* note 35, § 16.14, at 506.

40. *Stokes*, 38 U.S. at 191.

41. *Id.*

42. *Fairchild v. Cal. Stage Co.*, 13 Cal. 599, 605 (1859).

43. *Id.* at 601.

44. *Id.* at 602, 605.

45. See Elmo Shagnasty, *Looking at the Law*, ANVIL MAGAZINE, Oct. 1997, <http://www.anvilmag.com/farrier/lookinga.htm>.

46. See James Zoltak, *California “Common Carrier” Ruling Roils Biz*, AMUSEMENT BUSINESS, Jul. 5, 2005 at 41.

47. CAL. CIV. CODE § 2100 (2006).

48. *Id.* § 2101.

49. See HARPER ET AL., *supra* note 35, §16.14, at 511–12.

Whittier, the court concluded that an elevator is a common carrier.⁵⁰ In *Treadwell*, an elevator in the defendants' store collapsed, injuring the plaintiff passengers.⁵¹ The court held that the passengers in the elevator expected a smooth transition during their transport to various floors of the building.⁵² It is now well-established law that elevators and escalators constitute common carriers.⁵³ Since *Treadwell*, the California courts have further expanded the common carrier definition to various forms of transportation, including airplanes,⁵⁴ buses,⁵⁵ taxicabs,⁵⁶ mule trains,⁵⁷ and ski lifts.⁵⁸

IV. FACTUAL AND PROCEDURAL HISTORY OF *GOMEZ V. DISNEY*

On June 25, 2000, Cristina Moreno rode on the Indiana Jones ride at Disneyland.⁵⁹ The Indiana Jones attraction is a thrilling experience that "consists of a dynamic ride vehicle which is used to enhance the sensation of vehicle motion and travel experience by passengers in the vehicle."⁶⁰ The vehicle "move[s] along a predetermined path on a track,"⁶¹ which at all times stays within a building decorated with caverns, bridges, and exploding pyrotechnics.⁶² During the course of the ride or shortly after exiting the ride, Moreno suffered a brain aneurysm.⁶³ Moreno's family contends she suffered serious injury, or at least her injury was exacerbated, by the violent shaking imposed by the ride.⁶⁴ Disney denied this claim.⁶⁵ The injuries required extensive hospitalization and multiple brain surgeries;

50. See *Treadwell v. Whittier*, 80 Cal. 574, 585 (1889).

51. *Id.* at 576.

52. *Id.* at 578.

53. See *Vandagriff v. J.C. Penny Co.*, 228 Cal. App. 2d 579, 582 (Ct. App. 1964); 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 768 (9th ed. 1988).

54. *Smith v. O'Donnell*, 215 Cal. 714, 719-20 (1932).

55. *Lopez v. S. Cal. Rapid Transit Dist.*, 40 Cal. 3d 780, 783 (1985).

56. See *Larson v. Blue & White Cab Co.*, 24 Cal. App. 2d 576, 578 (Ct. App. 1938).

57. *McIntyre v. Smoke Tree Ranch Stables*, 205 Cal. App. 2d 489, 492 (Ct. App. 1962).

58. *Squaw Valley Ski Corp. v. Super. Ct.*, 2 Cal. App. 4th 1499, 1505 (Ct. App. 1992).

59. *Gomez v. Super. Ct. (Walt Disney Co.)*, 35 Cal. 4th 1125, 1127 (2005).

60. *Id.* at 1142.

61. *Id.*

62. TheRaider.net, *Indiana Jones Adventure: Temple of the Forbidden Eye*, <http://www.theraider.net/information/attractions/forbiddeneye.php> (last visited Sept. 24, 2006).

63. See *Gomez*, 35 Cal. 4th at 1127.

64. Anthony J. Sebok, *The California Supreme Court's Ruling on the "Indiana Jones" Ride: Was the Court Mistaken When It Treated the Ride Like a City Bus?*, FINDLAW, Jun. 27, 2005, <http://writ.news.findlaw.com/sebok/20050627.html>.

65. *Id.*

as a result, Moreno died on September 1, 2000.⁶⁶

The estate of Christina Moreno and her heirs (“Plaintiffs”) filed suit against Disney and related defendants (“Disney”).⁶⁷ In addition to claiming “causes of action for premises liability, ‘product negligence’, strict products liability, and unfair business practices,”⁶⁸ the plaintiffs also claimed Disney had “common carrier liability,” because the Indiana Jones ride consisted of a vehicle “used to transport passengers while, at the same time, providing them with entertainment and thrills.”⁶⁹

Disney challenged the action on the grounds that its thrill rides are not common carriers.⁷⁰ The trial court sustained the demurrer, and agreed with Disney “that amusement rides such as roller coasters are not common carriers [since] [h]ere, the primary purpose of the ride is entertainment, thrills, and the incidental consequence is that people are transported in the process.”⁷¹

Plaintiffs appealed the trial court’s decision. The California Court of Appeal sided with the Plaintiffs, directing the lower court to overrule the demurrer on grounds that Disney acted as a common carrier.⁷² Disney appealed to the state’s highest court.⁷³ The California Supreme Court granted Disney’s petition for review and ultimately affirmed the Court of Appeal’s decision to classify thrill rides as common carriers.⁷⁴

The Plaintiffs now plan to move ahead with their civil lawsuit against Disney.⁷⁵ After this ruling, the Plaintiffs may unfairly benefit from a slam-dunk case. The Plaintiffs will most likely win if they can prove the Indiana Jones ride could be safer. The attraction is controlled by computers, so Disney could always slow down the speed or even smooth out the sharp turns. Disney could make the experience as smooth and uneventful as taking a bus down a city street. Now that the Indiana Jones ride is classified a common carrier, Disney may have no choice but to do just that.

V. ANALYSIS OF THE CALIFORNIA SUPREME COURT’S DECISION IN

66. *Gomez*, 35 Cal. 4th at 1127.

67. *Id.*

68. *Id.* at 1128.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Gomez*, 35 Cal. 4th at 1128.

73. *Id.*

74. *Id.* at 1141–42.

75. Terence Chea, *Amusement Parks Liable for Safety of Thrill Rides, State Court Rules*, SFGATE.COM, June 16, 2005, <http://sfgate.com/cgi-bin/article.cgi?file=/news/archive/2005/06/16/state/n163227D85.DTL>.

*GOMEZ V. DISNEY**A. The Court Failed to Consider Legislative History*

The California Supreme Court has long held that the “objective of statutory interpretation is to ascertain and effectuate legislative intent.”⁷⁶ When statutory language may lead to more than one reasonable interpretation, the court should “look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy . . . and the statutory scheme of which the statute is a part.”⁷⁷ Since room exists for interpretation of what constitutes a common carrier under section 2100, the California Supreme Court compels courts to turn to the statutory intent.⁷⁸

Unfortunately, the majority in *Gomez v. Disney* does not adhere to its own rule and fails to analyze legislative history in its opinion.⁷⁹ In fact, the decision’s dissent calls attention to this conspicuous omission.⁸⁰ “When the legislature passed these statutes in 1872, it almost certainly did not intend that they would be applied to the kind of amusement park thrill ride at issue here, and the majority notably does not assert otherwise.”⁸¹ The dissent further explained that “[u]nder our rules of statutory interpretation, this should be the controlling factor in deciding the question at issue here.”⁸²

1. The Court Ignored the Construction of the Statute

When determining the statutory intent, the court must “determine the legislature’s intent *when it enacted the statute*” in question.⁸³ Evidence demonstrates that the legislature could not have intended thrill rides to be a subject of the statute in 1872 because the necessary technology behind such rides had yet to reach America.⁸⁴ In fact, the first roller coaster in America

76. *People v. Woodhead*, 43 Cal. 3d 1002, 1007 (1987).

