DEFINING THE DURATION OF EXTRAORDINARY DILIGENCE FOR THE SAFETY OF PASSENGERS

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ABSTRACT

Humans have always been explorers. This drive to search and discover stems from man's insatiable curiosity for the unknown. And in all of the greatest explorations of our time, transportation has played an indispensable role. The march of development in transport technology during their times made it possible for Columbus, Magellan, Armstrong and other pioneers like them to discover not only new lands and civilizations, but also new planets and galaxies.

Today, modern transport remains a major factor in determining the course of human, political, and economic development. In an age of borderless economies, people have become more transient than ever before. As such, there is a natural demand for efficient and convenient means of travel. For many years, this need has been addressed by business entities popularly known in law as common carriers.[1] Despite the advancement in mass transportation technology, however, there is one element in the business of common carriage that has remained stagnant - the tendency of common carriers to prioritize profits over the quality of their service and the safety of their passengers. Laws nevertheless exist for the purpose of curbing this deleterious tendency.

Article 1755 of the Civil Code, for instance, provides that "a common carrier is bound to carry the passenger safely as far as human care and foresight can provide, using the utmost diligence of very cautious persons, with a due regard for all the circumstances." To add compulsive force to this obligation, Article 1756 provides for a disincentive against erring common carriers by presuming it negligent in case of death or injury to the passenger.

Presently, a controversial issue involving the extraordinary diligence required of common carriers exists. This controversy relates to the issue of time. From and until what point in time is a carrier required to assume and perform its obligation to observe extraordinary diligence for the safety of passengers? The law does not define the time parameters of this obligation, although Philippine and American jurisprudence have suggested some answers. Due to the controversy spawned by the absence of positive law on the matter and the seemingly erratic nature of such jurisprudence, it is desirable, if not imperative, that a law be enacted to settle the issue and henceforth guide the courts in their adjudication of disputes between carriers and passengers.

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[1] Article 1732 of the New Civil Code defines common carriers as "persons, corporations, firms or associations engaged in the business of carrying or transporting passengers or goods or both, by land, water, or air, for compensation, offering their services to the public."

The purpose of this work is to formulate a legal provision defining the duration of the extraordinary responsibility of carriers for the safety of passengers. The writer hopes that this work will help in clearing up any cloud on the issue and ultimately facilitate the enforcement of, and compliance with, the obligation of observing extraordinary diligence.

I. INTRODUCTION

A. Background

The concept of common carriage has been around for a long time, and the responsibility imposed by the State upon businesses engaged in transport continues to evolve. Prior to the Civil Code of 1950, common carriers did not receive "special" treatment. Under the Civil Code of 1889, liabilities of common carriers were regulated by the general *culpa contractual* provisions therein. Failure on the part of the carrier to use due care in carrying its passengers safely was considered a breach of contractual duty under its Articles 1101, 1103, and 1104.[2]

There were, of course, certain rules which subjected carriers in general to liability for negligence in the Code of Commerce. Under Article 362 of that Code, a carrier was made "liable for the losses and damages resulting from the causes mentioned in the preceding article if it is proved, as against him, that they arose through his negligence or by reason of his having failed to take the precautions which usage has established among careful persons." Also, under Section 3 of the Carriage of Goods by Sea Act,[3] (COGSA) "the carrier shall be bound before and at the beginning of the voyage to exercise due diligence to- a) make the ship seaworthy."

The old laws not only required common carriers to exercise merely ordinary diligence, but also treated them with such liberality incompatible with today's standards. Under Section 4 of the COGSA for example, the carrier is not made responsible "for loss or damage arising or resulting from- a) act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship." While remaining good law, the Supreme Court has not allowed this exculpatory clause to prevail over the present common carrier provisions in the Civil Code.[4]

In upgrading the diligence required of common carriers, legislators believed that laws had become impotent in protecting the public from the abuses commonly committed by common carriers. Justice Paras mentions an all too common scenario:

[2] Del Prado v. Manila Electric Co., 52 Phil. 900, 904 (1929). These provisions are now embodied in Articles 1170,1172 and 1173 of the New Civil Code.

[3] Commonwealth Act No. 65 (1936).

[4] *See* National Development Company v. Court of Appeals, 164 SCRA 593 (1988).

> "Concededly one of the most fantastic phenomena in vehicle-cursed cities of the Philippines is the death defying pedestrian. But almost as reckless, and equally blame-worthy in vehicular accidents is the average bus, jeepney, or taxi driver. Too often, the man at the wheel does not care, ostensibly whether he lives or not. To him life seems deadly cheap, and he apparently has resolved to make it cheaper. The pleas of his passengers are amazingly unavailing; the driver, intrigued by his own nonchalance, answers with laughter, derisive and cruel and as a final taunt, steps on the gas with an even greater ferocity.[5]

It is this recognized interest of the public to have an efficient and safe public transportation system that has caused the evolution of the ordinary responsibility of a common carrier into an extraordinary responsibility. Indeed, the Supreme Court has recognized that "in approving the draft of the Civil Code as prepared by the Code Commission, Congress must have concurred with the Commission that by requiring the highest degree of diligence from common carriers in the safe transport of their passengers and by creating a presumption of negligence against them, the recklessness of their drivers which is a common sight even in crowded areas and, particularly, on the highways throughout the country may somehow, if not in a large measure, be curbed."[6]

As a result, under Article 1733 of the New Civil Code, instead of being obliged "to take the precautions which usage has established among careful persons,"[7] a common carrier became bound "to observe extraordinary diligence in the vigilance over the goods and for the safety of the passengers transported by them, according to all the circumstances of each case." The law further provides for a presumption of negligence to be imputed against the carrier in cases of death or injury to passengers, obviously in an attempt to force carriers to comply with this new obligation.[8] As observed by the Supreme Court, "the law concerning the liability of a common carrier has now suffered a substantial modification in view of the innovations introduced by the new Civil Code"[9] as embodied now in Articles 1733, 1755, and 1756.

B. Objective of the Thesis

The law on common carriers requires the carrier to observe extraordinary diligence in the vigilance over the goods and the safety of the passengers transported by them.[10] In the case of transport of goods, the duration of the extraordinary diligence requirement is defined by Article 1736 of the Civil Code. This provides that extraordinary responsibility "lasts from the time the goods are unconditionally placed in the possession of, and received by the carrier for transportation until the same are

[5] 5 EDGARDO PARAS, CIVIL CODE OF THE PHILIPPINES: ANNOTATED 458-59 (12th ed. 1990).

[6] Nocum v. Laguna Tayabas Bus Co., 30 SCRA 69 (1965).

[7] Code of Commerce, art. 362.

[8] Civil Code of the Philippines, Republic Act No. 586, art. 1756 (1950).

[9] Isaac v. A.L. Ammen Trans. Co., Inc., 101 Phil. 1049 (1957).

[10] Civil Code, art. 1733.

delivered actually or constructively by the carrier to the consignee or to the person who has a right to receive them."[11]

The law, however, for some undisclosed reason, does not define the duration of extraordinary diligence in the transport of passengers. The objective of this thesis, therefore, is to define the duration of the extraordinary obligation of carriers for the safety of passengers and to incorporate it as part of Article 1755.

To achieve such objective, the following will be discussed and analyzed:
1) the current laws on common carriage;
2) general principles of law;
3) Philippine and American jurisprudence relative to this issue.

Pertinent rules on statutory construction shall also be used in the discussion.

C. Limitation of the Thesis

In the transportation industry, the mode of transport is classified into land, water, and air. These three modes of transport have their respective legal idiosyncrasies. In discussing the extraordinary diligence required of common carriers for the safety of passengers, this thesis will treat transportation in general, cutting across these classifications, except in some portions of the thesis where making a distinction may be necessary.

Also, this work is primarily concerned with the issue of time. The law requires a common carrier "to carry the passengers safely as far as human care and foresight can provide, using the utmost diligence of very cautious persons, with a due regard for all the circumstances."[12] This obligation raises two questions: 1) what acts must carriers perform under this obligation? and 2) when should a carrier perform these acts? This work will attempt to answer these questions.

D. Organization of the Thesis

This thesis is divided into five chapters, beginning with this Introduction. The second chapter discusses the contract of carriage in general. It deals with the fundamental principles of obligations and contracts with a view to determining the time of perfection and termination of the contract of common carriage. Ultimately, it attempts to determine the time of creation and termination of the carrier-passenger relationship. The third chapter discusses Philippine and American jurisprudence which lay down rules relating to, and which will hopefully aid us, in determining the duration of the extraordinary diligence required of carriers for the safety of passengers. The fourth chapter attempts to formulate a legal provision defining the duration of the carrier's extraordinary diligence obligation and provides the reasons therefor. It

[11] *See* APL v. Klepper, 110 Phil. 243 (1960); Compania Maritima v. Insurance Co. of North America, 12 SCRA 213 (1964); LuDo v. Binamira, 101 Phil. 120 (1957).

[12] Civil Code, art. 1755.

also proposes the adoption of a codal provision expressing the thesis. The last chapter is the conclusion.

II. THE CONTRACT OF COMMON CARRIAGE

From as early as *Rakes v. Atlantic Gulf & Pacific Co.*,[13] the Supreme Court had ruled that the relationship between the carrier and the passenger arises from contract.[14] This is the same rule in most of, if not throughout, the United States.[15] Thus, the creation and termination of the contract of common carriage determine when a person becomes and ceases to be a passenger. The question may be stated twofold: (1) when is the contract of common carriage created? and (2) when is the contract of common carriage terminated?

In discussing the beginning and end of the *vinculum juris* between the carrier and the passenger, there is a need to first distinguish between the two aspects of the contract of common carriage of passengers. This distinction is explained in *British Airways, Inc. v. Court of Appeals*.[16] Here, the Supreme Court said:

> In dealing with the contract of common carriage of passengers, for purpose of accuracy, there are two (2) aspects of the same, namely: (a) the contract to carry (at some future time), which contract is consensual and is necessarily perfected by mere consent; and (b) the contract of carriage or of common carriage itself which should be considered as a real contract for not until the carrier is actually used can the carrier be said to have already assumed the obligation of a carrier.

The first aspect of the contract , the contract to carry, is perfected like all other consensual contracts - by mere consent. And from that moment, "the parties are bound not only to the fulfillment of what has been expressly stipulated but also to all the consequences which, according to their nature, may be in keeping with good faith, usage and law."[17] Consent itself is "manifested by the meeting of the offer and acceptance upon the thing and the cause which are to constitute the contract."[18] Acceptance may be express or implied.[19]

[13] 7 Phil. 359 (1907).

[14] *See also* Cango v. Manila Railroad, 38 Phil. 767 (1918); Medina v. Cresencia, 99 Phil. 506 (1956); Fores v. Medina, 105 Phil. 266 (1959).

[15] Neidert v. Portland Stages, Inc., 376 P. 2d 92 (1962), *citing* Todd v. Louisville & N.R. Co., 113 N.E. 95 and Roberts v. Northwest Airlines, 275 N.W. 410.

[16] 218 SCRA 699 (1993).

[17] Civil Code, art. 1315.

[18] Civil Code, art. 1319.

[19] Civil Code, art. 1320.

Applying these concepts to the contract to carry, it may be said that the relation of carrier and would-be passenger first begins when a person offers to become a passenger and the carrier accepts the offer.[20] It may also be said that a common carrier, being engaged in a public duty, makes a continuous offer of its services and is therefore the offeror, with the would-be passenger accepting the offer, thereby binding the carrier to a contract.[21]

Whether the offer comes from the carrier or from the passenger is, however, of little significance. The result is the same, *i.e.* to create a contract involving reciprocal prestations. Thus, a person who purchases a ticket from Philippine Airlines on 1 October 1996 for a flight from Manila to Cebu on 2 October 1996 enters into a contract with the carrier - a contract to carry. But it is not until the person takes the flight on 2 October 1996 when he becomes a passenger in the real sense, or when the parties enter into the contract of carriage.[22]

In the case of land transportation, where the carrier offers its services to the public by continuously advertising in its conveyances the routes being serviced by it, and by stopping for passengers either at designated bus stops or on any portion of the street, the contract to carry would appear to exist at the time the person signals the bus to stop or otherwise manifests an intention to board the bus, and the bus driver signals his acceptance of the offer by slowing down or stopping at a point where the client can now board the conveyance.[23] At this point in time, it may be said that there is already a "meeting of the offer and acceptance upon the thing and the cause which are to constitute the contract."[24]

Vda. de Nueca v. Manila Railroad Company[25] illustrates the absence of meeting of minds. Here, Fermin Nueca availed of the respondent company's freight services to transport seven sacks of palay. Nueca's cargo was successfully loaded. After the passengers had boarded the train, shunting operations were started to hook the freight wagon thereto. Before the train reached the turnoff switch, its passenger coach and the freight wagon were derailed and fell on its side, pinning Fermin Nueca. The latter was killed instantaneously. In the resulting lawsuit, the trial court ruled in favor of the respondent company for the following reasons:

> Firstly, there was no proof or even an averment that the deceased bought a ticket or paid his fare at the same time that he paid the freight charges for his cargo, or at any time thereafter; and secondly, it can be inferred from the site of the accident

[20] 13 C.J.S. 1059, *citing* U.S. Fidelity & Guaranty Company v. Aschenberger 65 F. 2d 976.

[21] Dangwa Transportation Co., Inc. v. Court of Appeals, 202 SCRA 574, 580 (1991).

[22] British Airways v. CA, 218 SCRA 699 (1993).

[23] Del Prado v. Meralco, 52 Phil. 900 (1929); Tamayo v. Pascua, 8 CAR 741 (1965); Gray v. City and County of San Francisco, 20 Cal. Rptr. 894 (1962); Hot Springs Street Railway Co. v. Jones, 354 S.W. 2d 278 (1962).

[24] Civil Code, art. 1319, *See also Tamayo*, 8 CAR at 748.

[25] 65 O.G. 3151 (1968).

that the deceased was either inside the baggage car or beside it, in which cases he was not in a proper place for passengers.[26]

In absolving the respondent company for breach of contract, the Court of Appeals ruled:

> Disregarding, then, the matter of tickets, and assuming that the deceased was an intending passenger, such a relation was never accepted by the appellee as he did not present himself at the proper place and in a proper manner to be transported. He should have stayed at the station, ticket office, waiting room, or even inside the passenger coach; but not beside the baggage car or inside it, the latter place not being used for conveying passengers.[27]

In the above case, the offer of the deceased pertained to the transportation of his sacks of palay on respondent's train. Respondent accepted by receiving the payment and loading said sacks of palay on its freight wagon. It was doubtful whether the deceased also intended to become a passenger even if he was near the passenger coach when the accident happened. The Court of Appeals ruled that there was no acceptance on the part of the carrier, assuming that the deceased offered to become a passenger. Clearly, there was no meeting of the offer and acceptance upon the thing and the cause which constitutes the contract to carry.

