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OPINION	:	No. CV 78-81
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of	:	<u>January 4, 1979</u>
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SUBJECT: TRANSIT VEHICLE AS UNATTENDED WHEN DRIVER IS OPERATING A WHEELCHAIR LOADING SYSTEM—If specified precautionary measures have been taken, a transit vehicle would not be considered unattended pursuant to Vehicle Code section 22515 when a driver is operating a wheelchair loading system.

The Honorable Edward E. Kynaston, Deputy Chief, Enforcement Services Division, Department of California Highway Patrol, has requested an opinion on the following question:

Would a vehicle be considered unattended pursuant to the provisions of Vehicle Code section 22515 if a transit bus driver has effectively set the brakes of this vehicle and, while the motor is running, moved within the vehicle 25 feet to the rear of the driver's seat to operate a lift gate for wheelchairs?

The conclusion is:

A bus would not be unattended, so as to constitute a violation of Vehicle Code section 22515, during such time as a transit bus driver is operating a lift gate for passengers in wheelchairs that is located at the rear exit door of the bus. While the vehicle's motor is operating, nevertheless the brakes are effectively set, the throttle is locked, the driver

possesses the key necessary to operate the vehicle and he remains in the vehicle while it is at a designated bus stop loading and unloading passengers.

ANALYSIS

Vehicle Code¹ section 22515 provides that:

“No person driving, or in control of, or in charge of, a motor vehicle shall permit it to stand on any highway unattended without first effectively setting the brakes thereon and stopping the motor thereof.”

We are asked to determine whether a transit bus driver violates section 22515 during such time as he operates a passenger “wheelchair loading system” that functions in the following manner.

“WHEELCHAIR PASSENGER LOADING SYSTEM

“ELEVATOR OPERATION

“[The] wheelchair elevator is located at the rear exit door. When [the] wheelchair lift is to be operated, the driver opens the rear door which applies brake and throttle interlocks. A key operated master switch at the driver’s position locks the rear door in the open position, thus immobilizing the coach. The driver then removes the key and proceeds to the rear exit door where the same key permits the driver to open the control panel cover.

“The driver turns the power switch on, and then activates a momentary ‘deploy’ switch which deploys the platform. Release of the deploy switch at any time stops the platform. The driver then activates a momentary down’ switch until the elevator is lowered to ground level. A sensing device automatically stops the platform at ground level. After the wheelchair passenger is on the platform, it is raised by the driver activating a momentary ‘up’ switch bringing the platform back up to floor level, where the passenger debarks from the platform.

“To retract the lift the driver simultaneously activates the momentary unlock’ switch and the ‘park’ switch. When platform is fully retracted, driver releases switches, turns power switch off, locks panel cover and returns to driver’s compartment where he de-activates the wheelchair lift system with the master switch key.”

¹ All unidentified section references are to the Vehicle Code.

Thus, the bus driver has effectively set the brakes but he has not stopped the motor of the vehicle. The question arises as to whether he has permitted his vehicle to “stand on any highway unattended” under the circumstance that he has left the driver’s seat and is operating a device located at the rear exit door while the vehicle’s motor is not stopped.

Preliminarily, we note that a “highway” is defined as “a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel. Highway includes street.” (§ 360, see also §§ 332, 590, 591, 600 and Sts. & Hy. Code, §§ 23, 24 and 25.)

It appears that section 22515 is not violated if the driver has not permitted his vehicle to “stand” on a highway, or, if it is standing on a highway, that it has not been left “unattended.”

It does not appear that the meaning of the term “to stand,” in the context in which it is used in the Vehicle Code, has been specifically addressed by any appellate court in California. It is instructive to observe the various words that the Legislature has used in regulating behavior with respect to nonmoving vehicles. Section 22500, for instance, provides that “[n]o person shall stop, park, or leave standing any vehicle whether attended or unattended” under described circumstances, subject to specified exceptions. (See also, §§ 22504, 22507, 22509, 22510, 22511, 22514 and 22520 for similar examples.)

Courts of our sister states have often concluded that the term “park” and the phrase “leave standing” are synonymous. (See, e.g., *Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp.* (Neb. 1955) 72 N.W.2d 669, 675; *Faison v. T & S Trucking Company* (N.C. 1966) 146 S.E.2d 450, 456.) Many courts have concluded that the type of behavior that is intended to be regulated by these terms does not include a temporary or momentary stopping on a road for a necessary purpose. (See, e.g., *Spivey v. Walden* (NC. 1974) 208 S.E.2d 730, 733; *American Co. v. Baker* (Ark. 1933) 60 S.W.2d 572; *Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp.*, *supra*, 72 N.W.2d 669, 675; but see *Stafford v. Consolidated Bus. Lines* (Tenn. 1942) 164 S.W.2d 15, 16; *Fontaine v. Charas* (N.H. 1935) 181 A. 417.)

However, the type of temporary or momentary stopping that is usually tolerated is that allowed for by section 22500, e.g., when necessary to avoid conflict with other traffic or in compliance with the directions of a peace officer, or that type permitted on freeways by section 22520, e.g., when the vehicle is disabled or when necessary to avoid injury or damage to persons or property.