77. *Id.* at 1008.

78. *See id.*

79. *See Gomez v. Super. Ct. (Walt Disney Co.)*, 35 Cal. 4th 1125, 1142 (2005) (Chin, J., dissenting).

80. *Id.*

81. *Id.*

82. *Id.*

83. *City of Burbank v. State Water Res. Control Bd.*, 35 Cal. 4th 613, 625 (2005) (emphasis added).

84. *A Short History of Rollercoasters*, <http://www.themedattraction.com/coaster.htm> (last visited Nov. 18, 2006).

was not introduced until 1884, twelve years after the legislature passed the statute.⁸⁵ California's first thrill park opened to the public in Santa Cruz more than three decades later in 1904.⁸⁶

In 1872, the legislature understood carriers for reward to mean stagecoaches, carriages, and the fledgling railroad.⁸⁷ In fact, the legislative notes show the 1872 statute was triggered by a case involving a stagecoach.⁸⁸ To identify common carriers, the legislature used a note entitled, "Who are Treated as Common Carriers by the Courts of California," which contained a list of common carriers, including: stagecoaches, steamboats, steamtugs, railroads, and ferrymen.⁸⁹ That same note states "Common carriers . . . [are] [p]roprietors of stage coaches, and stage wagons, and railroad cars . . . so are truckers, wagoners, teamsters, cartmen, and porters, who undertake to carry goods for hire, as a common employment, from one town to another . . . or from one part of a town or city to another."⁹⁰ Clearly a thrill ride consisting of a fast, turbulent, jarring track that whizzes a passenger past audio-animatronics figures and pyrotechnic special effects is far different from the examples listed by the legislature.

2. The Court Failed to Consider the Purpose of the Statute

Two treatises claim that the *purposes* of sections 2100 and 2101 are to ensure the progression of commerce.⁹¹ At the time that the statute was enacted, the legislature realized the importance of railroads and steamboats to the economy.⁹² The expeditious moving of goods and commercial agents from location A to location B served to stimulate the economy and make regional businesses wealthier.⁹³ The legislature wanted the utmost safety for the movement of people and cargo so that there would be no hindrance to economic growth in California.⁹⁴ Moreover, the legislature

85. *Id.*

86. Charles Hillinger, *Time Warp: Boardwalk Recalls Era When Life Was a Beach*, L.A. TIMES (San Diego County edition), Aug. 27, 1989, at 3.

87. *Gomez*, 35 Cal. 4th at 1144.

88. *Id.*

89. *Id.* (citing Code Commrs., notes foll. Ann. Civ. Code, § 2168, at 27–28 (1st ed. 1874, Haymond & Burch, commrs.-annotators)).

90. *Id.*

91. *Gomez*, 35 Cal. 4th at 1145 (citing JOSEPH ANGELL, A TREATISE ON THE LAW OF CARRIER OF GOODS AND PASSENGERS (1849); ISAAC REDFIELD, THE LAW OF CARRIERS OF GOODS AND PASSENGERS (1869)).

92. *Id.*

93. *Id.*

94. *Id.*

labeled the statutory code section “Carriage,” further demonstrating that, in enacting the statute, the legislature had in mind the carrying of goods and people.⁹⁵ Clearly, amusement park operators are not in the business of transporting cargo and people between various locations. Accordingly, thrill rides do not influence the economy or bring wealth to the region in the manner contemplated by the legislature in the enactment of sections 2100 and 2101.

3. Courts Must Give Statutory Language a Common Sense Meaning

When analyzing legislative intent, courts should give statutory language a common sense meaning.⁹⁶ As the court stated in *Dyna-Med v. Fair Employment & Housing Commission*, “[s]tatutes are to be given a reasonable and commonsense interpretation consistent with the apparent legislative purpose and *intent* ‘and which, when applied, will result in a wise policy rather than mischief or absurdity.’”⁹⁷ In determining a legislature’s intent, courts should also consider the consequences that result from a particular interpretation.⁹⁸

Applying a common carrier standard “to conventional transportation devices is completely consistent with the purpose and design of such devices: to provide smooth, secure and uneventful transportation.”⁹⁹ In contrast, the purpose of thrill rides is to frighten and surprise the rider by utilizing means that present the impression of inherent danger. Dangerous elements are intrinsic to these rides, and passengers choose these rides for exactly this reason. Some may argue that thrill ride passengers seek imagined danger, rather than real danger. This argument falls short, since passengers are not watching a movie about roller coasters; rather, they are *on* the roller coaster. Imagined danger does not exist when a passenger is plummeting 200 feet and speeding through extremely tight twists and turns at velocities exceeding 100 miles an hour. The danger is real.

95. *Id.*

96. *People v. Nguyen*, 22 Cal. 4th 872, 878 (2000).

97. *Dyna-Med, Inc. v. Fair Employment & Hous. Comm’n*, 43 Cal. 3d 1379, 1392 (1987) (internal citation omitted).

98. *In re Estate of Ryan*, 21 Cal. 2d 498, 513 (1943).

99. *Gomez v. Super. Ct. (Walt Disney Co.)*, 35 Cal. 4th 1125, 1148 (2005).

B. The Court's Misguided Approach to State Case Law Erroneously Compelled Its Conclusion

1. Majority Opinion Ignored Relevant California Case Law

Although the court in *Gomez v. Disney* discussed section 2100, the majority predicated its opinion upon California case law.¹⁰⁰ However, while a few cases concede the point,¹⁰¹ California case law does not necessarily support the conclusion that roller coasters and other thrill rides fall within the definition of common carrier.¹⁰²

First, the majority opinion failed to adhere to its own rationale in *People v. Duntley*, where the court held that “the law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons who have not expressly assumed that character, or by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it.”¹⁰³ Undoubtedly, Disney did not expressly assume the character of a common carrier when operating its Indiana Jones ride. Disney never held out to visitors that this attraction is a public mode of transportation. Moreover, neither Disney’s conduct nor the nature of the business would justify a belief that Disney intended to assume the classification of common carrier.

Second, the court’s flawed majority opinion failed to consider its previous holding in *McCordic v. Crawford*, where the court ruled on the standard of liability for “[a] proprietor, or one who operates a place of amusement.”¹⁰⁴ In *McCordic*, an injured plaintiff obtained a judgment against the operator of a thrill ride called the “Loopa.”¹⁰⁵ The court held that the proprietors, or those who operate a place of amusement, are held to the ordinary negligence standard of care, rather than the utmost standard of care that applies to common carriers under California Civil Code section 2100.¹⁰⁶ The *McCordic* court reasoned that, under negligence law, operators of amusement rides are akin to any other business that invites guests onto their property for financial gain and, accordingly, owe a duty of

100. *Id. passim*.

101. *See Kohl v. Disneyland, Inc.*, 201 Cal. App. 2d 780 (Ct. App. 1962); *see also Barr v. Venice Giant Dipper Co.*, 138 Cal. App. 563, 564 (Ct. App. 1934).

102. *See People v. Duntley*, 217 Cal. 150, 164 (1932); *see also McCordic v. Crawford*, 23 Cal. 2d 1, 6–7 (1943); *see also Potts v. Crafts*, 5 Cal. App. 2d 83, 84 (Ct. App. 1935).