As earlier mentioned, the second aspect of the contract is the real contract of carriage. It is here where the would-be passenger becomes a passenger in fact. The ramifications of this aspect of the contract of carriage are discussed at length in Chapter IV. For the purpose of this section, it is sufficient to briefly discuss the concept of real contracts and to distinguish this aspect of the contract from its consensual counterpart.

Generally, a real contract requires the delivery of the object of the contractor its perfection. Pledge is an example of a real contract. To constitute the contract of pledge, it is necessary "that the thing pledged be placed in the possession of the creditor, or of a third person by common agreement."[28] Thus, in order to perfect a contract of pledge the pledgor must deliver the thing to the pledgee who must receive the same. This shows that in a real contract, an essential overt act is performed by the parties which directly and clearly signifies their intention to effectuate the real contract. This overt act is subsequent to and is more than just the giving of consent. This is what distinguishes a real contract from a consensual one. The example above also shows that the overt acts appear to consist of what one may call an "active overt act" and a "passive overt act." In the contract of pledge, the active overt act is the act of the pledgor in delivering the thing. The passive overt act is the act of the pledgee in receiving the thing, which also signifies the latter's acceptance of the obligation.

[26] *Id.* at 3153.

[27] *Id.* at 3155.

[28] Civil Code, art. 2093.

In the contract of common carriage, the essential overt act is the "actual use" of the carrier. In this overt act, the passenger performs the active overt act by delivering himself to the carrier for transportation, and the carrier, the passive overt act by accepting or receiving the passenger. It is important to emphasize, however, that this delivery and acceptance on the part of the passenger and the carrier, respectively, must be of such a nature that it directly and clearly signifies the intention of entering into the contract of carriage, as distinguished from the executory contract to carry. Therefore, the active overt act of the passenger must be the act of presenting himself to the carrier for the purpose of boarding the conveyance[29] and the passive overt act of the carrier is the act of allowing the passenger, expressly or impliedly, to board the conveyance.[30] Only through the concurrence of these overt acts can it be said that the parties have entered into the real contract of carriage - the contract of transporting the passenger "safely as far as human care and foresight can provide, using the utmost diligence of very cautious persons, with a due regard for all the circumstances."[31]

With respect to the termination of the contract of common carriage - both in its consensual and real aspects - the laws on the extinguishment of obligations apply. Thus, the contractual relation may be considered terminated, or the obligor released from liability for non-performance, upon payment of the obligation, rescission, resolution, by agreement of the parties to terminate the same,[32] or legal or physical impossibility of performance,[33] among others.

To properly apply these modes of termination to the contract of common carriage, it is required that they exist in relation to the principal obligation of the carrier to transport passengers to the destination agreed upon. As such, and in the absence of any other obligation on the part of the carrier under the contract, it can be generally concluded that the contract of common carriage ends when the carrier completely performs the service of transporting the passenger to the destination agreed upon,[34] when the obligation to transport has become legally or physically impossible to perform without the carrier being at fault,[35] or when the parties have rescinded or otherwise agreed to end the relationship.

The issue of beginning and end of the contract of common carriage, and the distinction between the contract to carry and contract of carriage, are matters of great significance. This is because a carrier's duty to exercise extraordinary diligence exists only during the second aspect of the contract. A carrier, therefore, is liable

[29] Del Prado v. Meralco, 52 Phil. 900, 904 (1929).

[30] Metropolitan Transit System, Inc. v. Burton, 120 S.E. 2d 663 (1961); Hot Springs Street Railway Co. v. Jones, 354 S.W. 2d 278 (1962); Roberts v. Yellow Cab Co., 240 A.2d 733 (1968); Civil Code, art. 1756.

[31] Civil Code, art. 1755.

[32] Civil Code, art. 1231.

[33] Civil Code, art. 1266.

[34] Civil Code, art. 1233

[35] Civil Code, art. 1266.

under the contract of common carriage for damages due to a passenger's injury or death only if it takes place during the real contract of carriage.[36]

III. DURATION OF EXTRAORDINARY DILIGENCE FOR THE SAFETY OF PASSENGERS

In the previous chapter, the writer dwelt on the commencement and end of the contract to carry, and briefly, on the contract of common carriage. In relation thereto, the distinction between the contract to carry and the contract of common carriage was discussed. This chapter will focus on the duration of the contract of carriage alone and the time during which the carrier is required to observe extraordinary diligence.

Article 1733 of the Civil Code requires the carrier to observe extraordinary diligence "for the safety of the passengers transported by them, according to all the circumstances of each case." From the outset, it is clear that a carrier is bound to exercise extraordinary diligence in favor only of a particular person - a passenger. Due to the dual nature of the contract of common carriage, it is necessary to determine at what stage of the contract is a person considered a passenger.

The obligor and obligee in the contract of common carriage is the carrier and the passenger, respectively. However, "not until the carrier is actually used can the carrier be said to have already assumed the obligations of a carrier."[37] Consequently, we have referred to the obligee in a contract to carry as a would-be passenger. This is because it is only when the carrier is actually used that the parties become truly the carrier and the passenger under the contract. Therefore, to determine the duration of the extraordinary diligence requirement, the question is: when is a person a passenger in the real or true sense?

A. Commencement of Passenger Status

Justice Vitug recognizes that the law defines the lifetime of extraordinary diligence in the carriage of goods, but that "no equivalent provisions exist in the carriage of passengers."[38] Citing American jurisprudence, he proposes that in case of persons, "utmost diligence should start once the passenger places himself to and is accepted by, and while he remains under the proper care and charge of, the carrier."[39] For their part, Senator Padilla and Justice Campos have expressed that "(t)he relation of

[36] *See infra*, Chapter IV.

[37] British Airways v. *CA*, 218 SCRA 699 (1993).

[38] JOSE VITUG, COMPENDIUM ON CIVIL LAW AND JURIS PRUDENCE 683 (1993), *citing* 10 AM. JUR. 27.

[39] *Id.*

'carrier and passenger' commences when a person with the good faith intention of taking passage and with the express or implied consent of the carrier places himself in a situation to avail himself of the facilities for transportation which the carrier offers."[40]

Stated differently, it may be said that the relation of passenger and carrier commences, and the carrier begins to be under a duty to exercise extraordinary diligence to ensure the passenger's safety "when, one puts himself in the care of the carrier, or directly within its control, with the bona fide intention of becoming a passenger, and is accepted by such carrier. "[41]

To attain the status of passenger, it may not be necessary that one has actually entered the carrier's vehicle. Being in the carrier's premises preparatory to boarding the means of conveyance may vest the person with the status of passenger. In *Cangco v. Manila Railroad Co.*,[42] the Supreme Court declared that the contractual duty of the carrier to transport the passenger "carried with it, by implication, the duty to carry him in safety and to provide means of entering and leaving its trains."[43] In this case, the passenger, while alighting from the train, stepped on a sack of watermelons, fell on the platform, was drawn under the moving car and was injured. The Court not only spoke of the duty of the carrier to provide safe means of egress as being part of the contractual undertaking assumed by common carriers, but held that the failure of the carrier to maintain its platform as would afford *"safe means of approaching* and leaving its trains" made it liable.[44]

The principle laid down in *Cangco* was reiterated in *Del Prado v. Manila Electric Co.*[45] In this case, the plaintiff failed to catch defendant's street car when it stopped at the designated place to take on passengers. Plaintiff then ran across the street to catch the car. Upon approaching the car, he raised his hand as an indication to the motorman of his desire to board the car. In response, the motorman slowed down, but did not fully stop. At this moment, the plaintiff seized with his left hand the front perpendicular handpost, at the same time placing his left foot upon the platform. But before plaintiff's right foot reached the platform, the motorman applied the power, causing the plaintiff to fall. In holding the carrier liable, the Supreme Court, citing *Cangco*, ruled that "the duty that the carrier of passengers owes to its patrons extends to persons boarding the cars as well as to those alighting therefrom."[46]

[40] AMBROSIO PADILLA and JOSE CAMPOS, THE LAW ON TRANSPORTATION 6 (1959).

[41] Vda. De Nueca, et al. v. Manila Railroad Co., 65 O.G. 3153 (1968); *see also* Peoples Checker Cab Company v. Dunlap, 307 P. 2d 833 (1957), *citing* Chicago, R.I. & P. Ry. Co. v. Warren, 132 Okl. 107, 269 P. 368; Chicago South Shore & South Bend Railroad v. Brown, 320 N.E. 2d. 809.

[42] 38 Phil. 767 (1918).

[43] Cangco v. Manila Railroad, 38 Phil. 767, 781 (1918).

[44] *Id. See also* Katamay v. Chicago Transit Authority, 289 N.E. 2d 623 (1972); Brandelius v. City and County of San Francisco, 206 P. 2d. 432 (1957); Bailey v. Louisville and Nashville Railroad Co., 160 S.E. 2d 245 (1968); Roberts v. Yellow Cab Co., 240 A. 2d 733 (1968); Chicago South Shore & South Bound Railroad, 320 N.E. 2d. 809 (year of promulgation unavailable).

[45] 52 Phil. 900 (1929).

[46] *Id.* at 904.

It follows then that the duty to exercise extraordinary diligence, extending as it does to ensure the safety of passengers in the process of boarding and alighting, extends in the proper cases to persons waiting to board a train, ship or plane in the carrier's premises pursuant to a contract to carry. It also extends to a place, although not owned by the carrier, but which may be subject to a reasonable degree of control by the carrier.

Justice Paras, however, seems to favor the view that "the passenger must have, with the carrier's consent, placed a part of his body on any part of the jeepney, taxi or bus - such as the stepping platform or the running board."[47] Senator Padilla 's work on the Civil Code also mentions the view that the contract of carriage is perfected from the moment the passenger boards the carrier by some physical act.[48] He quotes from the decision of the Court of Appeals in *Vda. De Galvez v. Marikina Bus, Inc.*[49] which says that "(f)rom the moment a passenger boards a common carrier by placing her right foot on the running board, the contract of carriage is perfected, and the obligation of the common carrier towards the passenger commences." In *San Diego v. MD Transit & Taxi Co., Inc.*,[50] the Court of Appeals referred to the time when the passenger had "her right foot already up on the running board" of a passenger vehicle which has stopped at his signal so he could board it as perfecting the contract of carriage. And later, in *Motos v. Capistrano*,[51] the Court of Appeals again held that a contract of carriage is perfected where a carrier offers carriage to persons bound for its destination, by shouting the name of its destination ("Pandacan, Pandacan") and stopping at a waiting shed, and a passenger accepts the offer by boarding the bus.

Zorotovich v. Washington Toll Bridge Authority[52] enumerates the following criteria used in determining whether a person has attained the status of passenger:

1. Place. This refers to "a place under the control of the carrier and provided for the use of persons who are about to enter the carrier's conveyance."
2. Time. This refers to "a reasonable time before the time to enter the conveyance."
3. Intention. This refers to a "genuine intention to take passage upon carrier's conveyance."
4. Control. This refers to "a submission to the directions, express or implied of the carrier."
5. Knowledge. This pertains to notice to the carrier "either that the person is actually prepared to take passage or that persons awaiting passage may reasonably be expected at the time and place."

[47] 5 EDGARDO PARAS, *supra* note 5, at 460, *citing* Illinois C.R. Co. v. O'Keefe, 686 Ill. 155.

[48] AMBROSIO PADILLA, V CIVIL LAW 975 (1974)

[49] 18 CAR [1s] 807 (1971).

[50] 5 CAR [2S) 571, 576 (1964).

[51] 23 CAR [2S] 1062, 1069 (1978).

[52] 491 P. 2d. 1295 (1971).

These criteria may be applied to reconcile apparent conflicts in jurisprudence as to when the contract of carriage begins and continues. In any case, one can see that no physical contact with the carrier may be required so that, first, the person can attain the status of passenger; and second, the carrier can be considered as being "actually used."

Katamay v. Chicago Transit Authority[53] illustrates the criteria of place and intention. Here, the plaintiff was standing on the carrier's elevated platform waiting to board the train. The train stopped at the platform, its doors opened, several people boarded, and as plaintiff started towards the train, she fell. Her shoes were off her feet and the heels were wedged in the spaces between the wooden planks and the platform. The Supreme Court of Illinois held that plaintiff had obtained the status of passenger because at the time of the accident, she was standing on defendant's elevated platform waiting and had in fact started to board defendant's train.

The District of Columbia Court of Appeals reached a different conclusion in *Baker v. D.C. Transit System, Inc.*[54] In that case, the would-be passenger was injured when she caught her heel in a crack in a cement block where she was waiting for a bus. The court denied liability, noting that the bus company did not have any control over the concrete slab nor did it have an obligation to maintain or inspect it. The criterion of place not being met, the court acquitted the carrier.

Suarez v. Trans World Airlines, Inc. (TWA)[55] is an interesting portrayal of the control factor. In this case, reservations on a TWA flight were made on the telephone by a husband for the carriage of his wife who had just suffered an angina attack. At the instructions of her doctor, arrangements were also made for TWA to meet the patient with a wheelchair when she arrived at the airport to take her flight. On the appointed day, the wife proceeded to the airport. A TWA employee met her at the curb and wheeled her into the TWA counter inside the terminal. However, problems occurred with respect to the issuance of her ticket and boarding pass and the patient suffered a heart attack, allegedly due to poor treatment of TWA personnel. The United States Court of Appeals held that the patient had become a passenger, the lack of contact with the aircraft notwithstanding:

> The factor which sharply distinguishes the present case from others is the disablement of Mrs. Suarez and her virtual captivity in the carrier's wheelchair, underscoring heavily the "control" element in the Katamay-Zorotovich criteria . . . Here, Mrs. Suarez "submitted her body" to the control of TWA when she was placed in the TWA wheelchair after being told by her doctor that "he did not want her to walk for several days . . . . and this advice was given with some emphasis and was conveyed by both Mr. and Mrs. Suarez to TWA."

[53] 289 N.E. 2d. 623 (1972).

[54] 248 A. 2d. 829 (1989).

[55] 498 F. 2d. 612 (1974).