Speaking generally, we believe that the term “standing” means standing still, stopped, not moving, or fixed in place. We should keep in mind that, conceptually, a vehicle may be deemed “standing” irrespective of whether it is attended or unattended. There arises some semantical confusion because of the overlap of these terms—stop, park, stand—

depending upon the activity that the Legislature intends to proscribe or circumscribe. Thus, a vehicle that “stops” may also “stand” or it may not, depending upon the precise context. We need not consider the subtleties of meaning that may attach to the term “standing” depending upon the context in which it appears in each of the sections of the Vehicle Code that we have mentioned.

As far as section 22515 is concerned, we think it is clear that the term “standing” has its generally understood meaning, i.e., standing still, stopped, not moving. So defined, it is apparent that the term is generally applicable to a transit bus qua vehicle. We have serious doubts, however, that a court would conclude that a transit bus is “standing” on a highway, within the meaning of section 22515, when it is at rest at a designated bus stop for the purpose of boarding passengers. However, we do not deem it necessary to rest our conclusion upon that rationale.

Assuming, therefore, that a court might conclude that a bus is “standing” on a highway when it is at a bus stop for the limited purpose of taking on or letting off passengers, we consider whether the bus is “unattended” under the factual circumstances described in this opinion.

The criteria imposed by section 22515 as a condition of avoiding a violation of that section are that the motor of the vehicle must not be operating and the brakes must be effectively set. It is apparent that the purpose that the statute seeks to accomplish is the avoiding of risks to persons and property that may be presented as a result of an unattended vehicle moving without being controlled. However, it is also important to note that another danger legislated against by the use of the word “standing” is that of a moving vehicle striking a “standing” vehicle. (See generally, *Wilson v. Foley* (1957) 149 Cal. App. 2d 726, 735; *Callison v. Dondero* (1942) 51 Cal. App. 2d 403, 408–410; *Fleming v. Flick* (1934) 140 Cal. App. 14, 29–30.)

Section 22515 has been construed as not being violated when the driver departs the vehicle, with the motor running, when there are other occupants in the vehicle. (*Keller v. Pacific Tel. & Tel. Co.* (1934) 2 Cal. App. 2d 513, 520.) It is not clear whether *Keller* stands for the proposition that mere occupancy of a vehicle by a person other than the driver is sufficient to establish compliance with section 22515. The *Keller* court seems to have characterized the factual situation as being one where the vehicle was “left in charge” of the driver’s wife, under the circumstance that the vehicle’s controls were directly accessible to the person remaining in the vehicle. (*Keller v. Pacific Tel. & Tel. Co.*, *supra*, at pp. 517, 522.)

We should consider also the decisions of courts of other states since they are persuasive guides for construing similar statutes in this state. (*Acco Contractors, Inc. v. McNamara & Peepe Lumber Co.* (1976) 63 Cal. App. 3d 292, 296; *Estate of Setrakian* (1959) 169 Cal. App. 2d 795, 803.)

Thus in *Pinyan v. Settle* (NC. 1965) 139 S.E.2d 863, it was held that though a two-year-old child was left in the vehicle, the vehicle was nonetheless “unattended” because for purposes of the statute that term means “without anyone present who is competent to prevent any of the probable dangers to the public.” (139 S.E.2d at p. 869.)

In *Ceen v. Checker Taxi Co., Inc.* (1976) 42 111. App. 3d 93 [355 N.E.2d 628], it was held that though a passenger was in the rear seat of a taxi, the vehicle was left “unattended” when the driver left the taxi with the engine running. In that case the court stated:

“ . . . We are of the opinion that this requires an owner or driver to leave such a vehicle in the attendance of a person the owner or driver trusts, who is to be responsible for watching over that vehicle, who is capable of controlling the vehicle and who has immediate access to the controls should the vehicle be suddenly set in motion while the motor is running.

“ . . . We are also of the opinion that one reading the statute can reasonably understand that leaving a stranger sitting in the passenger compartment of a taxicab where he has no immediate access to the vehicle’s controls and who the cab driver has neither reason to trust nor who is left with any instructions to watch over the vehicle would constitute leaving the cab unattended.

“ . . . Our construction of the term ‘unattended’ includes not only the situation where there is no one in the vehicle, but also where there is a person present, but that person cannot be trusted by the owner or is not responsible for watching over the vehicle or does not have immediate access to the vehicle’s controls or is not capable of operating the vehicle if that becomes necessary.” (355 N.E.2d at pp. 631–632.)

See also, *Alspach v. McLaughlin* (Ind. App. 1969) 247 N.E.2d 840, 846, holding that a vehicle left in possession of an intoxicated person is left “unattended.”

It could be concluded that even though a vehicle is occupied, it is still “unattended” within the meaning of section 22515, unless the occupant has immediate access to the controls, he can appropriately be deemed responsible for operating them, and he is competent to exercise that responsibility.