103. *Duntley*, 217 Cal. at 164; *Samuelson v. Pub. Util. Com.*, 36 Cal. 2d 722, 730 (1951).

104. *McCordic*, 23 Cal. 2d at 6.

105. *Id.* at 3–4.

106. *Compare McCordic*, 23 Cal. 2d at 6–7, with CAL. CIV. CODE § 2100 (2005).

care to those guests.¹⁰⁷ The majority opinion in *Gomez* distinguished *McCordic* by claiming the case “did not address the duty of care of the operator of an amusement park.”¹⁰⁸ The majority in *Gomez* is incorrect, because *McCordic* cited opinions from other jurisdictions to show that it is well-settled law that owners and operators of amusement parks are required to exercise the measure of care owed to invitees, including the reasonable care in the construction, maintenance, and management of the ride.¹⁰⁹

Furthermore, in *Davidson v. Long Beach Pleasure Pier Co.*, a California appellate court applied what seemed to be a heightened reasonable care standard, rather than the utmost safety standard, in a case involving an accident on a thrill ride called “tilt-a-whirl.”¹¹⁰ In *Davidson*, a girl sustained an injury during the course of the ride.¹¹¹ The court held that “[an amusement park] is required to maintain in a reasonably safe condition, every contrivance used in its premises, and to properly inspect and supervise the same . . . [It is their] further duty to use reasonable care to see that [passengers] were not injured while the tilt-a-whirl was running.”¹¹² Finally, in *Potts v. Crafts*, a California court stated that “[t]he proprietor of a public place of amusement owes to his patrons the duty of using ordinary or reasonable care to see that they are not injured.”¹¹³

2. The Majority Opinion Felt Persuaded by Cases Not on Point or Lacking Even a Minimal Analysis

The majority opinion in *Gomez v. Disney* emphasized three California cases that concluded roller coasters and other similar attractions are common carriers.¹¹⁴ Although the cases cited by the majority opinion do in fact classify a recreational ride as a common carrier,¹¹⁵ these cases are either not on point or lack the proper analysis for their findings.

First, in *McIntyre v. Smoke Tree Ranch Stables*, the operator of a

107. *McCordic*, 23 Cal. 2d at 6–7.

108. *Gomez v. Super. Ct. (Walt Disney Co.)*, 35 Cal. 4th 1125, 1136–37 n.5 (2005).

109. See *McCordic*, 23 Cal. 2d at 6–7.

110. *Davidson v. Long Beach Pleasure Pier Co.*, 99 Cal. App. 2d 384, 385–87 (Ct. App. 1950).

111. *Id.* at 386.

112. *Id.* at 387.

113. *Potts v. Crafts*, 5 Cal. App. 2d 83, 84 (Ct. App. 1935).

114. *Gomez v. Super. Court (Walt Disney Co.)*, 35 Cal. 4th 1125, 1132–33 (2005).

115. *McIntyre v. Smoke Tree Ranch Stables*, 205 Cal. App. 2d 489, 492 (Ct. App. 1962); *Barr v. Venice Giant Dipper Co.*, 138 Cal. App. 563, 564 (Ct. App. 1934); *Kohl v. Disneyland, Inc.*, 201 Cal. App. 2d 780, 784 (Ct. App. 1962).

guided mule train that took paying passengers on a roundtrip from Palm Springs to Tahquitz Falls was found to be a common carrier.¹¹⁶ The Court of Appeal reasoned that “a person who paid a roundtrip fare for the purpose of being conducted by mule over the designated route between fixed termini, purchased a ride . . . and that the transaction between them constituted an agreement of carriage.”¹¹⁷ *McIntyre* is inapposite because, for the purposes of determining whether the common carrier rule should apply, there are several differences between a desert mule train ride and a roller coaster. One, the *purpose* of engaging in this desert mule ride is extremely different from the purpose of boarding a roller coaster. Passengers embarked on the mule ride in order to experience a traditional method of transportation to the main attraction, which was Tahquitz Falls. The mule riding was incidental to the primary objective, which was to view Tahquitz Falls. In contrast, the purpose of riding on a roller coaster is to have a thrilling experience while being dropped hundreds of feet, and turned upside-down several times, at speeds exceeding 100 miles per hour. Two, the *expectation* for riding in a mule train is that of a smooth, uneventful, and methodical passage through the desert. The expectation of riding a roller coaster is therefore the exact opposite of that of the mule train, as the roller coaster passenger desires a jarring, eventful, and chaotic experience. In fact, the more chaotic, the better! Three, the mule train, although it exists in a recreational context, is set up to *transport* passengers. The mule train carried passengers from Palm Springs to Tahquitz Falls,¹¹⁸ a journey of several miles.¹¹⁹ A typical roller coaster tends to move passengers around for about two to three minutes, but generally does not provide transportation to alternate locations. So, the court in *McIntyre* was incorrect in analogizing a mule train to a roller coaster.

Second, in *Barr v. Venice Giant Dipper Co.*, the operator of a roller coaster that “was in the nature of a miniature scenic railway consisting of a train of small cars constructed to carry two passengers each” was a common carrier.¹²⁰ The court opined that “[t]he owner and operator of a scenic railway in an amusement park is subject, where he has accepted passengers on such railway for hire, to the liabilities of a carrier of passengers generally.”¹²¹ *Barr* is unpersuasive for two reasons. One, the

116. *McIntyre*, 205 Cal. App. 2d at 492.

117. *Id.*

118. *Id.* at 490.

119. David Lansing, *Tahquitz Canyon*, SUNSET, Feb. 2006, available at <http://www.sunset.com/sunset/travel/california/article/0,20633,1143706,00.html>.

120. *Barr*, 138 Cal. App. at 563–64.

121. *Id.* at 564.

issue before the court was not whether the attraction was a common carrier, but rather what sort of liability the owner and operator faced.¹²² The *Barr* opinion contains little discussion about the attraction's common carrier status, and accordingly it is a mistake for the court to cite. Two, it is unclear if this attraction is a scenic railway or a roller coaster. If it is a scenic railway, then it should be considered a common carrier, even if it is in the context of an amusement park. A scenic railway, like a mule train ride, is differentiated from a roller coaster.

Third, in *Kohl v. Disneyland, Inc.*, the operator of a stagecoach ride within the context of an amusement park was a common carrier.¹²³ In *Kohl*, the plaintiffs were riding on "The Surrey with the Fringe on Top" attraction, which was a horse-drawn carriage.¹²⁴ "While carrying passengers, the horses became alarmed and ran, causing the carriage to tip over."¹²⁵ The court stated that "[b]ecause of the passenger-carrier relationship between the parties, the duty imposed upon the defendant was to exercise the utmost care."¹²⁶ Yet, *Kohl* offers little support for the majority's holding in *Gomez v. Disney* for several reasons. One, although the attraction is in an amusement park, it perfectly matches the common carrier definition set forth in section 2100.¹²⁷ To further illustrate the point, the legislative history of section 2100 lists stagecoaches and horse drawn carriages as common carriers.¹²⁸ Hence, the stagecoach in *Kohl* is *not* a thrill ride, but rather a traditional form of transportation not relevant to this discussion. The Indiana Jones ride, just like all thrill rides, does not resemble a stagecoach. Two, the issue before the Court of Appeal was whether there was "substantial evidence" to support the jury's verdict in the lower court.¹²⁹ In answering this question, the court asserted that a "passenger-carrier relationship" existed between the plaintiffs and Disneyland.¹³⁰ However, the court provided no analysis to support this assertion. "These analytical omissions may have resulted from the case's procedural posture and the parties' contentions; Disneyland did not raise the issue on appeal, probably because it won in the trial court and was defending the verdict on appeal based only on the adequacy of the

122. *See id.*

123. *Kohl v. Disneyland, Inc.*, 201 Cal. App. 2d 780, 780–84 (Ct. App. 1962).