In addition to the authority given by the foregoing case law, there is a rule of international law which prescribes a specific rule for the commencement of the passenger-carrier relationship. Under Article 17 of the Convention for the Unification of Certain Rules Relating to International Transportation By Air (also known as the "Warsaw Convention"),[56] "(t)he carrier shall be liable for damages sustained in the event of death or wounding of a passenger or other bodily injury suffered by a passenger if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." Upon the authority of Article 17, therefore, a person would become a passenger if the damage occurs while he is in the process of "embarking." The Warsaw Convention also does not require that the person, or any part of his body, be in physical contact with the aircraft.

In *Day v. Trans World Airlines*,[57] for instance, the United States District Court ruled that passengers who were injured by a terrorist attack that took place while they were about to board a bus that was to take them from the Athens airport terminal to the aircraft , were passengers and that the injuries were sustained while "in the course of any of the operations of embarking."[58]

B. Termination of Passenger Status

The prevailing Philippine rule holds that the passenger-carrier relation continues until the passenger has left the premises used by the carrier at the point of destination and has been allowed a reasonable time to leave.[59]

The first of the Philippine cases involving the issue of termination of the passenger - carrier relation is *La Mallorca v. Court of Appeals*,[60] decided by the Supreme Court in 1966. In that case, plaintiffs, husband and wife, together with their minor children Milagros, Raquel and Fe boarded a Pambusco bus. Upon reaching their destination, plaintiffs and the children alighted from the bus and the father led his companions to a shaded spot about 4 or 5 meters away from the vehicle. The father returned to the bus to get a piece of baggage which was not unloaded when they alighted from the bus. Raquel appears to have followed her father back to the bus such that while the latter was still on the running board of the bus waiting for the conductor to give him his *bayong*, the bus started to run. The father had to jump from the moving vehicle. It was at this instance that Raquel, who had apparently gone near the bus, was run over and killed. The Supreme Court held the carrier liable, declaring that it had failed to exercise the utmost diligence required by Article 1755 of the Civil Code

[56] 51 O.G. 5084 (1955).

[57] 393 F. Supp. 217 (1975).

[58] Day v. Trans World Airlines, 393 F. Supp. 217, 221 (year of promulgation unavailable).

[59] PADILLA AND CAMPOS, *supra* note 40, at 6, *citing* Atlantic City R. Co. v. Kiefer, 66 A. 930; La Mallorca v. Court of Appeals, 17 SCRA 739 (1966); Aboitiz Shipping v. Court of Appeals, 179 SCRA 95 (1989); Philippine Airlines v. Court of Appeals, 226 SCRA 423 (1993).

[60] 17 SCRA 739 (1966).

to be observed by a common carrier in the discharge of its obligation to transport its passengers safely. The Court took note of the facts that (a) the driver never put off the engine ; (b) he started to run the bus even before the conductor gave him the signal to go; and (c) the conductor was still unloading the passenger's baggage. Using a test of "reasonableness," the Court further declared that the presence of Raquel near the bus was not unreasonable, and that she, therefore, remained a passenger.[61]

The Supreme Court of Oregon, deciding *Neidert v. Portland Stages, Inc.*,[62] a case strikingly-similar to La Mallorca, appears to have held differently. Here, the plaintiff had completely alighted from defendant's bus at her destination. She then remembered that she had left a package inside the bus and turned back to retrieve the package from the bus. As she was doing so, the bus started to move again and the plaintiff fell and was injured. In absolving the carrier from liability, the court held that the contractual obligation of the carrier of safe carriage had ceased when plaintiff alighted in a safe place. At that point, the court declared the relationship of carrier and passenger had ceased.

In *Lewis v. Goodman*,[63] a young girl had alighted safely from the bus when the driver noticed that she had left some books. On his return trip, the driver saw the girl standing on the side of the road and, intending to hand the books over to her, the driver drove his bus alongside the girl and stopped. The door of the bus opened and the girl reached in to obtain the books. After that, she stepped back and started to cross the road towards her home and in doing so passed in front of the stationary bus. It was at that point where the girl was hit and injured by another car passing by the left side of the bus. In the suit against the bus company, plaintiff argued that she was a passenger at the time of the incident even if she had gotten out of the bus and had come back merely for the purpose of retrieving the books. Therefore, it was contended that the carrier owed her that degree of duty which is due to a passenger. The Court of Appeals of Louisiana disagreed. It ruled that the carrier-passenger relation had already terminated at the time of the accident:

> The usual rule is that when a carrier deposits a passenger at a safe place and the passenger has alighted, the status of passenger comes to an end and that thereafter the duty owed to the former passenger is only the duty of ordinary care.
>
> . . . .
>
> We think that the status of passenger had terminated and the fact that the little girl found it necessary to await the return of the bus and to receive the books did not revive that relationship even if the child re-entered the bus to get the books.

[61] *La Mallorca*, 17 SCRA 739, 744 (1966).

[62] 376 P. 2d. 92 (1962).

[63] 92 So. 2d. 723 (1957).

Shanowat v. Checker Taxi Company[64] provides an instance when the passenger alights in an unsafe place. In that case, the Appellate Court of Illinois ruled that the passenger-carrier relationship subsisted even if the passenger, a young girl, had completely alighted from the vehicle. There, the taxicab driver, upon arriving at the girl's destination, double-parked his car on a busy street and informed the passenger that she could alight, which the passenger did. While the passenger's mother was paying the fare, the passenger alighted, stepped in front of the cab and crossed the street. The passenger was then hit by a passing car. The court held that :

> [A] person ceases to be a passenger as soon as he safely steps from the vehicle into the street or highway at a reasonably safe and proper place.
>
> . . . .
>
> The traveled portion of the street or highway, however, under present day conditions can hardly be characterized as a place of safety and a passenger deposited in the traveled portion and injured as a consequence may hold the carrier liable.
>
> The rule has been applied that where a passenger is discharged in an unsafe place, the relation of carrier and passenger is not terminated until the passenger, in reasonable exercise of ordinary care for his own safety has had reasonable opportunity to reach a place of safety. The Shanowat children having been discharged into the street which was far from being safe, we believe that the relation of carrier and passenger still existed and that the driver accordingly was still bound to exercise the highest degree of care.[65]

In another case, where the passengers were discharged by the bus driver at a slippery snow-covered street and not at a regular stopping place, the Supreme Court of Washington held that the carrier-passenger relationship had not terminated and held in favor of a passenger who slipped soon after she alighted.[66] The Supreme Judicial Court of Massachusetts also reached the same conclusion in a case where the passenger alighted from the bus into a manhole cover adjacent to the step and slipped.[67] The court there reiterated that "(t)here was an obligation on the defendant as a carrier to stop its bus at a safe place for passengers to alight or to give warning of danger in alighting."[68]

Presence of a risk of injury to a passenger has also been considered in determining whether the place of disembarkation is "reasonably safe." Thus, "a passenger is not

[64] 198 N.E. 2d. 573 (1964).

[65] *Shanowat*, 198 N.E. 2d. 573, 576 (1968).

[66] Peterson v. City of Seattle, 316 P. 2d. 904 (1957).

[67] Brown v. Metropolitan Transit Authority, 171 N.E. 2d. 869 (1961).

[68] *Id.* at 871, *citing* Wakeley v. Bostin Elevated Ry. Co., 105 N.E. 436; McManus v. Boston Elevated Ry. Co., 160 N.E. 529.

discharged at a reasonably safe place merely because there is no hazard at the precise spot he alights... What is reasonably safe depends upon the probability of injury to passengers and the likely seriousness of injury if it occurs."[69]

In 1989, *Aboitiz Shipping Corporation v. Court of Appeals*,[70] another case involving the issue of termination of the carrier-passenger relationship was decided by our Supreme Court. There, the Court harkened to the "reasonableness test" given in *La Mallorca*.

In *Aboitiz*, passenger Anacleto Viana boarded the vessel M/V Antonia, owned and operated by defendant carrier Aboitiz Shipping, bound for Manila. Upon arrival of the vessel at Manila's Pier 4, the passengers disembarked, including Viana. The Pioneer Stevedoring Corporation then took over the exclusive control of the cargoes loaded on said vessel pursuant to an agreement between the stevedoring company and Aboitiz. A crane owned by the stevedoring company and placed alongside the vessel started to unload cargoes one (1) hour after the passengers had disembarked. Viana, who had already disembarked, but obviously remembering that some of his baggages were still loaded in the vessel, returned alongside the vessel. He called the attention of a member of the vessel's crew and pointed to where his things were loaded. At that point, the crane hit him. Viana was pinned between the side of the vessel and the crane and died three days later.

In affirming the liability of defendant-carrier for the injuries, the Supreme Court ruled that at the time of his death, Viana was still a "passenger:"

> The rule is that the relation of carrier and passenger continues until the passenger has been landed at the port of destination and has left the vessel owner's dock or premises. Once created, the relationship will not ordinarily terminate until the passenger has, after reaching his destination, safely alighted from the carrier's conveyance or had a reasonable opportunity to leave the carrier's premises. All persons who remain on the premises a reasonable time after leaving the conveyance are to be deemed passengers, and what is a reasonable time or a reasonable delay within this rule is to be determined from all the circumstances, and includes a reasonable time to see after his baggage and prepare for his departure. The carrier-passenger relationship is not terminated merely by the fact that the person transported has been carried to his destination if, for example, such person remains in the carrier's premises to claim his baggage.[71]
>
> . . . .
>
> . . . [W]e cannot in reason doubt that the victim Anacleto Viana was still a passenger at the time of the incident. When the accident occurred, the victim was in the act of unloading his cargoes, which he had every right to do, from petitioner's

[69] Feldman v. Howard, 214 N.E. 2d. 235 (1966).

[70] 179 SCRA 95 (1989).

[71] Aboitiz Shipping v. Court of Appeals, 179 SCRA 95, 102 (1989).

vessel. As earlier stated, *a carrier is duty bound not only to bring its passengers safely to their destination but also to afford them a reasonable time to claim their baggage.*[72]

In reaching its conclusions in *Aboitiz,* the Court cited American decisions to support the rule that the relation of carrier and passenger continued until the passenger had been landed at his destination and had a reasonable opportunity to leave the vessel owner's dock or premises.[73]

Interestingly, the same authorities relied upon in *Aboitiz* were invoked by the United States Court of Appeals in reaching a different conclusion . In *Ortiz v. Greyhound Corporation,*[74] a decision rendered by the United States District Court of Maryland and affirmed by the United States Court of Appeals, the passenger arrived at his destination and alighted safely from the Greyhound bus at its terminal in Baltimore. He stayed at the terminal for 2 hours waiting for his daughter to fetch him until he wandered out into the terminal driveway used by Greyhound for the operation of its buses. While there, he was struck and injured by a bus that was backing out. The District Court and Court of Appeals ruled that at the time of the incident, the passenger-carrier relation had already terminated. The Court of Appeals expressed:

> It is a well settled rule of law that a carrier owes to a person in a passenger status the duty to exercise the highest degree of care and skill in everything that concerns his safety. This duty is not limited to the actual transportation of passengers but requires also that the carrier provide safe means of ingress to the station and vehicle, safe waiting spaces and safe means of egress from the vehicle and station. Kaplan v. Baltimore & O.R. Company, 1594, 2076 Md. 56, 113 A. 2d 415; Dilley v. Baltimore Transit Co. 1944, 183 Md. 557, 39 A. 2d 469, 155 A.L.R. 627. See also 13 C.J.S. Carriers ss. 678 (a), 713, 723 (1939).
>
> . . . .
>
> The relation of carrier and passenger does not cease at the moment the passenger alights from the carrier's vehicle, but continues until the passenger has had a reasonable opportunity to leave the carrier's station premises. What is a reasonable time is, of course, to be determined from all the facts and circumstances and includes a reasonable time to care for baggage and prepare for departure. 13 C.J.S. Carriers s. 565, (1939).[75]

Saludo v. Court of Appeals,[76] a case decided by our Supreme Court in 1992 also involves the carrier's duty to exercise extraordinary diligence in favor of passengers

[72] *Id.* at 104.

[73] *Id.* at 102, *citing* 80 C.J.S. 1086, 13 C.J.S. 1073, and 14 AM. JUR. 2d. 250.

[74] 275 F. 2d. 770 (1960).

[75] *Id.* at 773.

[76] 207 SCRA 498 (1992).

who had arrived at their destination. In this case, plaintiffs were passengers on a TWA flight bound for San Francisco, California, departing from Chicago. Before boarding their flight for San Francisco, the passengers watched from the look-out area of the airport to see if the casket containing their deceased mother was going to be loaded on the same flight, as they had presumed. They, however, did not notice any. Upon arrival in San Francisco, the plaintiffs inquired with the employees of TWA at the San Francisco airport as to the whereabouts of the casket. The carrier's employees said they did not know. It appears also that these employees engaged in little effort, if at all, to discover the casket's whereabouts. It later turned out that the remains of plaintiff's mother was loaded on the wrong flight. Plaintiffs sued TWA for damages.

In finding for the passengers, the Supreme Court invoked the carrier's duty to observe extraordinary diligence and said:

> Airline companies are hereby sternly admonished that it is their duty not only to cursorily instruct but to strictly require their personnel to be more accommodating towards customers, passengers and the general public. After all, common carriers such as airline companies are in the business of rendering public service, which is the primary reason for their enfranchisement and recognition in law. Because the passengers in a contract of carriage do not contract merely for transportation, they have a right to be treated with kindness, respect, courtesy, and consideration. A contract to transport passengers is quite different in kind and degree from any other contractual relation, and generates a relation attended with public duty. The operation of a common carrier is a business affected with public interest and must be directed to serve the comfort and convenience of passengers. Passengers are human beings with human feelings and emotions; they should not be treated as mere numbers or statistics for revenue.[77]
>
> They (plaintiffs) were, however, entitled to the understanding and humane consideration called for by and commensurate with the extraordinary diligence required of common carriers, and not the cold insensitivity to their predicament . . . The imperviousness displayed by the airline's personnel, even for just that fraction of time, was especially condemnable particularly in the hour of bereavement of the family of Crispina Saludo, intensified by anguish due to the uncertainty of the whereabouts of their mother's remains. Hence, it is quiet apparent that private respondents' personnel were remiss in the observance of that genuine human concern and professional attentiveness required and expected of them.[78]

A more recent pronouncement of our Supreme Court relating to the issue of the termination of the relationship between passenger and carrier appears in *Philippine Airlines, Inc. v. Court of Appeals,*[79] decided in 1993. Plaintiff in this case was a passenger on board PAL Flight 477 from Cebu bound for Ozamiz City. The routing of the flight

[77] Saludo v. Court of Appeals, 207 SCRA 498, 533 (1992).

