5.73 CARRIERS FOR HIRE (Approved 6/88)

A. General Duty of Common Carriers to Passengers

In this case (you may find from the evidence that) the defendant is what is known in the law as a common carrier. A common carrier undertakes for pay to carry all persons who apply for passage, so long as there is room and there is no legal excuse for refusing.[1] Typical common carriers are railroads, street cars, subways, elevated railroads, buses, steamships, airplanes, taxicabs and others similarly engaged in public transportation.

A common carrier must exercise a high degree of care to protect its passengers from dangers that are known or are reasonably foreseeable. Carriers must use the utmost caution to protect their passengers, the kind of caution that is characteristic of a very careful and prudent person. A carrier must act with the highest possible care consistent with the nature of the undertaking involved.[2]

1. Disabled Passenger

Indeed, where the carrier, through its employees, is aware that a passenger about to board has a physical disability, the carrier owes that passenger an even

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[1] *Weehawken Tp. v. Erie Railroad Co*., 20 *N.J*. 572, 581 (1956).

[2] *Harpell v. Public Serv. Coord. Transp*., 20 *N.J*. 309, 316-317 (1956); *Pope v. Veterans Taxi Serv*., 97 *N.J. Super*. 274, 277 (App. Div. 1967).

greater degree of attention than if the passenger had no physical disability.[3]

2. Against Acts of Fellow Passengers

This includes the duty to protect passengers from wrongful acts of co-passengers, if the utmost care could have prevented those acts from injuring a passenger. If a danger was known or reasonably could have been anticipated, the carrier has a duty to protect its passengers from any injury that could be caused by that danger.[4]

3. As to Acts of Third Parties

This includes the duty to protect passengers from wrongful acts of a third party, if the utmost care could have prevented those acts from injuring a passenger. If a danger was known or reasonably could have been anticipated, the carrier has a duty to protect its passengers from any injury that could be caused by that danger.[5]

4. Sudden Stops or Jerks

A common carrier must exercise a high degree of care in starting, stopping or decreasing the speed of a vehicle so as not to imperil the safety of passengers.

A violent stop, jerk or lurch which would have been unlikely to occur if

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[3] *Carter v. Public Serv. Coord. Transp.*, 47 *N.J. Super*. 379, 388-389 (App. Div. 1957).

[4] *Harpell v. Public Serv. Coord. Transp.*, 20 *N.J.* 309, 316-317 (1956).

[5] *Id.*

proper care had been exercised justifies the inference of negligence in the operation or maintenance of the vehicle or its brakes.[6]

5. Overcrowding

The overcrowding of a passenger vehicle without more is not in and of itself negligent. However, it is well recognized that overcrowding creates dangers. A common carrier must exercise a high degree of care to protect its passengers from reasonably foreseeable dangers arising from overcrowding.[7]

B. When Carrier-Passenger Relationship Starts

1. At Station

A person becomes a passenger when he/she enters upon the station grounds of the carrier through the approaches provided by the carrier and that person has the intention of becoming a passenger. If you find that (a) plaintiff entered the station grounds through the usual way provided for passengers and, (b) plaintiff had the intention of becoming a passenger by paying the fair (either before or after entering the [train]), then plaintiff had become a passenger. He/She therefore was entitled to the care owed by a carrier to a passenger.[8]

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[6] *Gaglio v. Yellow Cab Co*., 63 *N.J. Super*. 206, 209 (App. Div. 1960).

[7] *Miller v. Public Serv. Coord. Transp*., 7 *N.J*. 185, 187-188 (1951).

[8] *Exton v. Central Railroad Co*., 62 *N.J.L*. 7, 12 (Sup. Ct. 1898), *aff'd* 63 *N.J.L*. 356 (E.& A.

2. Boarding Vehicle[9]

A person becomes a passenger when he/she boards the carrier's vehicle, intending to become a passenger, and the carrier actually or impliedly consents to the person becoming a passenger. The person must be present at a proper time and in a proper manner and at some place under the control of the carrier to allow the carrier to have the opportunity to exercise the degree of care which the law requires on behalf of the passenger. The carrier must know the person intends to board the vehicle. Knowledge by the carrier may be either actual or what a reasonable carrier should have been aware of by reason of the acts and conduct of the person and by the facts and circumstances presented.[10]

C. Duty as to Transportation Facilities

A common carrier has a duty to exercise reasonable care in the construction and maintenance of station buildings, platforms and approaches, so that they are reasonably safe for passengers to use them.[11] Passengers have a right to assume

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1899).