124. *Id.* at 782.

125. *Id.*

126. *Id.* at 784.

127. *See* CAL. CIV. CODE § 2100 (2004).

128. *See* CAL. CIV. CODE § 2100 (1874); *see also Gomez*, 35 Cal. 4th at 1144 (noting that stagecoaches are listed as common carriers).

129. *Kohl*, 201 Cal. App. 2d at 784.

130. *Id.* at 787.

evidence.”¹³¹ Thus, it is a grave error for the majority in *Gomez* to use the *Kohl* case as authority since the proposition of whether thrill rides are common carriers was never considered by the court, and accordingly the majority opinion is incomplete.¹³²

The majority was also persuaded by *Neubauer v. Disneyland, Inc.*, where a federal district court construing California law classified a Disneyland attraction as a common carrier,¹³³ but this case should not have persuaded the California Supreme Court in *Gomez*. The analysis from the federal court is only one page long and lacks even a minimal explanation of the reasoning behind its conclusion. Indeed, its lone rationale is that “the California statutory common carrier definition is very broad. Any narrowing of that definition must be for the legislature and not the court.”¹³⁴ The court in *Neubauer* even acknowledged that amusement park rides arguably were not contemplated by the common carrier theory.¹³⁵ Therefore, the California Supreme Court should not have relied on *Neubauer*.

C. The Court Did Not Take into Account That Ordinary Negligence Law and State Regulations Already Accommodate for Thrill Ride Dangers

1. Negligence Law 101

A majority of courts have held that standard negligence law is comprehensive and forceful enough to handle issues related to amusement park rides. In *most* states, courts have held that the standard of care required of amusement ride operators is the care that reasonable and prudent persons would exercise under the circumstances.¹³⁶ This standard requires an amusement park to exercise a degree of care in operating a thrill

131. *Gomez*, 35 Cal. 4th at 1152–53 (Chin, J., dissenting).

132. *See, e.g.*, *People v. Alvarez*, 27 Cal. 4th 1161, 1176 (2002) (“[I]t is axiomatic that cases are not authority for propositions not considered.”).

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

134. *Id.*

135. *Id.*

136. The majority of courts that have decided this issue have applied this general rule. *See, e.g.*, *Sergermeister v. Recreation Corp. of Am.*, 314 So. 2d 626, 630 (Fla. Dist. Ct. App. 1975); *Harlan v. Six Flags Over Ga., Inc.*, 297 S.E.2d 468 (Ga. 1982); *Rivere v. Thunderbird*, 353 So. 2d 346, 347 (La. Ct. App. 1977); *Siciliano v. Capitol City Shows, Inc.*, 475 A.2d 19, 25 (N.H. 1984); 27A AM. JUR. 2D *Entertainment and Sports Law* § 90 (1996); J.H. Cooper, Annotation, *Liability of Owner, Lessee, or Operator for Injury or Death on or near Loop-o-plane, Ferris Wheel, Miniature Car, or Similar Rides*, 86 A.L.R. 2D 350 (1962); F.M. English, Annotation, *Liability to Patron of Scenic Railway, Roller Coaster, or Miniature Railway*, 66 A.L.R. 2D 689 (1959).

ride commensurate with the dangers and risks created by that particular ride.¹³⁷

Accordingly, what constitutes reasonable care varies “in proportion to the danger to be avoided and the consequences that might reasonably be anticipated.”¹³⁸ Furthermore, “in the exercise of ordinary care . . . the amount of caution required by the law increases, as does the danger that reasonably should be apprehended.”¹³⁹ Since roller coasters and other similar attractions are inherently dangerous, the law already demands a higher standard of care. The operators must act in a reasonable manner to ensure safety of the riders. As the foreseeable risk increases, so does the duty of care. Since these are machines that often involve fast speeds, sudden drops, and young children as patrons, operators face an extremely high duty of care, often referred to as extraordinary diligence.¹⁴⁰ As Prosser and Keaton noted:

[I]f the risk is an appreciable one, and the [possible consequences are serious, the question is not one of mathematical probability alone. The odds may be a thousand to one that no train will arrive at the very moment that an automobile is crossing a railway track, but the risk of death is nevertheless sufficiently serious to require the driver to look for the train and the train to signal its approach. It may be highly improbable that lighting will strike at any given place or time; but the possibility is there, and it may require precautions for the protection of inflammables. As the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution.¹⁴¹

Instead of the court classifying every roller coaster and similar attraction as a common carrier, the court should have turned to existing law. Using Prosser’s definition above, the court should not have looked to the probability of an injury as a result of riding a thrill ride, but should rather look at the gravity of harm that could occur *should* an accident happen. As such, the court should have held that the elevated gravity of harm creates a high duty of care. For example, a thrill ride involving a 100-foot drop and speeds exceeding ninety miles per hour will impose a substantially high duty of care. Even if the probability of injury on this fictional ride is low, the gravity of harm, should an injury occur, remains elevated. Accordingly, the duty of care is already substantially high and

137. *E.g.*, *Sergermeister*, 314 So. 2d at 628.

138. *Warner v. Santa Catalina Island Co.*, 44 Cal. 2d 310, 317 (1955).

139. *Jensen v. Minard*, 44 Cal. 2d 325, 328 (1955).

140. For an example of “extraordinary diligence,” see *Sergermeister*, 297 S.E.2d at 469.

141. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 31, at 171 (5th ed. 1984).

does not need to be elevated further to common carrier status.

2. Closer Look at Theme Park Safety

The California Supreme Court in *Gomez* arguably contorted the definition of common carrier because it felt thrill rides need to be safer.¹⁴² The decision may have been influenced by the widespread media attention to an unfortunate situation at a Florida theme park where a four-year old boy died after riding a thrill ride.¹⁴³ In addition, the justices may have ruled in response to local coverage of a fatal accident on Disney's Big Thunder Mountain Railroad thrill ride in the Anaheim park.¹⁴⁴ Although these incidents were tragic, they were unusual.

Even if the court felt it necessary to contort a statute to protect patron safety, statistics show that thrill rides in California are actually extremely safe.¹⁴⁵ In fact, in 2004, Southern California had three hundred fifty reported accidents at thrill parks, but none resulted in serious injury or death.¹⁴⁶ Three hundred fifty minor injuries¹⁴⁷ in an industry of 110 million individual rides¹⁴⁸ is an acceptably low statistic.

As mentioned above, the last fatality in Southern California occurred at Disneyland on the Big Thunder Mountain Railroad attraction in 2003.¹⁴⁹ In that case, the state blamed the accident on faulty maintenance,¹⁵⁰ which is a breach of extraordinary diligence. Here, Disney would be, and should be, liable, and the victims of this tragedy should likely recover damages without placing common carrier status on Disney or an utmost care standard of care. This illustrates how deserving plaintiffs have a remedy against negligent ride operators, regardless of common carrier classification.