[78] *Id.* at 534.

[79] 226 SCRA 423 (1993).

was Cebu-Ozamiz-Cotabato-Cebu. Fifteen minutes before landing in Ozamiz City, the pilot received a radio message that the airport was closed due to heavy rains and inclement weather and that he should proceed to Cotabato City instead. As a result, plaintiff was forced to disembark in Cotabato City. Despite the fact that plaintiff was a stranger to the place, he was left at the airport and was not even accommodated in a Ford Fiera loaded with PAL personnel that had left the airport. PAL neither provided plaintiff with transportation from the airport to the city, nor food and accommodations for his stay in Cotabato City.

Plaintiff sued PAL for damages and sought recovery of, among others, reimbursement of his expenses while in Cotabato City. The Supreme Court held PAL liable for breach of contract and invoked the duty of carriers to observe extraordinary diligence. The Supreme Court said:

> The contract of air carriage is a peculiar one. Being imbued with public interest, the law requires common carriers to carry the passengers safely as far as human care and foresight can provide, using the utmost diligence of very cautious persons, with due regard for all the circumstances . . . . Indisputably, PAL's diversion of its flight due to inclement weather was a fortuitous event. Nonetheless, such occurrence did not terminate PAL's contract with its passengers. Being in the business of air carriage and the sole one to operate in the country, PAL is deemed equipped to deal with situations as in the case at bar. What we said in one case once again must be stressed, i.e., the relation of carrier and passenger continues until the latter has been landed at the port of destination and has left the carrier's premises. Hence, PAL necessarily would still have to exercise extraordinary diligence in safeguarding the comfort, convenience, and safety of its stranded passengers until they have reached their final destination. On this score, PAL grossly failed. . . .[80]

The *PAL* case raises another factual issue respecting the termination of the passenger status - that of the interruption of the carriage. Does the interruption of the operation or carriage suspend the passenger's status as such? In PAL, the Supreme Court ruled in the negative. Earlier, in *Sarreal v. Soliman*,[81] the Court of Appeals also reached the same conclusion.

In *Sarreal*, the plaintiff took defendant-carrier's bus from Manila to Mariveles. Complying with company policy, the bus made a stop-over at the carrier's station in Balanga, Bataan for 30 minutes. The passengers were told by the conductor that they could go down for "personal necessity." Plaintiff went down to go to the toilet. Upon walking back to the bus, plaintiff was hit by another bus of the carrier entering the station. Sarreal sued the carrier. The Court of Appeals ruled against the carrier's contention that Sarreal was not a passenger at the time of the injury.

> Under these circumstances, the relation of passenger and carrier between the plaintiff and the defendant companies continued to exist and was not suspended, let alone terminated.

[80] Philippine Airlines, Inc. v. Court of Appeals, 207 SCRA 423,433 (1993).

[81] 8 CAR [2s] 960 (1965).

> The rule followed by most courts, with some authority to the contrary, is that a passenger who, without objection from the carrier or its agent, alights at an intermediate station, which is a station for the discharge and reception of passengers, for any reasonable and usual purpose, such as that of obtaining refreshment, for the sending or receipt of telegrams, or for exercise, or other matters of convenience or necessity, does not lose his status as a passenger . . . . Clearly, a bus passenger who disembarks at a rest stop when ordered to do so by the driver of the bus does not lose the status of a passenger (14 Am. Jur. 2d pp. 246-247, Section 773). . . .
>
> The relation of carrier and passenger having been constituted continues until the journey, expressly or impliedly contracted for, has been concluded and the passenger has left the carrier's premises, unless the relation is sooner terminated by the voluntary act of the passenger, or unless the passenger has relinquished his rights as such by some act or misconduct of his own, such as a refusal to pay fare, refusal to produce a ticket, failure to have his ticket stamped, detaching coupons, attempting to use an invalid ticket, or refusing to comply with reasonable rules of the carrier (10 C.J. pp. 623-624, Section 1047).
>
> As a general rule a passenger does not lose his character as such by merely temporarily alighting at an intermediate station, with the express or implied consent of the carrier, for any reasonable and usual purpose, such as the procuring of refreshments, the sending or the receiving of telegrams, or for the purpose of exercising by walking up and down the platform, or even motives of curiosity. (10 C.J. p. 628, Section 1051) This is an absolute right of the passenger, so long as his object in alighting is not inconsistent with his character as passenger; and it is not dependent on notice being given to the conductor of his desire to alight (13 C.J.S. p. 1076, Section 565).[82]

Recently, in the case of *Agana v. Japan Airlines* (JAL),[83] the Court of Appeals adopted the theory enunciated in the PAL case that the interruption of the carriage does not suspend the passenger status. In this case, plaintiffs entered into a contract of common carriage with JAL from Los Angeles to Manila, via Narita, Japan. Plaintiffs arrived in Narita on June 14, 1991. As per their agreement, plaintiffs were accommodated at Nikko Hotel at the expense of defendant to await their connecting flight on the next day for Manila. On June 15, 1991, plaintiffs proceeded to the Narita airport to take their connecting flight to Manila. Due to the eruption of Mt. Pinatubo, the flight was postponed to June 16. JAL again accommodated the plaintiffs at its expense at the Nikko Hotel. On June 16, however, the connecting flight to Manila was indefinitely postponed with the airport in Manila remaining closed. Plaintiffs were also informed that JAL would no longer spend for their accommodations. From June 16 to 21, plaintiffs spent for their hotel accommodations and meals.

[82] Sarreal v. Soliman, 8 CAR (2s) 960, 966-967 (1965).

[83] CA-G.R. CV No. 39089, December 22, 1993 (unpublished).

The Court of Appeals upheld the judgment holding JAL liable for expenses incurred by plaintiffs during their stranding from June 16 to 21. The Court of Appeals said:

> Similarly, appellant should have provided appellees who were stranded in a foreign airport without their fault with all the comfort and convenience of which it was fully equipped, until they have reached their final destination. Failing on its part to do so, and instead declassified its stranded passengers leaving each of them to their own devises in a strange and foreign land, appellant grossly failed in its duty to exercise extraordinary diligence in safeguarding the comfort, convenience, and safety of its passengers.

In American jurisprudence, "if the carriage is delayed short of the ultimate destination or if the passenger temporarily leaves the vehicle, it then becomes a question of fact as to whether or not the relationship of carrier and passenger terminates."[84] This question of fact is in regards to the cause for the interruption or premature termination of the carriage. If the cause is the carrier's own act, like stopping at the carrier's office first to satisfy a spontaneous urge of the driver, the passenger does not lose his status while waiting at the station for the driver.[85]

If the cause is the passenger's own act or due to events beyond the control of the carrier, the carrier-passenger relationship ordinarily terminates. In *Miscione v. Pennsylvania Railroad Company*,[86] the United States Court of Appeals ruled that the passenger status of plaintiff terminated when he voluntarily alighted, although it was at the wrong station. The same ruling was reached by the Court of Appeals of Kentucky in a case wherein the plaintiff voluntarily alighted from the conveyance when he realized that he got on the wrong bus.[87] In these cases, however, the carrier retains the duty not to discharge the passenger at a place that the carrier knows or ought to know is unsafe.[88] "A carrier is not, however, under a duty to advise or warn a passenger of the danger of traffic or to protect him after he has left the bus where the conditions are as apparent to the passenger as to the operator of the bus."[89]

C. Summary

On the basis of the foregoing discussion, the rules on the commencement of the passenger-carrier relationship may be summarized as follows:

1. The relationship of passenger and carrier begins when a person, with the good faith intention of taking passage and with the express or implied consent of the carrier, (a) presents himself as being ready to avail of the facilities for transportation offered by carrier; or (b) otherwise puts himself in the care of the carrier or directly under its control.[90]

2. There is no dispute that a person who, pursuant to a contract to carry, comes into contact with the means of conveyance is a passenger.[91]

3. Physical contact, however, is not always necessary to perfect the real contract of carriage. The carrier is required to consider the passenger's safety "as far as human care and foresight can provide."[92] Thus, the contractual duty to safely carry passengers requires carriers to provide safe means of ingress, i.e., entering the conveyance, or to otherwise not do any act which might increase the passenger's peril while preparing or attempting to board.[93] In such a case, the determination of whether or not a person has become a passenger will depend on circumstances of place, time, submission to control of carrier, clarity of person's intention to take passage, and knowledge by the carrier of that person's intention.[94]

Summarizing the rules regarding the *termination* of the passenger-carrier relationship is not as simple, however. While appearing to base their decisions on American jurisprudence, our courts have been more liberal in applying these rules. For purposes of this summary, therefore, we need to refer to a "Philippine rule" and an "American rule," as follows:

1. The Philippine rule is that a carrier's obligation to exercise extraordinary diligence for the safety of a passenger does not end until the latter has arrived at his destination.[95] This obligation continues regardless of the cause of the carrier's failure to convey the passenger to the agreed destination.[96]

[84] Henderson v. Tarver, 123 So. 2d 369 (1960).

[85] *Id.*

[86] 284 F. 2d 428 (1960).

[87] Southeastern Greyhound Lines v. Grimes, 385 S.W. 2d 189 (1964).

[88] *Id.*; *Peterson*, 316 2d. 904 (1957).

[89] Southeastern Greyhound Lines, 385 S.W. 2d. 189, 191 (1964).

[90] PADILLA and CAMPOS, *supra* note 40 at 6; VITUG, *supra* note 38 at 638; Vda. de Nueca v. Manila Railroad, 65 O.G. 3151 (1968).

[91] Dangwa Transportation Co. Inc. v. Court of Appeals, 202 SCRA 574 (1991); PARAS, *supra* note 5, at 460, *citing* Illinois C.R. Co. v. O'Keefe 686 Ill. 115; PADILLA AND CAMPOS, *supra* note 40, at 975, *citing* Vda. de Galvez v. Marikina Bus, Inc., 18 CAR [1s] 807; DelPrado v. Meralco, 52 Phil. 900 (1929).

[92] Civil Code, art. 1755.

[93] *Cangco*, 38 Phil. 767 (1918); *Del Prado*, 52 Phil. 900 (1929); *Day*, 393 F. Supp. 217; Warsaw Convention, art. 17.

[94] ZOROTOVICH, 491 p. 2d. 1295; *Katamay*, 289 N.E. 2d. 263 (1972).

[95] *Aboitiz Shipping*, 179 SCRA 95 (1989).

[96] *Philippine Airlines*, 226 SCRA 423 (1993).

2. The carrier also continues to be bound to observe extraordinary diligence until the passenger has, after a reasonable time, left the premises used by the carrier at the point of destination.[97]

3. The American rule requires the carrier to continue exercising a high degree of care in favor of passengers until the latter has safely alighted from the vehicle at a reasonably safe and proper place.[98] If the passenger disembarks at the carrier's premises, he remains a passenger until he has had a reasonable opportunity to leave the carrier's premises.[99] If the passenger alights at an unsafe place, however, the relation of carrier and passenger continues until the passenger, exercising ordinary care for his own safety, has had reasonable opportunity to reach a place of safety.[100]

In all cases, the duty to exercise extraordinary diligence is coterminous with the lifetime of the contract of carriage. Once the carrier's obligations arising from the contract are extinguished, its duty to exercise extraordinary diligence necessarily ends.

In making a reference to an American rule and a Philippine rule, this writer does not suggest the existence of a definite demarcation between these rules in a way that they are to all points irreconcilable. Our Court of Appeals, for instance, has adopted American jurisprudence in ruling that a passenger who, without objection from the carrier or its agent or with its express or implied consent, alights at a carrier's intermediate station for personal necessities, remains a passenger.[101] The distinction between an American rule and a Philippine rule has been made for purposes of this summary and to facilitate the reformulation of Article 1755, the task of the next chapter.

IV. REMAKING ARTICLE 1755

How amazing it is that, in the midst of controversies on every conceivable subject, one should expect unanimity of opinion upon difficult legal questions! . . . The history of scholarship is a record of disagreements. And when we deal with questions relating to principles of law and their application, we do not suddenly rise into a stratosphere of icy certainty.[102]

- Chief Justice Charles Evans Hughes

[97] La Mallorca v. CA, 17 SCRA 739 (1966); *Aboitiz Shipping*, 179 SCRA 95 (1989).

[98] Shanowat v. Checker Taxicar, 198 N.E. 2d. 573 (1964); *Lenis*, 92 So. 2d. 723 (year of promulgation unavailable). Neidert v. Portland Stages, Inc., 376 2d. 92 (1962).

[99] Ortiz v. Greyhound Corp., 275 p. 2d. 770 (1960).

[100] Brown v. Metropolitan Tran Arthur, 171 N.E. 2d 869 (1961); *Shanowat*, 198 N.E. 2d 573 (1968); Pharr v. Peterson v. City of Seattle, 316 2d. 904 (1957).

[101] Sarreal v. Soliman, 8 CAR 960, 966-967 (1965), *citing* 14 AM. JUR. 2d. 773, 10 C.J. 1047, *and* 13 C.J.S. 565.

[102] Address by Chief Justice Charles Evans Hughes, American Law Institute, May 7, 1936, *reprinted* in 65 John Bartlett, BARTLETTS FAMILIAR QUATATIONS at 586 (1992).

One cannot expect unanimity of opinion in the field of law. By its nature, the law breeds argument and diverse opinions. The variance in court rulings relating to the duration of a carrier's extraordinary responsibility exemplifies this fact. That as it may be, it is imperative to deliberate on the laws and analyze the decisional rules on this issue if they are to be of any use in defining the duration of extraordinary diligence for the safety of passengers.

In the preceding chapter, this writer summarized the rules governing the beginning and end of the passenger-carrier relationship.[103] We have, therefore, answered the two questions we posed in the beginning of this work, *i.e.*, first, when the carrier's obligation to observe extraordinary diligence commences; and second, when the obligation terminates. Because of the variance, however, between the Philippine rule and the American rule on termination of the passenger status, this chapter will dwell at length on the second question - when does a person lose his "passenger" status?

As mentioned in the beginning of this work,[104] our law on common carriers precisely defines the duration of extraordinary diligence for carriage of goods,[105] but not that of persons. In attempting to fill this gap, this writer will be guided by pertinent judicial decisions, principles of law and rules of statutory construction. A reference to other laws will also be made. These are among the criteria that guide judges in making decisions in cases where the law is silent, obscure or insufficient, pursuant to Article 9 of the Civil Code.[106]

Ultimately, the writer's objective is to determine what the law might contemplate is the duration of extraordinary diligence for the safety of passengers. This concept, of course, cannot be separated from the meaning and object of extraordinary diligence.

