Joseph S. Persoff
ESNER, CHANG & BOYER

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
March 2017 Issue

A common carrier's obligation to provide utmost care

THE DUTY SHOULD INCLUDE WARNING PASSENGERS ABOUT DEEP-VEIN THROMBOSIS

The bus ride from Texas to Los Angeles lasts approximately 30 hours. For prolonged periods of time the passengers sit in their small bus seats. The bus makes only the occasional stop. As the bus gets closer to Los Angeles, one passenger notices that her leg is starting to swell. She exits the bus at the Los Angeles bus terminal, takes about 15 steps, collapses, and dies. The coroner concludes that the passenger died from a pulmonary embolism due to deep-vein thrombosis (DVT).

DVT is the formation of a blood clot in one of the body's large veins. This blood clot can travel in the bloodstream to the lungs, causing a pulmonary embolism. In 2008 the Surgeon General concluded that a triggering event of DVT is prolonged periods of immobility.

The company that operates the bus is aware of the dangers posed by DVT. It has been the subject of workers' compensation claims from bus drivers complaining of DVT-related injuries due to long periods of immobility while driving. The operator even instructs its drivers to take breaks and walk around on the breaks to cut down on the risk of DVT. If the bus operator is required to warn its employees of the risks of DVT to protect its bottom-line, shouldn't the operator have an even stronger obligation to warn passengers of the dangers of DVT?

Think about how many times you have been on an airplane and sat through the safety seminar provided by the flight attendant? You are told where the emergency exits are located, how to operate the seat belt, what to do if there is a loss of cabin pressure, and not to use the bathroom during periods of turbulence. Providing warnings to passengers about how to protect themselves in the event of emergency is certainly not unusual or something that imposes a burden on the transportation industry.

The bus operator protests that it is impossible for it to predict which passengers might ultimately suffer from DVT on a long bus ride. The operator argues that trying to predict which passenger might develop DVT is the equivalent of trying to guess which passengers might suffer a sudden cardiac event and when they might suffer such an event. The bus operator complains that because it cannot predict who might develop DVT, it has no duty to warn about DVT.

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Missing the point

The bus operator is deliberately missing the point. This is not about a passenger with a pre-existing heart condition who suddenly and unexpectedly goes into cardiac arrest on a bus. (As opposed to in the bus terminal or in the parking lot or at home.) DVT is a specific medical condition that develops in the passenger while on the bus. The conditions on the bus help cause the DVT. (Long periods of immobility, cramped conditions, and few stops.) This is a bus-specific problem that can be eliminated through specific actions by the bus operator. (Warning passengers about the risk of DVT and the simple steps that can be taken to eliminate the risk – such as moving around and stretching.)

This article will examine the duties owed by common carriers (such as bus operators). It will also explain why in the case of DVT, common carriers such as bus operators have a duty to warn its passengers.

A presumption in favor of duty

There is a presumption in favor of duty and against a finding of lack of duty. In arguing that warning about DVT is creating a new duty, the bus operator has it completely wrong. It is the bus company who must justify carving out a special exception that permits it to avoid its duties toward its passengers.

The California Supreme Court has made it clear that California law presumes that there is a general duty of care to act reasonably, and that a defendant does not owe a duty of care to take reasonable steps to avoid injuring a plaintiff only if the court determines a categorical exception to the general duty rule is warranted. A categorical exception to the general duty rule is warranted only if the factors discussed by the California Supreme Court in *Rowland v. Christian* (1968) 69 Cal.2d 108, "clearly support" carving out the exception. The question is not "whether a *new duty* should be created, but whether an *exception* to [California's general duty rule] of exercising ordinary care in one's activities … should be created." (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 783.)

Duty is determined broadly

Duty is determined broadly, not specifically to the particular plaintiff. The *Cabral* Court emphasized that the *Rowland* factors "are evaluated at a relatively broad level of factual generality. Thus, as to foreseeability, [the California Supreme Court has] explained that the court's task in determining duty "is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed." (*Cabral*, 51 Cal.4th at p. 772.)

> For purposes of duty analysis, foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct. . . . [I]t is settled that what is required to be foreseeable is the general character of the event or harm – e.g., being struck by a car while standing in a phone booth – not its precise nature or manner of occurrence.