[9] As to transferring from one vehicle to another, *see Walger v. Jersey City Railway Co.*, 71 *N.J.L.* 356 (Sup. Ct. 1904), and *Rourke v. Hershook*, 3 *N.J.* 422, 425 (1950).

[10] *Martin v. West Jersey Railroad Co.*, 87 *N.J.L.* 648, 649 (E. & A. 1915); *Bernadine v. Erie Railroad Co.*, 110 *N.J.L.* 338, 343 (E. & A. 1933).

[11] *Buchner v. Erie Railroad Co.*, 17 *N.J.* 283, 285-286 (1955); *Bohn v. Hudson & Manhattan Railroad Co.*, 16 *N.J.* 180, 185 (1954).

that those facilities are reasonably safe.[12] If a carrier fails to meet this duty — by constructing or maintaining the property so as to make it likely to be a source of danger to passengers and others lawfully using the station[13] — then the carrier is liable to persons who enter the facilities in response to the carrier's invitation and are then injured as a result of the carrier's negligence.

[Add the following paragraph if a danger existed due to weather:]

If there is a danger to passengers from the effects of weather, for example, a slippery condition due to ice, if that danger reasonably could be anticipated by the carrier, the carrier has a duty of a high degree of care to its passengers.[14] In deciding whether the carrier met its duty, you should understand that the carrier must have had reasonable time to remove or remedy the condition resulting from the effects of weather.[15]

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[12] *Bohn v. Hudson & Manhattan Railroad Co*., 16 *N.J*. 180, 185 (1954).

[13] *Ibid.*

[14] *Karmazin v. Penna. Railroad Co*., 82 *N.J. Super*. 123, 130 (App. Div. 1964).

[15] *Id*. at 130-131.

[Add the following paragraph when carrier does not own or control facilities:]

The carrier owes that duty of reasonable care to passengers even if it does not own or control the facilities. That duty cannot be changed by any agreement between the carrier and the terminal company.[16]

D. Duty Owed on Discharge of Passenger[17]

1. Place of Stopping Vehicle

This includes the duty to select a reasonably safe place for the passenger to get off the vehicle and leave. If you find that the carrier, in selecting a place to unload plaintiff, failed to exercise its high degree of care, and as a result that brought about his/her injuries, you should find for plaintiff.[18] But, understand, that a common carrier does not have a duty to anticipate every uneven surface or defect in the road or alongside of the road, and then stop the vehicle to avoid the remote possibility of a passenger stepping on some uneven surface or in a depression which, even though the carrier exercised reasonable watchfulness, did not appear to be dangerous.[19]

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[16] *Horelick v. Penna. Railroad Co*., 24 *N.J. Super*. 413, 417 (App. Div. 1953), *aff'd*, 13 *N.J*. 349, 354 (1953).

[17] After stating general duty, *see* Model Civil Charge 5.30A.

[18] *Meelhein v. Public Serv. Coord. Transp*., 121 *N.J.L*. 163, 164 (E.&A. 1938).

[19] *Snell v. Coast Cities Coaches*, 15 *N.J. Super*. 595, 599 (App. Div. 1951).

2. Leaving Station

This includes the duty to use reasonable care to provide a safe means for passengers to exit the station. The duty to passengers does not end when the passengers are safely carried to their destination, but continues on while they are leaving the station where they got off the vehicle.[20]

E. Persons on Railroad Tracks

Plaintiff says that he/she was injured when he/she was hit by a moving train. The railroad company[21] claims that it lived up to its duty to plaintiff and, additionally, plaintiff was more responsible for the accident than it was. The first decision you're going to have to make is what plaintiff's status was, what category plaintiff was in when he/she was on the railroad tracks.[22] The law says that when a person is on another's property, that person falls into one of three possible categories: he/she is an invitee or a licensee or a trespasser. So when I say you must decide what status plaintiff had when the accident took place, that means that you are to determine whether plaintiff was an invitee, a licensee or a trespasser. That is important because, depending on your decision as to plaintiff's status, there

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[20] *Buchner v. Erie Railroad Co.*, 17 *N.J.* 283, 285-286 (1955).