A. Meaning, Object and Term of Extraordinary Diligence

1. CONSTRUING THE LAW

Article 1733 of the Civil Code provides:

Common carriers, from the nature of their business and for reasons of public policy, are bound to observe *extraordinary diligence in the vigilance over the goods and for the safety of the passengers transported* by them, according to all circumstances of each case.

[103] *See infra* pp. 14-35.

[104] *See infra* pp. 3-4.

[105] Civil Code, art. 1736.

[106] ARTURO TOLENTINO, COMMENTARIES & JURISPRUDENCE OF THE CIVIL CODE OF THE PHILIPPINES 38-42 (1990); PARAS, *supra* note 5.

Such extraordinary diligence in the vigilance over the goods is further expressed in articles 1734, 1735, and 1745 nos. 5, 6, and 7, while the *extraordinary diligence for the safety of the passengers* is further set forth in articles 1755 and 1756.

It is readily discernible that Article 1733 - or any other law for that matter - does not define extraordinary diligence. It does, however, make a distinction between (a) an "extraordinary diligence in the vigilance over the goods" and (b) an extraordinary diligence "for the safety of the passengers transported by them, according to all circumstances of each case." Moreover, Article 1733 states that "extraordinary diligence for the safety of the passengers is further set forth in articles 1755 and 1756."

Articles 1755 and 1756 in turn provide:

Article 1755. A common carrier is *bound to carry the passengers safely* as far as human care and foresight can provide, using the utmost diligence of very cautious persons, with a due regard for all the circumstances.

Article 1756. In case of *death or injuries to passengers*, common carriers are presumed to have been at fault or to have acted negligently, unless they prove that they observed *extraordinary diligence as prescribed in articles 1733 and 1755*. (underscoring supplied).

What is the meaning of the obligation "to carry the passengers safely?" What about the phrase "extraordinary diligence for safety?" Is there any significance to the fact that the law repeatedly uses the term "safety" when it refers to transport of persons?

A cardinal rule of statutory construction says that "in construing words and phrases used in a statute, the general rule of statutory construction is that, in the absence of legislative intent to the contrary, they should be given their plain, ordinary, and common usage meaning."[107] It is also accepted practice for courts to consult dictionaries "where a statute does not define the words or phrases used therein."[108]

Ordinarily, the phrase "to carry" is understood as the act of moving, conveying, or transferring something to another place. The Webster's Dictionary defines "carry" as "to move while supporting; transport; to transfer from one place to another."[109] The law itself defines "common carriers" as "persons, corporations, firms or associations engaged in the business of carrying or transporting persons or goods, or both."[110] Black defines "carrier" as "a person or corporation undertaking to transport persons or property from place to place, by any means of conveyance, either gratuitously or for hire;" and defines the word "carry" to mean "to bear, bear about, sustain, transport, remove, or convey."[111] None of the definitions of "carry" nor its

[107] Espino v. Cleofe, 52 SCRA 92 (1973).

[108] Lu Do & Lu Ym Corp. v. Central Bank of the Philippines, 108 Phil. 566 (1960).

[109] MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 175 (10th ed. 1994).

[110] Civil Code, art. 1732.

[111] BLACK'S LAW DICTIONARY (5th ed. 1979).

lexemes suggest any other meaning but the act of actually transporting, removing, or transferring from one place to another. And the law neither suggests nor intimates that a definition other than its plain meaning should be adopted.

With regard to the word "safely," Webster's Dictionary defines "safe" to mean "free from harm or risk: Unhurt."[112] Ordinarily, "harm" is understood to contemplate physical harm or injuries.

The plain meaning of the words used therefore indicates that the carrier has an obligation to transport the passenger safely to his destination, i.e., take steps to ensure that he is not physically harmed, and that in performing this obligation, the carrier must observe extraordinary diligence. This duty subsists during the time that the carrier is transporting the passenger.

That the duty to exercise extraordinary diligence in Articles 1733 and 1755 is circumscribed to ensuring the passengers' safety may also be gleaned from Article 1757, *viz.*:

Article 1757. The responsibility of a common carrier *for the safety of passengers as required in articles 1733 and 1755* cannot be dispensed with or lessened by stipulation, by the posting of notices, by statements on tickets, or otherwise. (emphasis supplied)

The same thing is suggested by the title of the Civil Code's subsection on carriage of passengers, which says "Subsection 3.- *Safety* of Passengers." This is likewise significant because headnotes, headings, or epigraphs of statutes "may be consulted in aid of interpretation."[113]

2. LEGISLATIVE INTENT

An examination of the legislative intent behind the use of these words is likewise important because "the intent of the legislature is the law, and the key to, and the controlling factor in its construction or interpretation."[114] The report of the Code Commission is pertinent as an expression of the rationale behind the present law on common carriers:[115]

[112] WEBSTER'S, *supra* note 109, at 1030.

[113] RUBEN AGPALO, STATUTORY CONSTRUCTION 62-63 (1990), *citing* Commissioner of Customs v. Relunia, 105 Phil. 875 (1959); People v. Desiderio, 15 SCRA 402 (1965).

[114] United States v. Tamparong, 31 Phil. 321 (1915).

[115] REPORT OF THE CODE COMMISSION ON THE PROPOSED CIVIL CODE OF THE PHILIPPINES 64-67 (1948).

As for the safety of passengers, the responsibility of common carriers. . .is based on the standards of care in obligations in general.

. . . .

The Commission believes that the Anglo-American law on the subject should be adopted. . . .

. . . .

The nature of the business of common carriers and the exigencies of public policy demand that they observe extraordinary diligence.

. . . .

That the business of common carriers is impressed with a special duty is recognized in the Philippines through the laws which subject the same to control and regulation by the Public Service Commission. *The public must of necessity rely on the care and skill of common carriers in the vigilance over the goods and the safety of the passengers.*

. . . .

Furthermore, with the modern development of science and invention, transportation has become more rapid, but more complicated and hazardous, so the public is forced to trust all the more in the utmost diligence and foresight of common carriers, whether by land, sea, or air. (emphasis supplied)

The stated purpose of the law also supports the theory that, in imposing the extraordinary diligence requirement, both the Code Commission and Congress contemplated the regulation of the manner carriers operated their conveyances, with the end in view of making the voyage safe for the passengers. Thus, the Supreme Court has expressed that,

> indeed, in approving said draft, Congress must have concurred with the Commission that by requiring the highest degree of diligence from common carriers in the safe transport of their passengers and by creating a presumption of negligence against them, the recklessness of their drivers which is a common sight even in crowded areas and, particularly, on the highways throughout the country may, somehow, if not in a large measure, be curbed.[116]

3. RELATED LAWS

It is settled that "where the law governing a particular matter is silent on a question at issue, the provision of another law governing another matter may be applied where the underlying principle or reason is the same." *Ubi cadem ratio ibi eadem disposito.*[117]

[116] 30 SCRA 69 (1969).

[117] PARAS, *supra* note 5.

The law on common carriers itself dictates this procedure. Thus, Article 1766 of the Civil Code provides that "in all matters not regulated by this Code, the rights and obligations of common carriers shall be governed by the Code of Commerce and by special laws."

a. Laws On Carriage of Passengers

(1) Under the Code of Commerce

The Code of Commerce does not directly supply the omission in the Civil Code. Its transport provisions largely cover rules on the transport of goods and limits its treatment of transport of persons to a section entitled "Passengers of Sea Voyage."[118] This section does not mention the diligence required of carriers for passenger transport. Its Article 700, however, is significant:

> Article 700. In all that relates to the preservation of order and discipline *on board the vessel, the passengers shall be under the control of the captain,* without any distinction whatsoever. (emphasis supplied)

The wording of the law is indicative of two (2) legal propositions: first, that the carrier has power to control, or otherwise direct the movement of persons who have entered into contracts of carriage with it; and second, that this power can only be exercised if these persons are in the custody of the carrier, i.e., they are on board the vessel. Consequently, persons who are not on board the vessel are not subject to the captain's disciplinary powers, and are not "passengers."

(2) Under Special Laws

The Warsaw Convention is an international treaty to which the Philippines is a party.[119] It applies to all international transportation performed by aircraft for hire.[120]

As an international treaty, it forms part of the Philippine legal system and may be deemed within the term or is in the nature of a "special law."[121] Article 17 of the Warsaw Convention provides:

> Article 17. The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, *if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.* [emphasis supplied]

Article 17 provides for time parameters during which the carrier can be held responsible for a passenger's injury or death. It again highlights the rule that the

[118] Code of Commerce, arts. 693-705.

[119] 51 O.G. 5084 (1955); Santos v. Northwest Airlines, 210 SCRA 256 (1992).

[120] Warsaw Convention, art. 1(1).

[121] PHIL. CONST. art. IIx, § 2.

passenger must be in the custody of the carrier or that the carrier is otherwise in a position to control or direct the movement of the passenger if it is to be held liable for injury or death. In this case, the accident which causes injury or death must have occurred in either of three (3) situations: (a) while the passenger is on board the aircraft; (b) while the passenger is engaged in the course of any of the operations of embarking; or (c) disembarking. Obviously, it is only in these cases where the carrier is able to ensure the passenger's safety or can subject the passenger to its regulations regarding safety.

There is, of course, no dispute as to when the passenger is on board. Like Article 700 of the Code of Commerce, it denotes a situation where the passenger is physically on the carrier's conveyance. But unlike the Code of Commerce, the Warsaw Convention extends the time frame during which the carrier is legally presumed to have custody of the passenger or be in a position to control or restrict the passenger's movement, i.e., to procedures of embarking or disembarking.

The scope of "embarking" was the subject of *Day v. Trans World Airlines, Inc.*[122] In *Day*, the passengers had received boarding passes, proceeded through passport and currency control pursuant to TWA's instructions, entered the lounge area, and begun to form a line at the gate for searches when a terrorist attack occurred, causing injuries to the passengers. In a suit against TWA, the New York District Court ruled that the passengers were in the act of embarking under the Warsaw Convention because they were, at the time, undertaking acts under the direction of the carrier as a condition for travel.

The other end of the time frame - "disembarking" - is the subject of *Knoll v. Trans World Airlines*.[123] Here, the District Court of Colorado ruled against a passenger who sustained injuries after she left the aircraft, walked 300 yards, and fell at a concourse of the airport, thus:

> Courts have consistently refused to extend coverage of the Warsaw Convention to injuries incurred within the terminal, *except in those cases in which plaintiffs were clearly under the direction of the airlines.*[124]
>
> . . . .
>
> Plaintiff was not disembarking when she fell. Plaintiff was in a concourse of the airport which was not near enough to the TWA gate from which she had walked to warrant a finding of liability. *She was not under the control of airline agents at that point, but involved in the activity of looking for immigration. More importantly, plaintiff's remaining activities (e.g.immigration, customs) were not conditions imposed by the airline for disembarking.* [emphasis supplied][125]

[122] 393 F. Supp. 217 (1975).

[123] 610 F. Supp. 808, 844 (1985).

[124] *Knoll*, 610 F. Supp. 808, 809 (1985), *citing* Schmid Kunz v. Scandanavian Airlines System, 628 F. 2d 1205; Maugnie v. Compagnie National Air Force, 549 F. 2d 1256; MacDonald v. Air Canada, 459 F. 2d 1402; Rolnick v. El Allsrael Airlines Ltd., 551 F. Supp. 261; Ricotla v. Iberia Lineas Dereas de España, 482 F. Supp. 497.

b. Laws on Carriage of Goods

The law, for obvious reasons, distinguishes between the extraordinary diligence required in the carriage of goods and that required in the carriage of passengers. The rule relating to the time during which the carrier is required to exercise extraordinary diligence for goods is, however, relevant to our discussion because it is also based on "custody" of the subject or object of the carriage.

(1) Under the Civil Code

Article 1736 of the Civil Code, in defining the duration of extraordinary responsibility for the vigilance over goods, refers to a time when the carrier is in possession of or has custody over the goods and is in a position to ensure that they are not lost or destroyed or do not deteriorate. It provides:

> Article 1736. The extraordinary responsibility of the common carriers lasts from the time the goods are unconditionally placed in the possession of, and received by the carrier for transportation until the same are delivered, actually or constructively, by the carrier to the consignee, or the person who has a right to receive them.

Thus, if the goods are lost or destroyed before they are "unconditionally placed in the possession of the carrier" for transportation, the carrier is not presumed to have acted negligently. Also, if the goods deteriorated after they had been "delivered, actually or constructively, by the carrier to the consignee, or the person who has a right to receive them," the carrier is not at fault, there being no duty to exercise extraordinary diligence at that time.

In *Lu Do & Lu Ym Corporation v. Binamira*,[126] the Supreme Court upheld the stipulation that considered the goods delivered upon being taken by customs authorities because the carrier would no longer have control over the goods:

> These provisions (referring to Articles 1734 - 1736) apply only when the loss, destruction or deterioration takes place while the goods are in the possession of the carrier, and not after it has lost control of them. *The reason is obvious. While the goods are in its possession, it is but fair that it exercise extraordinary diligence in protecting them from damage, and if loss occurs, the law presumes that it was due to its fault or negligence.*
>
> . . . .
>
> While we agree with the Court of Appeals that while delivery of the cargo to the customs authorities is not delivery to the consignee x x x we believe, however, that the parties may agree to limit the liability of the carrier considering that the

[125] *Id.* at 810.

[126] 101 Phil. 120 (1957).

goods have still to go through the inspection of the customs authorities before they are actually turned over to the consignee. *This is a situation where we may say that the carrier loses control of the goods because of a custom regulation and it is unfair that it be made responsible for what may happen during the interim.*[127]

(2) Under the Warsaw Convention

The same is true with the Warsaw Convention. Its Article 18 reads:

Article 18. (1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage, or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or the goods are in charge of the carrier, whether in an airport or on board an aircraft, or in the case of a landing outside an airport, in any place whatsoever.

Again, to hold the carrier liable, the destruction, loss or damage must take place during the time that the goods are "in the charge of the carrier." Should destruction, loss or damage take place at a time when the goods are not in the charge of the carrier, the latter would not be liable under the terms of the Warsaw Convention.