A day at an amusement park should not end in death and it is the job of courts and legislature to ensure the public's safety. As mentioned

142. See *Gomez v. Super. Ct. (Walt Disney Co.)*, 35 Cal. 4th 1125, 1149 (2005) (Chin, J., dissenting).

143. See Maura Dolan & Kimi Yoshino, *High Court Raises Bar for Safety of Thrill Rides*, L.A. TIMES, June 17, 2005, at A1.

144. *Man Killed in Roller Coaster Accident at Disneyland*, CNN.COM, Sept. 5, 2003, <http://www.cnn.com/2003/US/West/09/05/coaster.accident.ap>.

145. See News Brief, Cal. Attractions & Park Ass'n, Common Carrier Case Before State Supreme Court (Apr. 1, 2005), http://www.capalink.org/news/common_carrier.html.

146. Dolan & Yoshino, *supra* note 143, at A1.

147. *Id.*

148. Cal. Attractions & Parks Ass'n, *supra* note 145.

149. Dolan & Yoshino, *supra* note 143, at A1.

150. *Disneyland Takes Responsibility in Roller Coaster Death*, NBC4.TV, Dec. 2, 2005, <http://www.nbc4.tv/news/5453261/detail.html>.

earlier, four fatalities occurred nationwide at amusement parks in 2004.¹⁵¹ Two of these fatalities occurred at water parks: the first victim was “[a] [four]-year-old boy . . . [who] [l]ifeguards found . . . floating in five feet of water” at Water Works in Cuyahoga Falls, Ohio;¹⁵² while the second victim was “[a] [nineteen]-year-old man [who] drowned at Lake Quassapaug Amusement Park in Middlebury, Connecticut.”¹⁵³ The nineteen-year-old man was a camp counselor who “was reportedly a good swimmer.”¹⁵⁴ Although both deaths were extremely tragic, they would have occurred even if the respective states had classified thrill rides as common carriers.

The other two fatalities in 2004 occurred on roller coasters. In the first incident, a passenger died after falling out of a Superman-themed roller coaster at Six Flags New England, in Agawam, Massachusetts.¹⁵⁵ The decedent’s family told the press that the decedent suffered from advanced cerebral palsy and was “sickly and handicapped.”¹⁵⁶ Family members felt the park never should have allowed the decedent on the roller coaster in the first place.¹⁵⁷ In response, a Six Flags official stated, “[T]he federal Americans with Disabilities Act prohibits parks from preventing disabled people from boarding amusement ride as long as they are able to board without assistance from park personnel.”¹⁵⁸ Although it remains unclear how the decedent fell from the ride, a state investigation determined that the ride did pass state inspections and allowed the ride to reopen.¹⁵⁹ While questions remain in this unusual case, a certainty persists that forcing a common carrier standard upon this ride would not have prevented this accident from occurring.

In the second fatality, a man died after having surgery the day after he was involved in an accident on the “Revenge of the Mummy” ride at Universal Studios in Orlando, Florida.¹⁶⁰ In this incident, the man was

151. LEVENSON, *supra* note 14, at 8.

152. RideAccidents.com, Boy, 4, Dies From Water Park Injuries, <http://www.rideaccidents.com/2004.html#jul6> (last visited Nov. 20, 2006).

153. RideAccidents.com, Teen Drowns at Connecticut Amusement Park, <http://www.rideaccidents.com/2004.html#jul16> (last visited Nov. 20, 2006).

154. *Id.*

155. RideAccidents.com, Man Killed in Fall from Intamin’s Superman Ride of Steel Roller Coaster at Six Flags New England, <http://www.rideaccidents.com/2004.html#may1b> (last visited Nov. 20, 2006).

156. *Id.*

157. *Id.*

158. *Id.*

159. *See id.*

160. *Man Dies After Fall While Boarding Theme Park Ride*, LOCAL6.COM, Sept. 23, 2004,

boarding the roller coaster when he slipped from the platform and fell four feet, banging his abdomen and head on the side of the tracks.¹⁶¹ The man remained conscious the whole time following the accident, and scheduled for surgery the following day.¹⁶² During surgery, the man died on the operating table due to complications from a previous stomach ailment.¹⁶³ Although unfortunate, this fatality originated from a slip and fall that could have occurred on any business premises. As an invitee, there is a heightened level of duty to protect people. Consequently, Universal Studios may be liable, but either way, classifying the Mummy ride as a common carrier would not have further protected this individual.

3. New State Regulations Now Exist

In late 2001, the state legislature enacted tough regulations governing amusement rides operated anywhere in the State of California.¹⁶⁴ Many states have no such regulations,¹⁶⁵ including Florida, which has the largest amusement park industry in the country.¹⁶⁶ Section 344.5 of the California Code of Regulations expressly limits the application of these regulations to permanent rides in amusement parks and expressly excludes all other potential attractions, from playgrounds to hot air balloons.¹⁶⁷ The new law provides that each new permanent amusement ride must pass a demanding and comprehensive inspection “before the ride is placed in operation and opened to the public.”¹⁶⁸ For all existing rides, the law requires annual inspections that “include both a structural inspection and an operational inspection.”¹⁶⁹ The state requires record keeping in conjunction with each permanent ride, and will conduct audits of the paperwork.¹⁷⁰ The records shall include, but are not limited to, “records of accidents, records of employee training, and records of maintenance, repair, and inspection of the ride.”¹⁷¹ Moreover, the state regulations require an unannounced

<http://www.local6.com/print/3752688/detail.html>.

161. *Id.*

162. *Id.*

163. RideAccidents.com, Woman Injured at Universal Studios' Mummy Roller Coaster, <http://www.rideaccidents.com/2004.html#sep23> (last visited Nov. 20, 2006).

164. See CAL. CODE REGS. tit. 8, §§ 344.5–344.17 (2001).

165. SaferParks.org, Inventory of State Amusement Ride Safety Regulations (Sept. 1, 2006), http://www.saferparks.org/database/state_inventory.php.

166. See Zoltak, *supra* note 23, at 14, 16.

167. CAL. CODE REGS. tit. 8, § 344.5 (2001).

168. *Id.* § 344.8(a).

169. *Id.* § 344.8(c)(3).

170. *Id.* § 344.8(d)(1).

171. *Id.*

inspection during park hours.¹⁷²

If the state inspector “determines that a permanent amusement ride . . . presents an imminent hazard or is otherwise unsafe for patrons,” the state may shut down the ride.¹⁷³ Moreover, operation of the ride will not be restored “until the conditions cited in the Order Prohibiting Operation have been corrected and approved.”¹⁷⁴ The court did not consider the state’s control over the parks.¹⁷⁵ These relatively new arduous requirements clearly push operators into a higher level of care for their rides. Even if the court incorrectly deemed California’s amusement parks unsafe, it should have at least considered that the legislature recently dealt with the issue and should have allowed more time to see what affects these laws would have on amusement parks.

D. California Business Will Unfairly Suffer Due to the State Supreme Court’s Flawed Ruling in Gomez v. Disney

1. California Amusement Parks Will Lose Business to Parks from Other States

The amusement park industry is highly competitive¹⁷⁶ and each park must build an even more thrilling attraction each year to keep visitors coming. In 2005, new attractions opened across the country that featured the “fastest coaster in the country,” “steepest drop in the country,” and the “highest loop in the country.”¹⁷⁷ Amusement parks are constantly competing with each other’s attractions to keep people paying the admission price in order to stay in business. Now that California has classified thrill rides as common carriers, the state’s theme parks will most likely have to scale back the thrills in order to maintain utmost safety. Moreover, many parks might have to alter or even remove some of the more intense thrill rides since the liability for those rides is too high.