[21] The statutory limitation on liability, *N.J.S.A.* 48:12-152, only applies to a railroad company, not to its employees. *Potter v. Finch & Sons*, 76 *N.J.* 499, 503 (1978).

[22] *Benedict v. Podwats*, 109 *N.J. Super*. 402, 407 (App. Div. 1970), *aff'd* 57 *N.J.* 219 (1970): "Indeed, the ascertainment of that status is an essential preliminary to the application of the

are different duties or standards of care that the railroad company was required to meet. In other words, if plaintiff was an invitee, the railroad company was obliged to meet a particular duty — to act in a certain way — toward plaintiff; if plaintiff was a licensee, there is a different duty that applied; and if plaintiff was a trespasser, then the railroad company owed a third kind of duty to him/her.

I begin by describing what an invitee, a licensee and a trespasser each is. As you will see, the proper category for a particular person is determined by the circumstances that brought him or her onto another's property.[23]

An invitee is a person who is on another's property for the benefit of the property owner,[24] or because his/her visit was induced and encouraged by the owner.[25] For example, if I am a homeowner and you are delivering fuel oil to me at my home, when you come onto my property, you would be an invitee since you would be there, at least in part, for my benefit, which is that I now have fuel oil available as I need it. Or, as another illustration, if I am a merchant operating a store open to the public, I am encouraging you to come into my store by being open to the public. Again, you would be an invitee.

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standard of care to be exercised by the land occupier."

[23] *Daggett v. DiTrani*, 194 *N.J. Super*. 185, 189 (App. Div. 1984).

[24] *Id*. at 189-190.

[25] *Handelman v. Cox*, 39 *N.J*. 95, 105-110 (1963). Modify language of charge if the railroad company is possessor, but not owner, of railroad tracks.

The next category is that of a licensee. A licensee is a person who, one, is not an invitee, and, two, is permitted to go onto another's property.[26] Routine customs and practices often allow you to decide whether a land owner permits or is willing to have another party come on to the property.[27] Those customs may be such that it is entirely reasonable for someone to assume that his/her presence is permitted unless he/she is told otherwise. An example of a licensee might be someone who often cuts across a corner of one's property as a shortcut, where there is no fence to prevent that. Or a licensee might be a neighbor who goes next door to borrow some tools or pay a social visit.

The final category is a trespasser. A trespasser is someone who goes onto or remains on another's property and is neither an invitee nor a licensee. A trespasser would be someone who is not on another's property for the benefit of the owner, and who is neither invited nor allowed to go onto the property. We do have a law in New Jersey which says that it is unlawful for a person other than a railroad employee to walk along railroad tracks.[28] However, merely because someone is on railroad tracks does not mean necessarily that it was unlawful. Look at all the

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[26] *Snyder v. I. Jay Realty Co.*, 30 *N.J.* 303, 312 (1959).

[27] *Ibid*.

[28] *N.J.S.A.* 48:12-152. *See also* to *Demetro v. Penna. Railroad Co*., 90 *N.J. Super*. 308 (App. Div. 1966), where child held not a trespasser when she was killed after going onto tracks to push three smaller children from path of train.

circumstances[29] under which plaintiff came to be on the railroad tracks. Did he/she mean to go onto the tracks or was he/she pushed onto the tracks? Did he/she become ill and, as a result, fall onto the tracks?[30]

To repeat, the first thing you must decide is what plaintiff's status was when he/she was on the railroad tracks. You do that by looking at all the evidence and then deciding was it more likely than not that plaintiff was an invitee; if not, then you judge whether all the evidence shows it was more likely than not that plaintiff was a licensee; if not, then plaintiff must have been a trespasser.