4. SUMMARY

In conjunction with the foregoing discussion, Articles 1733, 1755 and 1766 of the Civil Code may be read as establishing the following principles:

1. Carriers are required to observe extraordinary diligence in the performance of their obligations as such. If they are transporting goods pursuant to a contract with a shipper, they must observe *extraordinary diligence in the vigilance over these goods. If they are transporting passengers pursuant to a contract with them, they must observe extraordinary diligence for the safety of these passengers.* In every case, a contract of carriage must be in effect to bind the carrier to the shipper or passenger.[128]

2. Extraordinary diligence "for the safety of the passengers" means that the carrier must "carry the passengers safely as far as human care and foresight can provide, using the utmost diligence of very cautious persons, with a due regard for all the circumstances."[129]

3. The carrier's obligation to observe extraordinary diligence subsists during the carriage or transport.

[127] *Id.* at p. 124 (emphasis supplied); Lu Do & Lu Ym Corp. v. Central Bank of the Philippines, 108 Phil. 566 (1960).

[128] Civil Code, arts. 1733 and 1755.

[129] *Id.*, art. 1755.

4. The carrier violates its duty to exercise extraordinary diligence for the safety of passengers when the passenger either dies or is injured. In such a case, the carrier is presumed negligent.[130]

In fine, the duty of the carrier to exercise extraordinary diligence when transporting persons is limited to ensuring his *safety*, i.e., keeping the passenger out of harm's way. That is not to say that the carrier has no other obligation. For instance, a passenger has "a right to be treated by the carrier's employees with kindness, respect, courtesy and due consideration."[131] This obligation, however, is not based upon the duty to exercise extraordinary diligence under Articles 1733 and 1755 but upon the law on Human Relations.[132]

Consistently, the established rule is that the carrier-passenger relationship does not commence until the passenger presents himself as being ready to avail of the facilities for transport offered by the carrier or otherwise puts himself in the care of the carrier or directly under its control.[133] It is only when the carrier is in a position to control or otherwise restrict the mobility of the passenger that it can be in a position to ensure his safety. Thus, when the passenger has been discharged safely at his destination and leaves the carrier's premises, the carrier's duty to exercise extraordinary diligence ends. Obviously, the carrier is no longer in a position to ensure the passenger's safety at that time.

Considering, therefore, that the meaning and object of the extraordinary diligence mandated in the law refer to the obligation of the carrier to secure the passenger's safety, a concept precisely related to injury and death, that duty is co-extensive with the carrier's ability to ensure that the passenger is safe from physical harm. Stated differently, the duty to exercise extraordinary diligence would then end when the carrier loses that ability.

B. Philippine Jurisprudence

In Chapter III of this work, the writer discussed the rules on termination of the relationship of carrier and passenger as established in Philippine jurisprudence.[134] There, we referred to cases decided by our Supreme Court, namely *Philippine Airlines v. Court of Appeals*,[135] *Saludo v. Court of Appeals*,[136] *Aboitiz Shipping Corporation v. Court of Appeals*,[137] and *La Mallorca v. Court of Appeals*.[138] A case decided by the Court of

[130] *Id.*, art. 1756.

[131] Zulueta v. Pan Am, 43 SCRA 397 (1972); Air France v. Carrascoso, 18 SCRA 155 (1966).

[132] Civil Code, arts. 19, 20 & 21; *Air France*, 18 SCRA 155 (1966).

[133] PADILLA AND CAMPOS, *supra* note 40, at 6; VITUG, *supra* note 38 at 683; *Vda. de Nueca*, 65 O.G. 3151 (1968).

[134] *See infra* pp. 20-32.

[135] 226 SCRA 423 (1993).

[136] 207 SCRA 498 (1992).

[137] 179 SCRA 95 (1989).

[138] 17 SCRA 739 (1966).

Appeals, *Agana v. Japan Airlines*,[139] was also discussed. Analyzing now these cases, one will see a tendency to unjustifiably extend the term of extraordinary diligence.

For the reader's convenience, this writer will reiterate the relevant facts of these cases to provide the background for the discussion hereunder.

In *Philippine Airlines v. Court of Appeals*, PAL operated a flight from Cebu to Ozamiz and Cotabato. From Cotabato, the flight would return to Cebu and continue to Manila. Plaintiff, Pedro Zapatos, boarded the flight in Cebu bound for Ozamiz. Fifteen (15) minutes before landing at Ozamiz, the pilot received a radio message that the airport was closed due to heavy rains and inclement weather. Consequently, the flight bypassed Ozamiz and went straight to Cotabato. Upon arrival in Cotabato, PAL informed the Ozamiz-bound passengers of their options to return to Cebu, or remain in Cotabato and take the next available flight to Ozamiz three days later. The passengers were also informed that there were only six (6) seats available on the Ozamiz-Cebu leg of the flight as there were already confirmed passengers for Manila, and that the basis for priority would be the check-in sequence at Cebu. Mr. Zapatos chose to return to Cebu but was not accommodated on the flight due to the priority listing. He was left at the airport without PAL providing him with transportation from the airport to the city proper nor food and accommodation for his stay in Cotabato City that night. The following day, Mr. Zapatos flew on PAL to Iligan City and from there hired a car to Kolambugan, Lanao del Norte, finally reaching Ozamiz City by crossing the bay in a launch.[140]

Zapatos then sued PAL for damages. Litigation eventually reached the Supreme Court which affirmed a Court of Appeals decision finding PAL liable. In deciding for plaintiff, the Supreme Court ruled that while the diversion of the flight to Cotabato was a fortuitous event, "such occurrence did not terminate PAL's contract" with Mr. Zapatos because "the relation of carrier and passenger continues until the latter has been landed at the port of destination and has left the carrier's premises." Thus, according to the Court, *"PAL necessarily would still have to exercise extraordinary diligence in safeguarding the comfort, convenience, and safety of its stranded passengers until they have reached their final destination."*[141] In the case of Mr. Zapatos, PAL's duty to exercise extraordinary diligence would, according to the Court, end only when he had reached Ozamiz. The failure of PAL to provide Mr. Zapatos with hotel accommodations in Cotabato was, therefore, a breach of that duty.

With all due respect to the Court's holding, it is doubtful whether the duty to exercise extraordinary diligence under Articles 1733 and 1755 of the Civil Code can correctly serve as the basis of liability for breach even when the passenger was no longer within the carrier's custody or could be subject to any degree of direction or control. In imposing the duty of extraordinary diligence, the law presumes that the

[139] CA-G.R. CV No. 39089, December 22, 1993 (unpublished).

[140] 226 SCRA 423, 428 (1993).

[141] *Id.* at 433 (emphasis supplied).

carrier is or can be in a position to ensure that the passenger is safe. This is precisely why the commencement of the carrier-passenger relationship requires the passenger to place himself under the care of the carrier[142] and is deemed to continue while the passenger is and remains "under the proper care and charge of the carrier."[143]

In this case, the Court would have the carrier exercise extraordinary diligence even after its passenger had disembarked from the aircraft, left the airport, entered Cotabato City proper, stayed overnight in the city, took another flight the following day to Iligan, travelled by land to Kolambugan, and even took a launch to finally bring him to Ozamiz.

This is obviously erroneous. One of the consequences of the duty to exercise extraordinary diligence is that in case of injury or death, the carrier is presumed negligent. If the Court were correct, it would follow that PAL would be presumed negligent if Mr. Zapatos was injured at any point between Cotabato and Ozamiz - say, while he was on board the plane which took him to Iligan, or the launch which took him to Ozamiz - which is absurd because PAL would not then be in a position to ensure the passenger's safety. Such a proposition would also give rise to two (2) contracts of carriage concurrently existing - the Cebu to Ozamiz contract overlapping with either the Cotabato to Iligan contract (air transport), the Iligan to Kolambugan contract (land transport), and the Kolambugan to Ozamiz contract (water transport). The Court's theory would also require two (2) carriers to simultaneously observe extraordinary diligence! And if, indeed, he was injured, would the passenger be able to invoke the presumption of negligence against both carriers?

Under American jurisprudence, the relationship of carrier and passenger may be terminated even before the passenger arrives at his destination either by the voluntary act of the passenger, or by the carrier for some lawful cause.[144] In this case, at the time Mr. Zapatos safely disembarked from the aircraft that had brought him to Cotabato, he was no longer a passenger. It may not, therefore, be argued that PAL and Mr. Zapatos continued to be bound by the contract of carriage after the latter had disembarked in Cotabato City. The Court had, after all, conceded that the failure of PAL to transport the passenger to Ozamiz was caused by *caso fortuito*.[145] Therefore, PAL could not have been made liable for its failure to perform under the contract.

The relationship of carrier and passenger had clearly ceased in Cotabato when due to *caso fortuito*, the carrier could not bring the passenger to his destination. Under Article 1266 of the Civil Code, "the debtor in obligations to do shall also be released when the prestation becomes legally or physically impossible without the fault of the

[142] Vda. de Nueca v. Railroad, 65 O.G. 3151 (1968); Zorotovich v. Washington Toll Bridge Authority, 491 p. 2d 1295 (1971).

[143] VITUG, *supra* note 38; People's Checker Cab Company v. Dunlap, 307 P. 2d 833 (1957).

[144] Georgia & F. R.Co. v. Thigpen, 80 SE 628 (year of promulgation unavailable); Fremont v. E. & M.V.R. Co. v. Hagblad, 101 NW 10033 (year of promulgation unavailable); 14 AM. JUR. 2d. 772.

[145] Philippine Airlines v. Court of Appeals, 226 SCRA 422, 433 (1993).

obligor." Also, the law considers caso fortuito as a legal excuse for the non-performance of contractual obligations.[146] To say, therefore, that the duty of PAL to exercise extraordinary diligence ceased only when Mr. Zapatos had reached his destination, notwithstanding the force majeure which caused the carrier's inability to perform the carriage, is to stretch the limits of the duty to observe extraordinary diligence beyond the lifetime of the contract of carriage.

The Court also expanded the meaning and object of extraordinary diligence from that which requires the carrier to ensure the passenger's safety. It expressed that the carrier also had an obligation to "safeguard the comfort and convenience" of the passenger, and that the performance of that obligation required extraordinary diligence.[147]

This is not the first time that the Supreme Court dealt with the issue of a carrier's obligations towards a passenger whose destination had been by-passed. In *Sweet Lines v. Court of Appeals*,[148] the carrier operated the M/V Sweet Grace which had a weekly Cebu-Catbalogan-Tacloban-Manila-Cebu run. The plaintiffs had boarded the M/V Sweet Grace in Cebu City bound for Catbalogan, Samar. The vessel left Cebu more than a day late due to engine repair and, to plaintiffs' surprise, headed for Tacloban City. The passengers were informed that the vessel would by-pass Catbalogan and proceed straight to Manila. The passengers were forced to disembark in Tacloban and had to arrange for their own transport to Catbalogan.

For by-passing their destination, the passengers sued Sweet Lines. The Supreme Court affirmed the lower courts' judgments finding the carrier liable because the cause of the inability of the carrier to bring the passengers to Catbalogan was not force majeure.[149] Notably, the Court in *Sweet Lines* did not judge the carrier against the standard of extraordinary diligence under Articles 1733 and 1755, even if Sweet Lines was admittedly a common carrier. Obviously, the plaintiffs there were no longer "passengers" as to be entitled to extraordinary diligence to ensure their safety after they disembarked in Tacloban, even if such was against their will. The Court, therefore, does not cite the rule that the duty to observe extraordinary diligence "lasts until the time that the passenger is landed at his destination."

In *Saludo v. Court of Appeals*, the Supreme Court also incorrectly relied on the law on extraordinary diligence to find the carrier liable for damages. Here, plaintiffs' mother had died in Chicago in the United States. They then made arrangements to ship her remains from Chicago to Cebu City. Airway bills were issued to carry the casket containing the deceased's remains on TWA from Chicago to San Francisco, and on PAL from San Francisco to Manila and Cebu.

[146] Civil Code, art. 1174.

[147] *Philippine Airlines*, 226 SCRA 422, 433 (1993).

[148] 121 SCRA 769 (1983).

[149] *Sweet Lines*, 121 SCRA 769, 773 (1983).

Wanting to travel on the same flight as their mother's, plaintiffs purchased carriage on TWA for travel between Chicago and San Francisco and on PAL from San Francisco to the Philippines. On the day of travel, plaintiffs checked in for their flight to San Francisco. While waiting to board the flight, plaintiffs observed the loading on the aircraft from the look-out area but did not notice anything that could have contained a casket being loaded. Upon arrival in San Francisco, plaintiffs went to a TWA counter to inquire if their mother was on the flight. TWA personnel only replied that they did not know. After several hours of waiting, plaintiffs were eventually informed that the shipment was loaded on a flight that left Chicago for San Francisco much earlier than plaintiffs', but that the shipment was withdrawn upon arrival in San Francisco because it had been belatedly determined that the casket contained the body of another person. The shipment was delayed by one day because of the error.

The Saludo's sued TWA and PAL for damages. The complaint was, however, dismissed by the trial court. Further appeal to the Court of Appeals was also unsuccessful. Ultimately, the case came before the Supreme Court which agreed with the trial court and the Court of Appeals that neither TWA nor PAL could be faulted for the switching of the casket containing the remains of plaintiffs' mother with that of another deceased. It upheld TWA's defense that it received for shipment a casket labeled "Remains of Crispina Saludo" and that, being hermetically sealed by the Philippine Consul, it relied on the representation that it did contain the remains of Mrs. Saludo. The Court, however, ordered TWA to pay plaintiffs nominal damages for the insensitive and cold treatment given them by the TWA employees at the San Francisco Airport. The Court gave its reason for holding TWA liable:

> The records reveal that petitioners, particularly Maria and Saturnino Saludo, agonized for nearly five hours, over the possibility of losing their mother's mortal remains, unattended to and without any assurance from the employees of TWA that they were doing anything about the situation. This is not to say that petitioners were to be regaled with extra special attention. *They were, however, entitled to the understanding and humane consideration called for by and commensurate with the extraordinary diligence required of common carriers* and not the cold insensitivity to their predicament.[150] (emphasis supplied)

A closer examination of the circumstances obtaining in the case however, shows that the duty to exercise extraordinary diligence could not have correctly served as the basis for the carrier's liability.