Applying this interpretation of section 22515 to the facts stated in the present opinion request, it would not appear unreasonable to determine that a bus driver does not have ready access to the controls of his bus for purposes of avoiding the danger of unexpected movement of another vehicle or of his vehicle when he is out of his driver’s seat and 25 feet away near the rear of the bus, operating a wheelchair lift.

It would also appear that, in such circumstances, the bus driver could not appropriately trust or rely upon passengers to assume the responsibility of taking control of the bus should an emergency arise while he is operating the lift. (See *Ceen v. Checker Taxi Co., Inc.*, *supra*, 355 N.E.2d 631; see also, § 12804 requiring a special license to operate a bus, and §§ 14606 & 14607 prohibiting one from permitting or authorizing a person, who is not properly licensed, to operate a vehicle.) Thus, a bus could be deemed to be unattended under such circumstances.

However, we believe that it is likely that a court would reach a contrary conclusion. First, we note that the statute does not expressly require that the operator of a vehicle remain in the driver's position when it uses the word "unattended." (See *Keller v. Pacific Tel. & Tel. Co.*, *supra*, 2 Cal. App. 2d 513, 520.) Compare, for instance, the language of section 22514 prohibiting the stopping, parking, or the leaving standing of a vehicle within 15 feet of a fire hydrant "except when such vehicle is *attended* by a licensed driver who is seated in the front seat and who can immediately move such vehicle in case of necessity." (Emphasis added.)

Secondly, we feel compelled to observe that it is conceivable that a court could construe the adverb "effectively" in section 22515 as pertaining to the phrase "stopping the motor" as well as to the phrase "setting the brakes." Based upon such an interpretation a court might well conclude that the throttle interlock system utilized in such vehicles constitutes compliance with the statute because it effectively stops the motor when considered in the context of whether the vehicle, thus restrained, is likely to move so as to create a risk to the public. 'While we recognize that such devices were not in existence at the time this statute was originally enacted (Stats. 1923, ch. 266, § 137) such an interpretation does not do violence to the intent of the Legislature but, to the contrary, effectively implements it in the light of modern technology. (See Pen. Code, § 4.)

Thirdly, violation of section 22515 would constitute an infraction. (See § 40000.1 *et seq.*) Where a penal statute is susceptible of two reasonable constructions, a defendant is ordinarily entitled to that construction most favorable to him. (*Bowland v. Municipal Court* (1976) 18 Cal. 3d 479, 488; *Keeler v. Superior Court* (1970) 2 Cal. 3d 619, 631; *Walsh v. Dept. Alcoholic Bev. Control* (1963) 59 Cal. 2d 757, 764–765.) We think that the term "unattended" as contained in section 22515 is ambiguous. Stated simply, we do not believe that a court would find a bus "unattended" under the facts set forth in this opinion. While the vehicle's motor may be operating, nevertheless the brakes are effectively set, the throttle is locked, the driver possesses the key necessary to operate the vehicle and he remains within the vehicle.

Nor is it without significance that the vehicle is assumed to be at a bus stop boarding passengers. We take official notice of a duty of care toward passengers that may, on occasion, require a bus driver to leave the driver's seat momentarily. As stated in *McBride v. Atchison, Topeka & S.F. Ry. Co.* (1955) 44 Cal. 2d 113, 118–120:

“A carrier is generally held to be bound to provide safe and convenient means of access to its vehicles and of departure from them. . . .’

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“A note in 55 American Law Reports 394, which cites many cases, points out that ‘Where a passenger is blind, sick, aged, very young, crippled, or infirm, and his condition is apparent or made known to the carrier, it is bound to render him the necessary assistance in boarding or alighting from its trains or cars.’ (Emphasis added.) In *Croom v. Chicago, M. & Sr. P. Ry. Co.*, 52 Minn. 296 [53 N.W. 1128, 38 Am. St. Rep. 557, 18 L.R.A. 602], the court said: ‘. . . if the company voluntarily accepts a person as a passenger, without an attendant, whose inability to care for himself is apparent or made known to its servants and renders special care and assistance necessary, the company is negligent if such assistance is not afforded. In such case it must exercise the degree of care commensurate with the responsibility which it has thus voluntarily assumed, and that care must be such as is reasonably necessary to insure the safety of the passenger, in view of his mental and physical condition. This is a duty required by law as well as the dictates of humanity’” (Cf. Civ. Code, § 54.1, subd. (a); Gov. Code, § 4500.)

Therefore, it is concluded that a driver of a transit bus, under the circumstances described in this opinion, does not violate section 22515 during such time as he is operating a lift gate for passengers in wheelchairs that is located at the rear exit door of the bus.

We do not completely eliminate the possibility of a court concluding otherwise if the evidence before it were such as to convince the court that there was a substantial risk to the public resulting from the operation of the vehicle in the manner contemplated in this opinion. We are aware of no such substantial risk at this time.

Further, we expressly do not consider whether there may be some circumstances where the driver of the bus has a duty of care to the passengers that requires that he not leave the driver’s seat in order to go to the rear exit door. Conceivably, it might constitute negligence to do so. All we are stating is that if he does do so, he has not left the vehicle unattended as that term is used in section 22515, under the facts we have considered.