(*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1145, internal quotation marks omitted).

The *Rowland* factors for assessing duty include:

> …the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

(*Cabral*, 51 Cal.4th at p. 781.)

The *Cabral* Court cautioned that a court's foreseeability analysis conducted based on case-specific facts rather than the proper level of generality:

> …would tend to 'eliminate the role of the jury in negligence cases, transforming the question of whether a defendant breached the duty of care under the facts of a particular case into a legal issue to be decided by the court.'

(*Cabral*, 51 Cal.4th at p. 773, quoting *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 724, fn. 13.)

Common carriers owe passengers a heightened duty

A bus operator is offering transportation of passengers for financial reward. That makes it a common carrier. California law provides that "[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." (Civ. Code, § 2100.) As part of this heightened duty, common carriers owe their passengers a duty to warn of known dangers. (*DeRoche v. Commodore Cruise Line, Ltd.* (1994) 31 Cal.App.4th 802, 809.)

Applying the duty analysis to warning passengers on long bus trips about DVT

The first three *Rowland* factors, which courts analyze as "foreseeability and related factors," are (1) the foreseeability of harm to the plaintiff; (2) the degree of certainty that the plaintiff suffered injury; and (3) the closeness of the connection between the defendant's conduct and the injury suffered.

(First,) it is reasonably foreseeable that a passenger on a bus traveling 30 hours could develop DVT. Scientific and medical literature provide ample evidence that the risk of passengers developing DVT on long trips exists. Also, such risks are well known and appreciated by bus operators. (Some bus operators actually provide DVT warnings). Second, the bus operator in the above example already warns its drivers to walk around in an effort to avoid injury from circulatory issues. The bus operator has had to pay out on worker's compensation claims

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related to DVT related injuries to its drivers. There have also been other incidents of passengers suffering DVT-related deaths on long bus trips. This is not an unknown issue to bus operators.

Most significantly, while people who regularly travel by bus, train, or airplane are not versed in the dangers of DVT, transportation companies understand and recognize the dangers. When a common carrier is in a position of superior knowledge of a known danger compared to the passenger, it has a duty to warn. (*DeRoche*, 31 Cal.App.4th at p. 809.) It has long been recognized that a defendant's superior knowledge about a potential danger is the basis for the affirmative duty to warn. (*Foster v. A.P. Jacobs & Associates* (1948) 85 Cal.App.2d 746, 752.)

There are cases that the defense might cite against a duty to warn of DVT. Do not be fooled. These cases do not apply to California law. (See, e.g., *Twardowski v. American Airlines* (9th Cir. 2008) 535 F. 3d 952 [applying international law]; *Caman v. Cont'l Airlines, Inc.* (9th Cir. 2006) 455 F. 3d 1087, 1089 [same]; *D'Aleman v. Pan American World Airways, Inc.* 259 F. 2d 493 (2d Cir. 1958) [applying Federal admiralty law and Virginia law]; *Sprayregen v. American Airlines, Inc.* (S.D.N.Y. 1983) 570 F. Supp. 16 [applying New York law].) This distinction is crucial because, as instructed by the California Supreme Court, the starting point for duty analysis is generally Civ. Code, § 1714, or in this case would be California Civ.Code, § 2100 due to a defendant's heightened duty as a common carrier.

While the opinions in *Twardowski* and *Caman* may seem applicable because they involve the failure to warn of the risk of DVT, the basis for the holdings in those cases that the defendants had no duty to warn of the dangers of developing DVT during a flight was the court's interpretation of Article 17 of the Warsaw Convention. (*Twardowski*, 535 F. 3d at p.958 ["[W]e have already held that *developing* DVT in-flight is not an 'accident,' . . . and that *failing to warn* about its risk is not an 'event' for purpose of liability for an 'accident' under Article 17].)

The *Caman* court concluded the plaintiff could not recover for the defendant's failure to warn about DVT because the plaintiff could only recover for an "accident," which the Warsaw Convention defines as an "unexpected or unusual event or happening that is external to the passenger," and not "the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." As the court held DVT did not constitute an "unexpected or unusual event or happening that is external to the passenger," the plaintiff could not recover for the defendant's failure to warn. (*Caman*, 455 F. 3d at p. 1090.) The *Twardowski* court relied on *Caman* to reach the same conclusion. (*Twardowski*, 535 F. 3d at p. 961.)