The duty to observe extraordinary diligence necessarily arises out of the contract of common carriage. At the time the Saludo's were subjected to the treatment complained of, they were not passengers in whose favor the carrier needed to observe extraordinary diligence. While the plaintiffs did in fact travel on TWA from Chicago to San Francisco, they had safely arrived in San Francisco and had completely disembarked from the aircraft which had taken them there.[151] Clearly, the obligation

[150] *Saludo*, 207 SCRA 98 (1992). (emphasis supplied)

[151] *Id.* at 531.

to safely transport the plaintiffs to San Francisco had been completely performed by TWA. Under the Civil Code, an obligation is extinguished by performance, which in turn means the complete rendition of the service.[152] Thus, it is settled that the relationship of carrier and passenger terminates where a passenger voluntarily leaves the carrier's conveyance with an intent to abandon his journey.[153] Considering, therefore, that all of TWA's obligations to the plaintiffs had been extinguished at the time they were subjected to the "insensitive" treatment, there is no justification for using the standard of extraordinary diligence. To hold otherwise would be to extend the duration of extraordinary diligence beyond the lifetime of the contract, which is not what the law intends.

Secondly, plaintiffs were no longer in the custody of the carrier at the time they were subjected to the treatment complained of. The carrier, therefore, could not have been in a position to ensure their safety. And assuming that the compensable injury in the law includes the non-physical or moral type of injury suffered by plaintiffs, the latter were not in the process of "disembarking" either as that term is understood under the Warsaw Convention.[154]

Again, this writer does not propose that the poor treatment given by TWA's employees to plaintiffs was excusable. Plaintiffs did not deserve the cold-hearted reception given by TWA's employees at the San Francisco airport, especially given their bereavement. But this obligation does not arise from contract or from the duty imposed by law upon carriers to observe extraordinary diligence, but conceivably from the precept that all persons must "in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith."[155] Thus, if the employees' conduct constituted willfully causing loss or injury to plaintiffs "in a manner contrary to morals, good customs or public policy,"[156] an action against TWA could be perhaps instituted.

In *La Mallorca v. Court of Appeals*,[157] a couple was traveling with their children on a Pambusco bus from San Fernando to Anao, Mexico, Pampanga. The bus arrived in Anao and stopped to allow the couple and their children to get off. The father was the first one to get down the bus, followed by his wife and children. He then led them to a shaded spot on the left pedestrian side of the road about four or five meters away from the vehicle. He then returned to the bus to retrieve a *bayong* that was still on the bus. In doing so, his young daughter, Raquel, followed him and while the

[152] Civil Code, arts. 1231 & 1232.

[153] Murray v. Cedar Rapids City Lines, 48 NW 2d 256 (year of promulgation unavailable); Buckley v. Old Colony R. Co., 36 NE 583 (year of promulgation unavailable); 14 AM. JUR. 2D. 772.

[154] Knoll v. TWA, 610 F. Supp. 844 (1985).

[155] Civil Code, art. 19.

[156] *Id.*, art. 21.

[157] 17 SCRA 739 (1966).

father was on the running board receiving the *bayong* from the conductor, the bus started to move. Raquel was run over by the bus. The Supreme Court held that the carrier breached its duty to exercise extraordinary diligence in favor of Raquel who remained a passenger:

> It has been recognized that the relation of carrier and passenger does not cease at the moment the passenger alights from the carrier's vehicle at a place selected by the carrier at the point of destination, but continues until the passenger has had a reasonable time or reasonable opportunity to leave the carrier's premises. And what is a reasonable time or a reasonable delay within this rule is to be determined from all the circumstances.
>
> . . . .
>
> The presence of said passengers near the bus was not unreasonable and they are therefore to be considered still as passengers of the carrier, entitled to the protection under their contract of carriage.[158]

The Court in *La Mallorca* also appears to have extended the duty of the carrier to exercise extraordinary diligence beyond the lifetime of the contract. One must note that Raquel's contract of carriage with her father was a separate contract. While it is true that the carrier-passenger relationship does not end until after the lapse of a reasonable time allowed the passenger to leave the carrier's premises, such as the time required to retrieve luggage, this may have been relevant if the father was the one injured. It was the father who had returned to the bus to retrieve luggage left by him and his presence on the bus may arguably be reasonable. In the case of Raquel, however, it is clear from the recital of facts in the case that she had disembarked from the vehicle and had in fact been led to a place of safety by her father (a "shaded spot on the left pedestrian side of the road about four or five meters away from the vehicle"). She was, therefore, no longer a passenger at the time of the injury and the carrier no longer owed a duty to exercise extraordinary diligence. This is the consistent teaching of American jurisprudence.[159]

In *Lewis v. Goodman*,[160] the victim, a "little girl," boarded the bus of defendant carrier. Upon reaching her destination, she alighted safely. Remembering that her books remained in the bus, she did not leave the place where she alighted, hoping the bus would immediately return. The bus driver, noticing that some books were left in the bus, investigated its ownership. Discovering that it belonged to the girl who just alighted and still seeing her at the last stop, the driver turned his bus around and stopped alongside the girl. The driver handed over the books as the girl reached in the bus to receive them. Immediately thereafter, the girl "darted right across in front of the bus" and was struck by an overtaking automobile.

[158] La Mallorca v. Court of Appeals, 17 SCRA 743, 744 (1996).

[159] *See* Seiler v. St. Louis Public Service Company, 295 SW 2d 393 (1956), and cases cited thereunder.

[160] 92 So. 2d 723.

Plaintiff argued that, "although the little girl had gotten out of the bus before and had come back merely for the purpose of retrieving her books, she nevertheless retained her status as a passenger and that, therefore, the transit company owed her that high degree of duty which is due to a passenger."[161] The Court of Appeals of Louisiana ruled:

> The contention of plaintiff that the little girl retained her status as a passenger and that, therefore, at the time of the accident, the Transit Company owed to her that very high degree of care which a common carrier owes to its passengers is , we think, not well founded.
>
> The child had left the bus on its downriver trip, and, through no fault of the driver, her little brother had forgotten his books on the bus. The usual rule is that when a carrier deposits a passenger at a safe place and the passenger has alighted , the status of passenger comes to an end and that thereafter the duty owed to the former passenger is only the duty of ordinary care.[162]

Furthermore, the family in *La Mallorca* did not alight at a Pambusco terminal but on a public street or highway and had moved to a shaded spot on the left pedestrian side of the road, about four or five meters away from the bus. Imaginably, they were already at the other side of the road. In any case, they were not and could not have been in the carrier's premises. Indeed, while the law grants the passenger "reasonable time" to leave the carrier's premises, it necessarily implies that the passenger must be in the carrier's premises during the length of what might be "reasonable time."

Aboitiz Shipping Corporation v. Court of Appeals[163] reiterates the rule laid down in *La Mallorca*. Here, the passenger, Anacleto Viana, had boarded the carrier's M/V Antonia in San Jose, Mindoro Occidental. Upon arrival at the Port of Manila, Viana disembarked. An hour after the passengers had disembarked, unloading of cargoes by Pioneer Stevedoring Company began. It was at about this time when Viana returned to the vessel, remembering that he had left something on the vessel. While he was pointing to someone where his baggages were, the crane unloading the cargoes hit him, causing his death. The Supreme Court held that the carrier was liable and that Viana's status as passenger had not terminated. The Court again invoked the duty of the carrier to exercise extraordinary diligence. It cited the rule that the relation of carrier and passenger does not terminate until the passenger has, after reaching his destination, "safely alighted from the carrier's conveyance" or had a reasonable opportunity to leave "the vessel owner's dock or premises," including a time "to see after his baggage and prepare for his departure."[164]

[161] *Id.* at 727.

[162] *Id.*

[163] 179 SCRA 95 (1989).

[164] Aboitiz v. Court of Appeals, 179 SCRA 95, 102 (1989).

There is nothing in the decision, however, which indicates that the pier where Viana disembarked was operated or controlled by the carrier as to place him within its custody or be subjected to its directions. Consequently, it may then be argued that the passenger-carrier relationship had terminated upon his having disembarked in safety at that place.[165]

Furthermore, when Viana remembered that he still had something on the vessel, approximately an hour had passed since he disembarked at a safe place. In a case involving similar facts but a much shorter time frame, the Supreme Court of Oregon held that the plaintiff was no longer a passenger. In this case,[166] the passenger had boarded a bus, carrying a small sack of fruit and fruit juices. She deposited the sack behind the driver's seat. When she arrived at her destination, the door was opened for her to leave the bus. Right after she had alighted from the bus, she remembered her package and attempted to retrieve it before the bus departed. In so doing, plaintiff fell and was injured. Her suit against the carrier was, however, dismissed. The court found that "the contractual obligation of the carrier of safe carriage ceased when the plaintiff departed from the bus and reached a place of safety."

In *Agana v. Japan Airlines*,[167] the Court of Appeals ruled that a common carrier had an obligation to provide hotel accommodations and meals in favor of passengers who had been stranded at a point between their origin and destination, notwithstanding the fact that the cause of the passengers' stranding was force majeure. The court again relied on the duty of the carrier to observe extraordinary diligence under the law.

In this case, plaintiffs were passengers of JAL travel from Los Angeles to Manila. As stipulated, the flight would first take them to Narita, Japan where they would stay overnight in a hotel at JAL's expense and continue with their flight to Manila the following day.

On June 13, 1991, plaintiffs left Los Angeles for Narita. They arrived Narita in the afternoon of June 14, 1991 and repaired to the Nikko Hotel in Narita where they spent the night. On June 15, 1991, plaintiffs checked in for their flight to Manila. This flight, however, was postponed to June 16 because Mt. Pinatubo had erupted in the Philippines, causing the closure of the airport. Plaintiffs again stayed at the Nikko Hotel that day, for which stay JAL paid. On June 16, plaintiffs could not be flown on the scheduled flight either because the airport in Manila remained closed, still due to the effects of the Mt. Pinatubo eruption. The flight was postponed indefinitely. JAL informed plaintiffs that it would no longer pay for their hotel or meal expenses. Plaintiffs continued to stay at the Nikko Hotel from June 16 to 21 and paid their own accommodations and meals. On June 22, 1991, the airport in Manila having reopened, plaintiffs were finally flown by JAL to Manila.

[165] *See* Lewis v. Court of Appeals, 92 So. 2d 723 (year of promulgation unavailable); *Ortiz*, 275 F. 2d 770 (year of promulgation unavailable).

[166] Neidert v. Portland Stages Inc., 376 p. 2d 92 (1962).

[167] CA-G.R. CV No. 39089 (December 22, 1993).

Plaintiffs sued JAL for damages arising from the "stubborn refusal by defendant to provide plaintiffs with hotel accommodations and meals while they were stranded as passengers" in Narita.[168] The trial court found JAL liable for these expenses, among others, which judgment was affirmed by the Court of Appeals. The latter held that:

> *appellant should have provided appellees who were stranded in a foreign airport without their fault with all the comfort and conveniences of which it was fully equipped, until they have reached their final destination.* Failing on its part to do so, and instead declassified its stranded passengers leaving each of them to their own devises in a strange and foreign land, *appellant grossly failed in its duty to exercise extraordinary diligence in safeguarding the comfort, convenience and safety of its passengers.*[169]

As explained above, the duty to exercise extraordinary diligence cannot extend in favor of passengers who are not on board the means of conveyance, or at least are in the process of embarking or disembarking under the terms of the Warsaw Convention.[170] Plaintiffs, during the time they could not be flown out of Narita, were not on board the carrier or in the process of embarking or disembarking.

The fact, however, that the passengers were merely transiting in Narita brings us to the specific issue raised in *Agana - i.e.*, whether or not the carrier had an obligation to provide living expenses or hotel accommodations and food in favor of the passengers during this time. The Court of Appeals held that it did and relied on the legal obligation of the carrier to observe extraordinary diligence. The appellate court also cited the decision of the Supreme Court in *Philippine Airlines v. Court of Appeals*.[171]

The obligation to observe extraordinary diligence, however, cannot include the duty to provide the hotel accommodations and meals demanded by the passengers. As explained above, this duty refers to ensuring the passenger's safety (and not comfort and convenience), which in turn has a precise relation to death and/or injury.[172] This duty is breached and becomes actionable under the Civil Code when, during the carriage, the passenger has died or was injured - which was not the case in *Agana*. Neither can the duty to observe extraordinary diligence for the safety of the plaintiffs exist during the whole time that they were stranded in Narita, even if a transportation contract existed between the parties. If injury, for instance, was sustained by one of the plaintiffs while at the Nikko Hotel - premises not under the carrier's control - no action against the carrier would arise under the contract of carriage. The passenger then would not be in the custody of the carrier.

[168] Agana v. Japan Airlines, CA-G.R. CV No. 39089 at 11 (December 22, 1993).

[169] *Id.* at 15 (emphasis supplied).

[170] Considering that the plaintifs' travel in this case was within the definition of "international transportation" the Warsaw Convention is applicable. *See* Warsaw Convention, art. 1(1).

[171] 226 SCRA 423 (1993).

[172] Civil Code, arts. 1733, 1755, & 1756.

As explained by the Supreme Court in *British Airways v. Court of Appeals*,[173] there is a distinction between two (2) aspects of the contract of common carriage: (a) "the contract to carry (at some future time), which contract is consensual and is necessarily perfected by mere consent" and (b) "the contract of carriage or of common carriage itself which should be considered as a real contract for not until the carrier is actually used can the carrier be said to have already assumed the obligation of a carrier." The duty to observe extraordinary diligence as imposed by Article 1755 is to be exercised only "in the second kind, that is the "real contract of carriage."[174] In the case of the plaintiffs in Agana, the existing obligation which bound JAL to them during their stay in Narita was an obligation to carry - which obligation JAL performed after the cessation of the force majeure. Clearly, they were not "passengers" during the time that they were staying at the Nikko Hotel.

The Code of Commerce[175] treats of the obligations of carriers and passengers in cases of the interruption or suspension of a journey. Article 698 provides:

> Article 698. In case a voyage already begun should be interrupted, the passengers shall be obliged to pay the fare in proportion to the distance covered, *without right to recover for losses and damages if the interruption is due to fortuitous event or to force majeure,* but with a right to indemnity if the interruption should have been caused by the captain exclusively. if the interruption should be caused by the disability of the vessel, and a passenger should agree to await the repairs,*he may not be required to pay any increased price of passage, but his living expenses during the stay shall be for his own account.*
>
> In case of delay in the departure of the vessel, the passengers have the right to remain on board and to be furnished with food for the account of the vessel *unless the delay is due to fortuitous events or to force majeure.* If the delay should exceed ten days, passengers requesting the same shall be entitled to the return of the fare, and if it is due exclusively to the fault of the captain or his agent, they may also demand indemnity for losses and damages. (emphasis supplied)

The conclusion that can be drawn from Article 698 is that if the cause of the interruption of the voyage is force majeure, the carrier has no obligation to the passenger whatsoever. This is consistent with Article 1266 of the Civil Code which releases the obligor in an obligation to do when the performance has become a legal or physical impossibility. Consequently, the carrier cannot continue to be bound to observe extraordinary diligence if it cannot perform the principal obligation of carriage. After all, the obligation to observe extraordinary diligence is merely a consequence of the contract of carriage.