If you decide that plaintiff was an invitee, then the railroad company had a duty to exercise ordinary and reasonable care to protect plaintiff. It had to take steps which were reasonable and prudent for plaintiff's safety.[31]

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[29] By analogy to *Baer v. Sorbello*, 177 *N.J. Super*. 182, 184-185 (App. Div. 1981).

[30] *See Eden v. Conrail*, 87 *N.J*. 467 (1981), where plaintiff suffered an epileptic seizure while standing on railroad platform awaiting train and fell onto train tracks.

[31] *Handleman v. Cox*, 39 *N.J*. 95, 111 (1963). Note should be made of the potential assertion that a railroad can be classified as a dangerous instrumentality. *See Renz v. Penn Central Corp*., 87 *N.J*. 437, 462 (1981).

If you decide that plaintiff was a licensee, then the railroad company had a duty to not perform acts which are willfully injurious.[32] In other words, the railroad could not intentionally do something that would be highly likely to cause injury or death.[33] And where there was a concealed danger known to be present, the railroad company was bound to give warning of it.[34]

If you decide that the plaintiff was a trespasser,[35] then the railroad company had a duty

[***Where plaintiff is adult trespasser***]

to refrain from acts which are willfully injurious, that is, the railroad could not intentionally set things up so as to make it highly likely that death or injury would result.[36]

[***Where plaintiff is infant trespasser***]

to the extent that it is foreseeable that a child would intrude onto the railroad tracks, to exercise reasonable care so as to protect a youngster against an unreasonable risk

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[32] *Snyder*, *supra*, at 316.

[33] *Reilly v. Spiegelhalter*, 100 *N.J. Super*. 276, 281-282 (App. Div. 1968).

[34] *Ibid*.

[35] The Supreme Court, in *Renz*, *supra*, at 463, expressly did not determine the nature of the standard of care or if the railroad is a dangerous instrumentality.

[36] *Renz*, *supra*, at 461. *Wytupeck v. Camden*, 25 *N.J*. 450, 463 (1957).

of harm.[37] What is reasonable care is measured by the foreseeability of a child trespassing and the extent of risk of harm. As the foreseeability of trespass increases and as the risk of harm increases than the more reasonable care must be used.[38]

If a least five out of six of you have judged that the railroad company did not live up to its duty of care to plaintiff, you will then have decided that the company was negligent. The next question for you to decide is whether that negligence proximately caused plaintiff's injury. By that, I simply mean that something happened to set the chain of events in motion to naturally and probably make the accident take place; in other words, was the company's negligence, assuming you find it was negligent, a substantial factor in producing the accident?

If you decide that the train company was negligent and that that negligence proximately caused plaintiff's injury, you're next going to have to determine the correctness of the company's claim that plaintiff was also negligent.

If you find that plaintiff was a trespasser, then I tell you as a matter of law that plaintiff was to some extent negligent.[39] You then must go on to compare the

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[37] *DeRobertis v. Randazzo*, 94 *N.J.* 144, 157 (1983).

[38] *Simmel v. N.J. Coop Co.*, 28 *N.J.* 1, 9 (1958).

[39] In *Renz*, *supra*, at 460, it was held that a trespasser is at least minimally negligent within scope of railroad immunity act, *N.J.S.A.* 48:12-152.

negligence of the parties.[40]

If you find that plaintiff was not a trespasser, it may still be that plaintiff was to some extent negligent. If you decide that plaintiff was not on the railroad tracks voluntarily, he/she was not necessarily negligent.[41] But, based on all of the circumstances other than plaintiff's involuntary presence on the tracks, such as the reasons leading up to plaintiff being in a position to end up on the tracks, not of his/her own accord, you must decide whether the train company has shown by the greater weight of the evidence that plaintiff was him/herself negligent.[42] If you find that plaintiff was negligent to any extent, and that that negligence proximately caused his/her injury, as I have described that concept to you, you then must go on to compare the negligence of the parties.[43]

F. Liability for Loss of or Damage to Goods Shipped

In this case (you may find from the evidence that) the defendant is what is known in the law as a common carrier. A common carrier undertakes for pay to carry the goods of all persons who want to ship them.[44] Typical common carriers

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[40] Court should continue by charging principles of comparative negligence under *N.J.S.A.* 2A:15-5 *et seq.*

[41] *Eden, supra,* at 472-473.