Additionally, while as noted above, *Twardowski* is distinguishable, even there the court acknowledged that airlines were warned about the dangers to their passengers of DVT by the airlines' trade organization, the English House of Lords, and airline medical officers. (*Twardowski*, 535 F. 3d at p. 958-59.) *Twardowski* discussed how "in December 2000, the British House of Lords published a report suggesting that airlines should make DVT information available through 'high profile pre- and in-flight preventive advice' as well as 'active encouragement of in-flight mobility and preventive leg exercises.'" (*Id*. at p. 959.) Further, the *Twardowski* court noted, before 2008 "[a]ir carriers generally put information about DVT on their websites and in inflight magazines." (*Ibid*.)

A defendant bus operator may argue that the risk of DVT is not reasonably foreseeable because various regulatory agencies do not mandate DVT warnings. Such an argument is irrelevant to whether or not the danger of DVT is reasonably foreseeable. (*Cf. Laurel Heights Improvement Assn. v. Regents of Univ. of Calif.*, 47 Cal.3d 376, 411 (1988)

["We agree that the absence of regulation did not mean asbestos was in fact formerly safe, nor, without a showing that the responsible regulatory authorities had considered the question and affirmatively decided not to regulate, was the absence of regulation even evidence that asbestos was not harmful."].)

Another factor is the degree of closeness of the connection between the defendant's conduct and the injury suffered. This factor "is strongly related to the question of foreseeability itself." (*Cabral*, 51 Cal.4th at p. 779.)

> Generally speaking, where the injury suffered is connected only distantly and indirectly to the defendant's negligent act, the risk of that type of injury from the category of negligent conduct at issue is likely to be deemed unforeseeable. Conversely, a closely connected type of injury is likely to be deemed foreseeable. (*Ibid*.)

In *Kesner*, the California Supreme Court recently concluded employers and landowners owe a duty to exercise ordinary care to prevent secondary asbestos exposure to members of a worker's household. (*Kesner*, 1 Cal.5th at p. 1140.) The injury here would be even less attenuated than the injury at issue in *Kesner*, as *Kesner* involved secondary exposure, whereas passengers in DVT cases are injured directly from a failure to warn.

The facts are that airlines have been aware of the risks of DVT for years, have taken steps to warn its passengers of the dangers of DVT for years – upon recommendations of the English House of Lords and the International Air Transport Association, and that bus operators have actual knowledge of danger of passengers developing DVT during long bus rides. A reasonably thoughtful company would certainly take these facts into account in guiding its practical conduct and would undertake the negligible burden of warning its passengers as a result. (*Kesner*, 1 Cal.5th at p. 1145.) Accordingly, this factor of foreseeability strongly weighs against carving out a categorical exception to Defendant's duty of care.

Because the foreseeability elements are unquestionably met, whether an exception exists to the duty owed by bus operators turns on the remaining "public policy" factors from *Rowland* – the moral

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blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. (*Cabral*, 51 Cal.4th at p. 781.)

Identical to the foreseeability factors, the focus of the public policy factors is "not whether they support an exception to the general duty of reasonable care on the facts of the particular case . . . , but whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy." (*Cabral*, 51 Cal.4th at p. 772.) "The overall policy of preventing future harm is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible. The policy question is whether that consideration is outweighed, for a category of negligent conduct, by laws or mores indicating approval of the conduct or by the undesirable consequences of allowing potential liability." (*Id*. at pp. 781-82.)

First, the bus operator's lack of action to protect its passengers is sufficiently blameworthy so as not to justify providing the operator special legal protection. Bus operators know about the risk of its passengers developing DVT and many of them frequently do nothing to mitigate the risk. Further, as discussed above, the operator has superior knowledge about the dangers of DVT, yet they frequently choose not to warn passengers of the risk. A defendant's superior knowledge about a dangerous condition is the precise reason why California law requires a duty to warn. (*Foster v. A. P. Jacobs & Assoc., et al.*, 85 Cal.App.2d at p. 752.)