It will become economically unfeasible for amusement parks in California to build new and exciting rides. Since the parks now must adhere to an utmost safety standard, they will risk massive lawsuits unless they build every ride with the utmost safety. This means that rides with

172. CAL. CODE REGS. tit. 8, § 344.8 (d)(2)(A) (2001).

173. *Id.* § 344.9(a).

174. *Id.* § 344.9(c).

175. *See Gomez v. Super. Ct. (Walt Disney Co.)*, 35 Cal. 4th 1125 (2005).

176. *See generally* Zoltak, *supra* note 23.

177. *See* Sophia Banay, *World’s Most Fun Amusement Parks 2005*, FORBES, May 26, 2005, available at http://www.forbes.com/2005/0/travel/2005/05/26/cx_sb_0526feat.html.

two hundred-foot drops should not be built since rides with fifty-foot drops are safer. In fact, perhaps rides with *no drops* should be built since that is even safer! Attractions that hit speeds of one hundred miles per hour should be slowed down to fifty miles per hour since that is safer. Plainly, these new rides will not attract a public that is looking for bigger thrills every year. Visitors will likely ferry their tourist dollars elsewhere as a California elevator-drop ride will simply turn into just an elevator. The public will not pay for a ride in an elevator.

Amusement park visitors, which totaled 328 million nationwide in 2004, will spend their tourist dollars in other states.¹⁷⁸ Just before *Gomez v. Disney* was heard by the court, *Time* magazine warned its nationwide readers that if California alters its standard from *reasonable care* to *utmost care*, the state's amusement parks could have "lower speeds, more restraints and fewer thrills."¹⁷⁹ This could create poor publicity for California theme parks which will in turn hurt tourism. Not only will gate revenues drop, but the twenty billion dollars the theme park industry and related businesses generate for the state, including tourist spending at hotels, restaurants, transportation, and retail stores¹⁸⁰ will plummet with it.

Additionally, California's insurance costs for amusement parks will now substantially increase. As a result of *Gomez*, operators of thrill rides are now insurers of their patrons.¹⁸¹ Since thrill rides are inherently dangerous and therefore could always be safer, the court's ruling forces liability on amusement parks for any incident that might occur. These cost increases will either pass on to the consumer in increased ticket prices or become absorbed by the amusement park. Either way, the effect of this increase puts California at a disadvantageous position versus parks in other states.

2. The Court's Language "Roller Coasters and Other Similar Attractions" Creates Excessive Vagueness, Leaving Amusement Park Liability for Non-Roller Coasters in the Dark

With this decision, operators of amusement parks will lack a clear understanding of the liability for attractions other than roller coasters in their own park. The plain language of the opinion states that roller coasters

178. Zimmerman, *supra* note 24.

179. Jeanne McDowell, *Thrill Rides: Headed for a Slowdown?*, TIME, Dec. 15, 2003, at 21.

180. California Attraction & Parks Association, Welcome to CAPA, <http://www.capalink.org> (last visited Oct. 23, 2005).

181. *Gomez v. Super Ct. (Walt Disney Co.)*, 35 Cal. 4th 1125, 1148 (2005) (Chin, J., dissenting).

and other similar attractions can be common carriers, but never defines or explains what is included in “other dissimilar, amusement rides.”¹⁸² A roller coaster is defined as a “steep, sharply curving elevated railway with small open passenger cars that is operated at high speeds as a ride, especially in an amusement park.”¹⁸³ The question remains whether only rides with railways and high speeds are considered similar attractions, or, whether the court considers attractions that offer similar thrills to be common carriers. Hypothetically, a large Ferris Wheel, which might be considered more prone to causing injuries than a typical roller coaster, might not be a common carrier, leaving major liability questions unanswered.

As the liability questions increase, so do the costs of insurance. Wayne Pielre, a lawyer who represents amusement park industry interests, filed an amicus brief co-signed by the International Association of Amusement Parks and Attractions, which stated that “exposing operators to greater liability could well have an impact on insurance premiums. . . .”¹⁸⁴ California’s businesses, from parks with million-dollar roller coasters to bars with mechanical bulls, will face higher premiums.¹⁸⁵ The President and Chief Executive Officer of Hans & Wilkerson Insurance, which provides insurance coverage to over thirty small U.S. amusement parks, stated that premiums for the amusement park industry are dependent upon factors such as revenue, number of rides, and previous loss experience at a particular park.¹⁸⁶ The President also stated that parks are covered by general liability insurance,¹⁸⁷ “[b]ut because of liability exposure, very few companies are willing to underwrite these risks.”¹⁸⁸ Due to the increased exposure in California, even fewer companies will underwrite these risks. Therefore, should a fatality or serious injury occur, many of the smaller parks will not be insured and will unlikely be able to afford the damages.

E. A Majority of Courts Have Adamantly Opposed Categorizing Thrill Rides as Common Carriers

1. Most States Hold Amusement Ride Operators to an Extraordinary

182. *Id.*

183. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1510 (4th ed. 2000).

184. Zoltak, *supra* note 46, at 41.

185. *Id.*

186. Banay, *supra* note 177.

187. *Id.*

188. *Id.*

Diligence Standard

As mentioned earlier, the majority of courts that have ruled on this issue have held that the care required of amusement ride operators is the care that a reasonably prudent person would exercise under the circumstances.¹⁸⁹ This section will discuss the means whereby various states handle the classification of amusement parks as common carriers.

The Supreme Court of Georgia unanimously held in *Harlan v. Six Flags Over Georgia* that ordinary care is the standard of care owed by the operator of a thrill ride.¹⁹⁰ In *Harlan*, a patron paid a fare to enter the Atlanta amusement park and subsequently became injured while riding a device called "The Wheelie."¹⁹¹ Plaintiff contended that the "operator of an amusement device . . . must exercise *extraordinary* diligence to protect the lives and persons of its passengers" (emphasis added).¹⁹² The plaintiff claimed that the thrill ride is akin to a common carrier¹⁹³ and thus faces a higher standard of care, as called for in the Georgia statute.¹⁹⁴ The court rejected this contention.¹⁹⁵ "We find it easy to distinguish between [the] operation of elevators, taxicabs, buses, and railroads, which are instruments of transportation that must be used by people to travel from one place to another, and operation of 'The Wheelie' and similar instruments, which are not."¹⁹⁶ The court further opined that expectations are different for riders of an elevator, who look for a smooth mode of transportation, and riders of a thrill ride, who "seek a sensation of speed and movement for the sake of entertainment and thrills."¹⁹⁷ Surely, a Georgia court would recognize that patrons who dare to venture onto the Indiana Jones ride seek the same "sensation of speed and movement for the sake of entertainment,"¹⁹⁸ as opposed to a smooth mode of transportation. Hence, similar to classification of the Wheelie, a Georgia court would hold that the Indiana Jones ride is not a common carrier.

189. See *supra* text accompanying note 100.

190. *Harlan v. Six Flags Over Ga., Inc.*, 297 S.E.2d 468, 469 (Ga. 1982).

191. *Id.* at 468.

192. *Id.*

193. *Id.* at 469.

194. GA. CODE ANN. §§ 18-201, 18-204.

195. *Harlan*, 297 S.E.2d at 469.