[42] *Eden, supra,* at 472-473.

[43] Court should continue by charging principles of comparative negligence under *N.J.S.A.* 2A:15-5.1 *et seq.*

[44] *Mershon v. Hobensack,* 22 *N.J.L.* 372, 377 (Sup. Ct. 1850).

are railroads, trucking companies, boats, airplanes and others similarly engaged.

A common carrier is absolutely and totally responsible for the loss of or damage to property given to the carrier for transportation,[45] with an exception that I shall describe to you in a moment.[46] The shipper — that is, the person who ships the goods using a common carrier — need only prove, one, delivery of the property in good condition to the common carrier and, two, either failure to return the goods or the return of those goods in a damaged condition. If these are shown and there is no other proof, plaintiff is entitled to your verdict.[47] Due care or lack of negligence by the carrier is not meaningful.

I told you a minute ago that there is an exception which can excuse a carrier from its absolute responsibility to a shipper. I want to describe this to you now.

[*Charge Appropriate Exception, as Applicable, to Facts of Case:*]

[1. The exception comes about if the loss or damage was caused solely by an act of God. An act of God is a natural event such as lightning, violent winds or seas or other accident of nature without any intervention by people. If the loss

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[45] *NOPCO Chem. Div. v. Blaw-Knox Co*., 59 *N.J*. 274, 281 (1971); *W.J. Casey Trucking v. G.E*., 151 *N.J. Super*. 151, 155 (Law Div. 1977).

[46] Although there are four exceptions, the court should charge only the exception which factually may apply to the case.

[47] *Jos. Toker Co. v. Lehigh Valley Railroad Co*., 12 *N.J*. 608, 612 (1953); *see also, Silver Lining, Inc. v. Shein*, 37 *N.J. Super*. 206, 211-212 (App. Div. 1955).

or damage is caused by human conduct along with an act of God, the carrier is liable. The carrier is excused only if an act of God solely brought about the loss or damage.]

[2. The exception comes about if the loss or damage was caused solely by public enemies, that is, an act of war. In that event, the carrier is not liable.]

[3. The exception comes about if the loss or damage was caused solely by the inherent nature of the property. By that I mean that the goods were of such a nature as to spoil or deteriorate by the mere passage of time even though they are carried in a manner suitable for their transportation.[48] For example, if eggs are being shipped, and if you find that eggs spoil with the passage of time, and if the carrier shipped the eggs in an appropriate and suitable manner, for instance, in a refrigerated truck, but despite that and solely because of the length of the trip and the time that it took, the eggs spoiled, then the carrier would not be liable. But if you find that the carrier delayed the transportation and that caused too much time to pass, then the carrier would be liable. The carrier has a duty to carry the shipment safely with due regard to its perishable nature.]

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[48] *NOPCO Chem. Div. v. Blaw-Knox Co.*, *supra*, at 281-282.

[4. The exception comes about if the loss or damage was caused by the fault of the shipper. If the shipper packs the goods improperly and that improper packing is not apparent to the carrier by ordinary observation and the loss or damage results from the improper packing, the carrier is not liable. But if the improper packing is apparent and the carrier accepts the goods without a special agreement limiting its liability, the carrier is liable.[49]]

The need or burden to prove that the loss or damage was caused solely by the exception that I have described to you is upon the carrier. The carrier must show, by the greater weight of the evidence, that the exception applies. [The need to prove that there was an agreement limiting its liability is also on the carrier and that agreement must be interpreted most favorably to the shipper and against the carrier.[50]]

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[49] *W.J. Casey Trucking v. G.E.*, 151 *N.J. Super*. 151, 157-158 (Law Div. 1977); *Lincoln Farm Products Corp. v. Central Railroad Co*., 81 *N.J. Suer*. 161, 166-168 (App. Div. 1963).

[50] To be charged only if fourth exception is given. For basis, *see Reich v. McGill*, 119 *N.J.L*. 358, 361 (E.&A. 1937); *Hill v. Adams Express Co*., 82 *N.J.L*. 373, 377 (E.&A. 1911).