In *Kesner*, the California Supreme Court concluded a defendant's superior knowledge about a risk is a reason for the moral blame factor weighing against carving out a categorical exception to the duty rule:

> We have previously assigned moral blame, and we have relied in part on that blame in finding a duty, in instances where the plaintiffs are particularly powerless or unsophisticated compared to the defendants.

(*Kesner*, 1 Cal.5th at p. 1151.)

The Court also noted the defendant's financial benefit shifts this factor in favor of the defendant owing a duty. (*Ibid*. [Moral blameworthiness factor weighs in favor of finding a duty where defendants benefitted financially from their use of asbestos and had greater information about the hazard].) Accordingly, here, this factor weighs strongly in favor of finding a duty.

Next, holding an operator to its general duty is supported by the overall policy of imposing the costs of negligent conduct upon those responsible. (See *Cabral*, 51 Cal.4th at p. 781.) Internalizing the cost of injuries caused by a particular behavior will induce changes in that behavior to make it safer." (*Kesner*, 1 Cal.5th at p. 1150.)

Third, the resulting burden to an operator of warning its passengers about the risk of developing DVT on long bus trips is negligible. A duty to warn passengers is not unduly burdensome on commerce. (*Haynes v. National R.R. Passengers Corp.* (C.D. Cal. 2006) 423 F. Supp. 2d 1073, 1084, citing *Gerling Global Reinsurance Corp. v. Low* (9th Cir. 2001) 240 F. 3d 739.) Bus operators already provide passengers with pre-trip travel warnings. An operator could easily address the risks posed by DVT by adding a couple sentences to that warning to notify passengers they should get up and walk around when the bus stops because they could develop a blood clot from being sedentary for long periods. Or, alternatively, an operator could put up a sign in its buses warning its patrons.

California law supports this conclusion. In *Verdugo v. Target Corp.* (2014) 59 Cal.4th 312 the issue was whether the defendant had a duty to acquire and make available an automated external defibrillator (AED) for use in a medical emergency. The Supreme Court concluded there should be no duty.

> The Court reasoned that requiring such a duty of retail establishments would be neither a minor nor minimal burden because such a duty would apply to all retail establishments, large and small, and the cost would not be limited to the cost of purchasing the AEDs, but that there would be "significant obligations with regard to the number, the placement, and the ongoing maintenance of such devices, combined with the need to regularly train personnel to properly utilize and service the AEDs and to administer CPR, as well as to have trained personnel reasonably available on the business premises.

This situation would not be like *Verdugo*, as the bus operator would have no "significant obligations" as a result of owing a duty to warn its passengers about DVT. Thus, this factor weighs in favor of a duty to warn, as there would be no "significant obligations" as a result of owing a duty to warn its passengers about DVT.

The last factor is the availability of insurance. The Seventh Circuit has recently concluded an employee's DVT injury was an "accident" for purposes of a company's life insurance policy. (*Prather v. Sun Life and Health Insurance Co.* (7th Cir. 2016) __ F. 3d __, 2016 WL 7232144, at * 1-2 .) Therefore, this factor does not weigh against the defendant owing a duty either.

In order for a defendant to be entitled to a categorical exception of its heightened duty of care as a common carrier, the *Rowland* factors must "clearly support" carving out such an exception. In this situation, not only do the factors not "clearly support" carving out an exception to a defendant's duty, but the factors do not weigh in a defendant's favor at all. A passenger developing DVT on a long bus ride is clearly foreseeable; further, common carriers likely have actual knowledge of the risk to its passengers yet choose to do nothing to mitigate such a risk, so the defendant would be morally blameworthy for its failure to act; and last, the burden to a defendant of being held to its duty as a common carrier would be negligible.

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Conclusion

Common carriers already owe a heightened duty to their passengers. The duty to warn is included within that duty. Any time a common carrier is seeking to avoid duty, they are asking the court to carve out an exception and make new law. In the case of warning bus riders of the dangers of DVT, such an exception is not warranted.

Joseph Persoff, a graduate of Syracuse University and the USC Gould School of Law, is an Associate with Esner, Chang & Boyer, *a boutique appellate firm with offices in Southern and Northern California. All of the partners are certified by the State Bar of California as appellate specialists. In addition to handling all aspects of appellate litigation, the firm also assists trial lawyers with dispositive and post-judgment motions.*