196. *Id.*

197. *Id.*

198. *Id.*

In Texas, the courts have long held that amusement rides are held to an ordinary standard of care, and are not common carriers.¹⁹⁹ In a recent Texas case, *Speed Boat Leasing, Inc. v. Doris Graf Elmer*, the court dealt with whether the operator of a speedboat that carries paying patrons on a “THRILL SCREAMING” ride through the Gulf of Mexico for pleasure, as opposed to for transportation purposes, is a common carrier.²⁰⁰ The trial court held that the speedboat is not a common carrier.²⁰¹ This holding was reversed by the Court of Appeal.²⁰² Finally, the case came before the highest court in Texas, which held that the “thrilling” ride was akin to an amusement park ride, and therefore did not constitute a common carrier.²⁰³ The court opined that when determining whether a party who engages in the transportation of patrons is a common carrier, the court looks to the party’s primary function.²⁰⁴

For an entity to be a common carrier, it must be determined that the “business of the entity is public transportation, and not transportation” that is “only incidental” to its primary business.²⁰⁵ In *Speed Boat Leasing*, for example, the boat owner’s primary purpose was to entertain passengers, and not to transport them from place to place.²⁰⁶ In fact, the transportation of passengers was only incidental to its main goal of “supply[ing] passengers with an exhilarating fun ride.”²⁰⁷ Thus, the court held that the business was not a common carrier.²⁰⁸ Similarly, Disneyland’s primary goal behind the Indiana Jones ride is to entertain and thrill the riders, and not to transport them from one location to another. In Texas, for the reasons just mentioned, a court would never classify the Indiana Jones ride as a common carrier.

According to a Utah court in *Lamb v. B & B Amusements Corp.*, a roller coaster is not a common carrier.²⁰⁹ In this case, a child sustained an injury when the third and fourth cars of a children’s roller coaster separated

199. See, e.g., *Scroggins v. Harlingen*, 112 S.W.2d 1035, 1041 (Tex. 1938); *Vance v. Obadal*, 256 S.W.2d 139, 140 (Tex. 1953).

200. *Speed Boat Leasing, Inc. v. Elmer*, 124 S.W.3d 210, 211 (Tex. 2003).

201. *Id.* at 213.

202. *Id.* at 214.

203. *Id.* at 213.

204. *Id.*

205. *Id.* at 211.

206. *Speed Boat Leasing, Inc.*, 124 S.W.3d at 213.

207. *Id.* (internal quotations omitted).

208. *Id.*

209. *Lamb v. B & B Amusements Corp.*, 869 P.2d 926, 930–31 (Ut. 1993).

after a bolt fastening the two cars together failed.²¹⁰ The injured child sued the amusement park and asked the court to classify the ride as a common carrier.²¹¹ The court refused, holding “[a]musement rides are not designed to provide comfortable, uneventful transportation, even when the equipment operates without incident and as intended.”²¹² Rather, amusement park rides feature “high speeds, steep drops, and tight turns.”²¹³ The court concluded that even though it will not hold thrill rides to a common carrier standard, “operators of an amusement ride must still exercise a reasonable degree of care, skill, and diligence sufficient to assure that a ride is as safe as is reasonably possible for its passengers.”²¹⁴ The Indiana Jones ride has high speeds, steep drops, and tight turns like those mentioned in *Lamb*,²¹⁵ and should remain outside the common carrier classification.

In Maryland, the courts have refused to classify entertainment devices as common carriers.²¹⁶ Instead, it has been held that the purpose of common carriers is to spur economic growth and guarantee the public a safe means for their personal transportation.²¹⁷ In *Gunther v. Smith*, a father and son sustained injuries when they were thrown from a horse-drawn wagon ride after the operator lost control of the horses.²¹⁸ The injured father and son sued the operator, asserting that the hayride was a common carrier and therefore the operator owed the highest degree of care to the passengers.²¹⁹ The court rejected this argument, holding that the common carrier standard is reserved for “providing public transportation so necessary to stimulating the channels of commerce and conveying all members of the public in their commercial and private pursuits.”²²⁰

Maryland has a history of rejecting the common carrier standard for amusement devices. In 1898, the operator of an amusement balloon ride was held to the standard of ordinary care.²²¹ During the early twentieth century, the court held that an operator of an amusement device that

210. *Id.* at 928.

211. *Id.* at 930.

212. *Id.* at 931.

213. *Id.* at 930.

214. *Id.* at 931.

215. Compare Part IV *supra*, with *Lamb*, 869 P.2d at 930.

216. *Gunther v. Smith*, 553 A.2d 1314 (Md. Ct. Spec. App. 1989).

217. *Id.*

218. *Id.* at 1315.

219. *Id.*

220. *Id.* at 1316.

221. *Smith v. Benick*, 41 A. 56, 57 (Md. 1898).

dropped patrons through a false floor to a standard of ordinary care.²²² More recently, in 1956, a Maryland court rejected a common carrier argument for a roller coaster, holding the operator had a standard of ordinary care.²²³

Along the same lines, the Connecticut Supreme Court in *Firszt v. Capitol Park Realty Co.*, held that a thrill ride does not fall under the common carrier classification.²²⁴ In fact, Connecticut, like Maryland and other states, has a long history of holding that amusement rides shall not be classified as common carriers.²²⁵ In *Firszt*, a mother and child rode in airplane-shaped cars hung by steel cables affixed to a steel support arm. Once the ride began to rotate, it would elevate the passengers fifteen feet above the ground.²²⁶ The airplane-shaped car circled around a tower at speeds up to twenty-five miles per hour.²²⁷ In this particular incident, a rod holding up the steel support arm broke and the car fell to the ground, throwing the mother and child out of the car.²²⁸ The court concluded the rules governing common carriers did not apply to this accident because the patron of an amusement park ride seeks entertainment, not transportation.²²⁹ The court held the main reason why common carrier status does not apply to amusement park rides is that people use public transportation in everyday life (from planes to elevators), but with amusement park rides, people choose to partake in the thrilling experience.²³⁰ The court summed it up succinctly:

One traveling upon his lawful occasions must perforce use the ordinary means of transportation, and is practically compelled to place himself in the care of carriers of passengers, and so the rule applied to carriers holds them to the highest degree of care and diligence. On the other hand, one desiring for his delectation to make use of pleasure-giving devices similar to the one in question is under no impulsion of business or personal necessity. He is seeking entertainment, and when invited by a manager to avail himself of the equipment provided by certain forms of amusement, he can properly ask only that he be not exposed by the

222. *Carlin v. Smith*, 130 A. 340, 342–43 (Md. 1925).

223. *Hawk v. Wil-Mar, Inc.*, 123 A.2d 328, 329 (Md. 1956).

224. *Firszt v. Capitol Park Realty Co.*, 120 A. 300, 303 (Conn. 1923).

225. *See, e.g., Godfrey v. Connecticut Co.*, 118 A. 446, 447 (Conn. 1922); *Bernier v. Woodstock Agric. Soc’y*, 92 A. 160 (Conn. 1914) (holding operators only to a standard of “reasonable care”).

226. *Firszt*, 120 A. at 302.

227. *Id.*

228. *See id.*

229. *Id.* at 303–04.