[173] 218 SCRA 699, 704 (1993).

[174] PARAS, *supra* note 5, at 460.

[175] The Code of Commerce is made suppletorily applicable to the law on common carriage. *See* Civil Code, art. 1766.

The only time that the law speaks about the obligation to provide food or otherwise pay the passenger's living expenses during the interregnum are in cases of (a) interruption of the trip caused by the disability of the vessel; and (b) delay in the departure of the vessel. In case of interruption of the voyage where the passenger agrees to await the repairs, the law requires the passenger to pay for his own living expenses. In case of delay in the vessel's departure, the passengers have the right to remain on board and to be furnished with food. This obligation, however, does not arise when the delay is due to a fortuitous event, in which case the passengers must spend for their own meals.

However one looks at the facts in *Agana*, therefore - whether from the point of view of interruption of the voyage or delay in the departure of the flight[176] - the carrier is not made liable for the passenger's living expenses because the cause of the interruption or delay is undoubtedly force majeure, a fact which even the Court of Appeals concedes.[177]

This is the rule in the United States. In *Bernstein v. Cunard Line and Eastern Airlines*,[178] the passengers were stranded in San Juan, Puerto Rico, because of the weather conditions in the New York area where they were headed. They sued Eastern Airlines for its "failure to provide air transportation from San Juan to Newark on February 12, 1983, *failure to provide hotel accommodations, meals, and transportation during the delay*, and for failure to provide alternative air transportation to Newark." In absolving the airline from liability, the Southern District Court of New York ruled:

> Eastern has conclusively demonstrated that as a result of the weather in the New York area on February 12th, Eastern was incapable of transporting plaintiffs to Newark in accordance with their reservations and trip plans. *The contract clearly absolves Eastern of any responsibility for this delay caused by the weather.*
>
> Plaintiffs argue, nonetheless, that Eastern was obligated to do the following: 1) promptly advise plaintiffs that their return on February 12th could not take place due to the closing of the New York area airports; 2) aid the plaintiffs in making alternative travel plans; 3) provide a return flight for the plaintiffs on the first available flight; 4) be available and accessible to plaintiffs; and 5) *arrange and provide lodging, meals, and transportation during the delay*. Plaintiffs cite absolutely no authority to support these assertions.
>
> None of these so-called obligations is to be found in the passage contract .... While Eastern undoubtedly has a public relations interest in keeping its stranded travelers satisfied, it has no specific duty to be ever accessible to each of the millions of travelers affected by a storm such as this one, nor could Eastern have possible known precisely when the airways to New York would reopen .... Insofar as Eastern is concerned, therefore, plaintiffs were simply round-trip passengers. *As such Eastern had no obligation to feed and shelter them during the weather-caused delay.*[179]

[176] The Code of Commerce has been held applicable to contracts of air transport; *see* Mendoza v. Philippine Airlines, 90 Phil. 836 (1952).

[177] Agana v. Japan Airlines, CA-G.R. CV No. 39089 at 12 (December 22, 1993). The Court of Appeals' decision is pending review before the Supreme Court. No decision has been promulgated.

[178] 19 Av. as. (CCH) 17, 485 (SDNY 1985).

The rule in American jurisprudence is also to the effect that a person is not a passenger during the time that he is transferring from one conveyance to another in premises not owned nor controlled by the carrier. In *Seiler v. St. Louis Public Service Co.*,[180] a passenger boarded a bus at a certain street and asked for a transfer ticket which would entitle him to transfer to another bus owned and operated by defendant. He disembarked into the sidewalk and transferred to another bus stationed in the same "bus zone." The bus the plaintiff was transferring to was only two feet away from the nose of the bus he had taken. While walking towards the second bus, the plaintiff tripped, fell, and was injured. The Court of Appeals ruled that the carrier-passenger relation had already ended when the accident occurred because he was "beyond and outside the control and direction of the carrier while walking upon a public way."

By way of summation, it may be said that under the contract of common carriage, the obligation of the carrier is to carry the passenger safely to his agreed destination. In the performance of this obligation, the diligence required of the carrier is extraordinary. In the absence of further or special agreement, this is the only obligation of the carrier. That is not to say that the manner of performing the carriage is left entirely to the carrier's discretion or is justified by a literal interpretation of the contractual agreement and laws.[181] The carrier must perform his obligation in accordance with what has been expressly stipulated as well as with "all the consequence which, according to their nature, may be in keeping with good faith, usage and law."[182] This, however, does not justify the intercalation or imposition by courts of contractual obligations not agreed upon nor contemplated by the parties. Courts do not have authority to "remake, modify, or revise the contract between the parties as contractually stipulated with the force of law between the parties so as to substitute its own terms for those covenanted by the parties themselves."[183]

In *Isaac v. A.L. Ammen Transportation Company*, the Supreme Court expressed that "the carrier is not an insurer against all the risks of travel."[184] Thus, while it is the carrier's obligation to transport the passenger from his point of origin to the place of destination, "such duty does not encompass all the risks attendant to a passenger in transit."[185] And more recently, in *Pilapil v. Court of Appeals*,[186] the Supreme Court had another opportunity to explain the scope and extent of a common carrier's responsibilities:

[179] *Id.* at 17,489-490 (emphasis supplied).

[180] 295 SW 2d 393 (year of promulgation unavailable).

[181] Samples of written contracts of carriage are appended to this work as Annexes A-D.

[182] Civil Code, art. 1315.

[183] Occena v. Jabson, 73 SCRA 641 (1976).

[184] Isaac v. A.L. Ammen Transportation Company, 101 Phil. 1046, 1050 (1957).

[185] Landicho v. Batangas Transport Co., 52 O.G. 7640 (1956); *see also* Necesito v. Paras, 104 Phil. 7578 (1958), Strong v. Iloilo Negros Air Express Co. 40 O.G. (Supp. 12) 269 (year of promulgation unavailable).

[186] 180 SCRA 546, 551-553 (1989).

In consideration of the right granted to it by the public to engage in the business of transporting passengers and goods, *a common carrier does not give its consent to become an insurer of any and all risks to passengers* and goods. It merely undertakes to perform certain *duties to the public as the law imposes* and holds itself liable for any breach thereof.

. . . .

"While the law requires the highest degree of diligence from common carriers in the safe transport of their passengers and creates a presumption of negligence against them, *it does not, however, make the carrier an insurer of the absolute safety of its passengers.*

. . . .

"Thus, it is clear that neither the law nor the nature of the business of a transportation company makes it an insurer of the passenger's safety, but that its liability for personal injuries sustained by its passenger rests upon its negligence, *its failure to exercise the degree of diligence that the law requires.*[187]

. . . .

"Where, as in the instant case, *the injury sustained by the petitioner was in no way due to any defect in the means of transport or in the method of transporting or to the negligent or willful acts of private respondent's employees, and therefore involving no issue of negligence in its duty to provide safe and suitable care as well as competent employees*, with the injury arising wholly from causes created by strangers over which the carrier had no control or even knowledge or could not have prevented, the presumption is rebutted and the carrier is not and ought not to be held liable. To rule otherwise would make the common carrier the insurer of the absolute safety of its passengers which is not the intention of the lawmakers."[188]

C. *Amending Article 1755*

On the basis of the foregoing discussion, it is recommended that Article 1755 of the Civil Code be amended to read as follows:

Article 1755. A common carrier is bound to carry the passengers safely as far as human care and foresight can provide, using the utmost diligence of very cautious persons, with a due regard for all the circumstances.

The extraordinary responsibility of common carriers for the safety of passengers lasts from the time the carrier allows the passenger to board, upon the presentation of the latter for that purpose, and until the passenger has safely disembarked at the agreed destination, without prejudice to the provisions in Chapter 4, Title I of Book IV of this Code.

[187] Pilapil v. Court of Appeals, 180 SCRA 546, 552 (1989), *citing* Civil Code, arts. 1170 & 1173; Alfaro v. Ayson, 54 O.G. 7920 (1958); *Necesito*, 104 Phil. 75 (1958).

[188] *Id.* at 552-53.

In cases where the passenger's place of disembarkation is operated and controlled by the carrier, the duty to exercise extraordinary diligence lasts until the latter has had a reasonable opportunity to leave such premises.

Limiting the duration of extraordinary responsibility to a defined time frame may arguably be inconsistent with the policy to protect the public from reckless public utility drivers and unscrupulous operators. Some critics may say that passengers will be deprived of the full protection of the law. That should not be the case, however. For every right violated, a remedy exists. *Ubi jus ibi remedium.* But this presumes that the wrong is actionable in law. After all, the law too, recognizes the rights of common carriers to be protected from unjustified impositions of liability and the court's "first and fundamental duty is to apply the law as they find it, not as they like it to be."[189]

V. CONCLUSION: A LEGISLATIVE PREROGATIVE

The provisions of our Civil Code on common carriers were taken from Anglo-American law.[190] For this reason, this writer has relied on the text of the law and drawn from American jurisprudence in an attempt to find a definition of the duration of extraordinary diligence. Prescinding from this exercise, it is this writer's conclusion that the obligation to exercise extraordinary diligence refers to ensuring the passenger's safety or taking steps to insure that he is not injured during the carriage. Our courts, however, have expanded the meaning of extraordinary diligence in two ways - first, by broadening its scope as to include not only safety but also comfort and convenience; and second, by stretching its term as to exceed the duration contemplated by law and the parties to the contract of carriage. Perhaps, this instance of judicial construction has been caused by the fact that the law itself does not define the duration of extraordinary diligence. For this reason, this writer proposes that a law be passed to fill this void.

Defining the duration of extraordinary diligence by statute should not cause any alarm to the riding public. The carrier may remain liable to the passenger even in those instances where injury or death occurs outside the scope of the contract of common carriage. This is true in every case where the carrier is guilty of a wrong actionable in law. The philosophy behind the most important innovations in the present Civil Code connotes a moral direction and have been designed to remedy every conceivable wrong.[191]

[189] Lorenzo v. Director of Health, 50 Phil. 595 (1927); Lacson v. Roque etc., et al., 92 Phil. 456 (1953); Resins, Inc. v. Auditor General, 25 SCRA 754, 757 (1968); Baking v. Director of Prisons, 28 SCRA 850 (1969).

[190] Home Insurance Co. v. American Steamship Agencies Inc. 23 SCRA 24 (1968); Maranan v. Perez, 20 SCRA 412 (1967) ; REPORT OF THE CODE COMMISSION, *supra* note 115, at 64.

[191] Agabin, *The Philosophy of the Civil Code*, 66 PHIL.L.J. 19 (1991); 2 J. CEZAR SANGCO, I TORTS AND DAMAGES 746-747 (1994); REPORT OF THE CODE COMMISSION, *supra* note 115, at 39.

Thus, a carrier can be made liable for damages based on the law on Human Relations,[192] the contract of common carriage,[193] or the law on quasi-delicts. There is, therefore, no need to continue to rely on the law of extraordinary diligence in every case.

Each basis of liability, however, has its respective legal qualifications. Indeed, the system of our Civil Code is like a road network of highways and streets. The use of these routes is subject to rules and regulations to ensure the safety of pedestrians as well as the motoring public. Like every road network, the Civil Code should be read and applied with a due regard for established rules to prevent traffic jams. For instance, the structured presentation of our law on Damages[194] requires specific conditions for recovery which in every case must be complied with. For this reason, one must distinguish the varying bases of the carrier's liability.

By liberally invoking the duty of the carriers to observe extraordinary diligence, our courts have breached the "rules of the road," causing "legal traffic jams," thereby muddling the theories and concepts incorporated in the Code. Effectively, the courts have amended the law, which it obviously cannot do.

Ultimately, this requires the exercise of congressional prerogative. Congress may adopt Article 1755 as proposed to be amended by this writer, or it may amend it to embody the liberal interpretation given by the our courts to the law of extraordinary diligence.

The beauty of the law lies in its dynamism. Laws can always be changed when they no longer serve the purpose for which they are passed. This power to change the law, however, lies with Congress.

[192] Civil Code, art. 19, et. seq.

[193] Id., art. 1732, et seq.

[194] Civil Code, arts. 2195-2235.

AN EXAMINATION OF SELECTED ISSUES INVOLVED IN THE EXECUTION OF INSANE DEATHROW CONVICTS

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ABSTRACT

The Supreme Court affirmed the first death sentence last 1996. Aside from this, there are 281 inmates on death row at present after their convictions by the lower courts. With the growing number of death row inmates and with the courts apparently disposed to meting out death sentences whenever called for, the issue of death row convicts becoming insane after final sentence has been pronounced and while awaiting their execution becomes an important issue.

In the Philippines, commentators are of the opinion that when a death row convict becomes insane, his execution should be stayed pending his treatment at a mental facility based on Article 79 of the Revised Penal Code. According to the provision, however, once the death row convict regains his sanity, he is once again death eligible.

The provision, which deals generally with the suspension of the execution of sentences once the convict becomes insane while serving said sentence, does not seem to adequately resolve certain issues especially in the death penalty context, such as: (1) the procedure to be observed once an insanity claim is raised by or on behalf of the death row convict, as well as (2) the procedure to be observed after a death row convict is adjudged insane. Both the due process clause and the equal protection clause of the Constitution require that uniform procedures be formulated in order that those entitled to the statutory right of not being executed while insane may avail of such as well as to avoid the arbitrary, capricious, unreliable and unpredictable administration of the death penalty.

Specifically, a resolution of the first issue entails answers to the following questions: (a) is the death row convict still entitled to procedural due process; (b) if so, to what extent or degree of procedural due process is he entitled? The study concludes that the death row convict is still entitled to procedural due process and that the extent or degree of such is determined by a balancing of the limited right to life of the death row convict by virtue of his statutory right not to be executed while insane vis-a-vis the interests of the state and society in avoiding the filing of spurious insanity claims, in avoiding the delay or frustration in carrying out the death penalty, as well as minimizing fiscal and administrative costs. The study then proposes certain guidelines by discussing selected aspects of procedure in order to aid in the formulation of uniform and specific procedures to deal with such issue.

A resolution of the second issue abovementioned entails answers to the following questions: (a) if the death row convict is adjudged insane, can the state forcibly treat him in order to render him sane for execution purposes; (b) does he have the right to refuse medication;

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