230. *Id.*

carelessness of those in charge of any given instrumentality to harm preventable by care appropriate to the operation of such instrumentality.²³¹

In *Gomez v. Disney*, Moreno embarked on the Indiana Jones ride for its entertainment value, not for transportation purposes.²³² If the incident occurred in Connecticut, Disney would presumably only be held to a duty to use reasonable care to bring about and keep the ride reasonably safe for all patrons.²³³

Florida has seven of the top ten most-attended amusement parks in North America.²³⁴ In addition, Florida has four of the top ten most-attended amusement parks in the world, including Magic Kingdom at Walt Disney World, the number one most-attended theme park in the world with 15,170,000 guests a year.²³⁵ Obviously, Florida has a bustling amusement park industry, and special attention should be paid to how its courts treat negligence liability issues. In *Sergermeister v. Recreation Corp. of America.*, a minor injured her finger on an attraction called “*Lover’s Coach*.”²³⁶ The *Sergermeister* court believed that reasonable care is the standard courts should use and quoted the state’s jury instructions on the matter: “[R]easonable care is that degree of care which a reasonably careful person would use *under like circumstances*.”²³⁷ The court felt that by adding “*under like circumstances*” to jury instructions, the liability of a specific attraction would go up and down depending on the scale of the attraction.²³⁸ For example, a massive roller coaster would have a higher safety standard than a playground slide on the park’s premises. To illustrate its point, the court stated: “The phrase, ‘*under like circumstance*,’ is akin to a temperature gauge. Thus, the reading, whether high or low, varies depending on the circumstances.”²³⁹ The California court, in *Gomez*, should have considered this “*under like circumstances*” gauge since absolute classification of all roller coasters and similar attractions as common carriers creates too high a level of liability on amusement parks.

231. *Id.* at 635–36.

232. *See Gomez v. Super. Ct. (Walt Disney Co.)*, 35 Cal. 4th 1125, 1136 (2005).

233. *Firszt*, 120 A. at 303.

234. Zoltak, *supra* note 23, at 16.

235. *Id.*

236. *Sergermeister v. Recreation Corp. of Am.*, 314 So. 2d 626 (Fla. Dist. Ct. App. 1975).

237. *Id.* at 630 (emphasis added).

238. *Id.*

239. *Id.*

2. Most of the Jurisdictions Cited By the Majority Opinion as Being in Support Did Not Consider Roller Coasters or Similar Attractions

The majority opinion in *Gomez v. Disney* has difficulty pointing to jurisdictions that support its contention that roller coasters and other similar attractions are common carriers.²⁴⁰ Of all the jurisdictions in the nation, the majority points to only four states that held an amusement device as a common carrier.²⁴¹ However, upon closer inspection, those opinions did not always involve roller coasters, but traditional modes of transportation.²⁴² For example, *Gomez* cites a Colorado case where the court classified a stagecoach as a common carrier.²⁴³ In that case, multiple patrons sustained injuries when an allegedly defective part broke off the horse-drawn stagecoach.²⁴⁴ Although the patrons rode the stagecoach for amusement purposes, it is still not a “roller coaster or other similar attraction,” but rather a statutorily defined common carrier.²⁴⁵ The *Gomez* court erred in citing this case, since the facts are completely distinguishable. The victim in *Gomez* did not ride a stagecoach, which in California would clearly be classified a common carrier, but rode a thrill ride.²⁴⁶ While a patron wants a stagecoach to uneventfully travel over some distance, the patron wants a thrill ride to accelerate, make quick turns, sudden drops, and ultimately provide an exhilarating experience. The court in *Gomez* cited only three states that held roller coasters to be common carriers, the most recent case dating back to 1931.²⁴⁷

IV. THE SIMPLE SOLUTION FOR LEGISLATURES

For all the reasons mentioned in the previous section, the court clearly erred in its judgment. To remedy this problem, the legislature should amend California Civil Code Section 2100 by simply excluding permanent

240. See generally *Gomez v. Super. Ct. (Walt Disney Co.)*, 35 Cal. 4th 1125 (2005).

241. See *id.* at 1137.

242. *Id.* at 1135 (citing *O’Callaghan v. Dellwood Park Co.*, 89 N.E. 1005 (Ill. 1909)).

243. *Lewis v. Buckskin Joe’s, Inc.*, 396 P.2d 933 (Colo. 1964).

244. *Id.* at 938.

245. *Id.* at 947.

246. *Gomez*, 35 Cal. 4th at 1127.

247. See *Brown v. Winnwood Amusement Co.* 34 S.W.2d 149, 152 (Mo. 1931) (holding that operators of a roller coaster were held to the degree of care required of common carriers); *Sand Springs Park v. Schrader*, 198 P. 983, 987 (Okla. 1921) (operators of a roller coaster were “bound to use the highest degree of care and caution for the safety of [their] patrons”); *Best Park & Amusement Co. v. Rollins*, 68 So. 417, 417–18 (Ala. 1915).

attractions at fixed-site locations engaged in the business of providing thrills and entertainment for guests. This exclusion will cover only *permanent attractions* at fixed-site amusement parks. “Permanent attractions” should be defined broadly as any attraction that is embedded within the park’s grounds. “Fixed-site amusement park” should be defined as a stationary, commercially-operated enterprise where guests are offered rides and similar attractions. These definitions will limit the amendment to fixed-site amusement parks, such as Disneyland and Universal Studios, and, accordingly, not cover attractions at nomadic recreational areas, such as carnivals and fairs.

Furthermore, the amendment should define a “ride” as any attraction where its primary purpose is not to transport passengers from one location to another. Therefore, transportation devices such as the Disneyland Parking Tram²⁴⁸ or the Disneyland Monorail²⁴⁹ will remain common carriers. These types of attractions meet the statutory definition and purpose. Every other attraction from a high-speed roller coaster to twirling teacups will be excluded. Exclusion from the statute will return theme park operators to an ordinary care standard requiring extraordinary diligence, which, for the reasons stated in this article, will allow amusement parks to remain competitive while properly protecting visitors from injury.

VI. EXIT TO YOUR LEFT—CONCLUSION

The California Supreme Court’s opinion in *Gomez v. Disney* demonstrates a flawed understanding of California case law and highlights the importance of statutory interpretation. The court may not interpret laws based on its own belief as to the safety of thrill rides. Rather, when a statute is not clear on its face, the court should rule based on the statute’s legislative history, precedent from the state’s case law, and persuasive authority from the vast majority of other jurisdictions. This court failed to correctly utilize any of these vehicles when deciding *Gomez v. Disney*.²⁵⁰

248. See Intercot West, Disneyland Inside & Out, <http://www.intercotwest.com/resortGuide/parking.asp> (last visited Nov. 11, 2005) [hereinafter *Intercot West*]. The Disneyland Parking Tram is a service provided by the Anaheim park that loads and unloads passengers at parking structures, or parking lots, and then transports the passengers to a loading/unloading spot near the park’s entrance.

249. See Intercot West, *supra* note 248 (stating that although Disneyland lists the Monorail as an attraction, its primary purpose is to transport guests from Disney’s hotel to a loading and unloading site inside the park).

250. *Gomez*, 35 Cal. 4th at 1125.

For these reasons, the California Legislature should amend the common carrier statute to exclude roller coasters and other similar attractions at fixed-site amusement parks. By doing so, the legislature will not only rescue the state's amusement parks, but also the twenty billion dollars in commerce the parks generate per year. Most importantly, it will continue to protect the safety of patrons at amusement parks. After the court's wrong turn, the state legislature now should step in and put the state back on track.

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* This Comment would never have happened if not for the guidance and assistance of Anne Braveman, my Note and Comment Editor, Professor David Tunick, and the staff of the Loyola of Los Angeles Entertainment Law Review. Also, special thanks to my fiancée, Heather Golick, for her love and support while I spent so many nights at the library to put this article together.

