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CASENOTES



AMUSEMENT RIDES  
AND THE  
“COMMON CARRIER  
DOCTRINE”  
IN CALIFORNIA



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# AMUSEMENT RIDES AND “COMMON CARRIER” DOCTRINE

## THE “COMMON CARRIER” DOCTRINE IN CALIFORNIA

It now is well established in California that commercial operators of elevators and escalators are carriers of persons for reward. (*Vandagriff v. J.C. Penney Co.* (1964) 228 Cal.App.2d 579, 582, 39 Cal.Rptr. 671; 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 768, p. 107.)

This summary addresses the application of the “common carrier” doctrine to amusement and recreational ride operators.

Carriers of persons for reward have long been subject to a heightened duty of care. (3 Harper & James, *The Law of Torts* (2d ed.1986) *The Nature of Negligence*, § 16.14, p. 506.) This heightened duty imposed upon carriers of persons for reward stems from the English common law rule that common carriers of goods were absolutely responsible for the loss of, or damage to, such goods. (Beale, *The History of the Carrier's Liability* in *Selected Essays* \*1129 in *Anglo-American Legal History* (Assn. of Am. Law Schools, edit., 1909) p. 148.) Carriers of goods are bailees and, at “early law goods bailed were absolutely at the risk of the bailee.” (*Ibid.*) Thus, carriers of goods for reward were “ ‘responsible absolutely for the goods delivered, even when lost by theft, and regardless of negligence.’ ” (*Id.* at p. 149, fn. 4.) This rule was applied in California in *Agnew v. Steamer Contra Costa* (1865) 27 Cal. 425, 429, 1865 WL 418, which held that a common carrier of goods (in that case a horse), “was an insurer against all injury not resulting from the act of God or the public enemies, or from the conduct of the animal.”

The rule that carriers of persons for reward must exercise great care for the safety of their passengers was adopted in California in 1859 in *Fairchild v. The California Stage Company* (1859) 13 Cal. 599, 1859 WL 1069, in which a passenger was injured when the stagecoach in which she was riding overturned. The court rejected the proposition that a carrier of persons for reward warrants the safety of its passengers, but held the carrier to a high duty of care: “While it is true that the proprietors of a stage-coach do not warrant the safety of passengers in the same sense that they warrant the safe carriage \*\*44 of goods, yet they do warrant that safety so far as to covenant for the exercise of extraordinary diligence and care to insure it; and they do this as common carriers.” (*Id.* at p. 605.)

The California Legislature soon adopted a comprehensive scheme governing carriage. Civil Code section 2085, which was enacted in 1872 and remains unchanged today, defines a “contract of carriage” in extremely broad terms as “a contract for the conveyance of property, persons, or messages, from one place to another.” Similarly, section 2168 defines a “common carrier” in expansive terms: “Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry.”

Carriers of persons are treated differently under the statutory scheme depending upon whether they act gratuitously or are paid. A carrier of persons “without reward” is subject only to a duty to “use ordinary care and diligence for their safe carriage.” (§ 2096.)

But a carrier of persons for reward, as was true at common law, is subject to a heightened duty. Section 2100, upon which plaintiffs rely in the present case, states: “A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.” “Common carriers are not, however, insurers \*\*\*356 of their passengers' safety. Rather, the degree of care and diligence which they must exercise is only such as can reasonably be exercised consistent with the character and mode of conveyance adopted and the practical operation of the business of the carrier. [Citations.]” (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 785, 221 Cal.Rptr. 840, 710 P.2d 907.). (See *Gomez v. Superior Court* (2005) 35 Cal.4th 1125, 1141).

### **CALIFORNIA COURTS HAVE HELD THAT THERE WAS AN UNBROKEN LINE CLASSIFYING RECREATIONAL RIDES AS COMMON CARRIERS**

The California Supreme Court held in *Gomez v. Superior Court* (2005) 35 Cal.4th 1125, that there is an unbroken line of authority in California classifying recreational rides as common carriers, including *McIntyre v. Smoke Tree Ranch Stables* (1962) 205 Cal.App.2d 489, 23 Cal.Rptr. 339, which held that the operator of a mule train that took passengers from Palm Springs to Tahquitz Falls and back was a common carrier. The Court of Appeal concluded: “The only reasonable conclusion to be drawn from these facts is that a person who paid a roundtrip fare for the purpose of being conducted by mule over the designated route between fixed termini, purchased a ride; that the defendant offered to carry such a person by mule along that route between these termini; and that the transaction between them constituted an agreement of carriage.” (*Id.* at p. 492, 23 Cal.Rptr. 339; *Squaw Valley Ski Corp. v. Superior Court* (1992) 2 Cal.App.4th 1499, 3 Cal.Rptr.2d 897 [ski resort chair lift facility is a common carrier].)

However, this “unbroken line” seems to have some recent “cracks” in it.

### **A “BUMPER CAR OPERATOR” IS NOT A COMMON CARRIER**

See: *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1161 —

Bumper car rides like Rue le Dodge are dissimilar to roller coasters in ways that disqualify their operators as common carriers. The dissenting justice below, we believe, analyzed this point correctly: “A bumper car ride is quite different from a roller coaster.... A roller coaster is constrained to a track and subject to the exclusive control of the operator. Those choosing to ride a roller coaster ‘surrender[ ] themselves to the care and custody of the [operator]; they ... give[ ] up their freedom of movement and actions....” [Citation.]’ (*Gomez, supra*, 35 Cal.4th at p. 1137 [29 Cal.Rptr.3d 352, 113 P.3d 41].) ... [¶]

In contrast, a bumper car ride such as Rue le Dodge consists of small electric cars that operate at medium speeds around a flat surface track.... Cedar \*\*\*561 Fair and its employees maintain and inspect the ride; set maximum speeds for the minicars; load and unload riders; activate the ride;

have control over an emergency switch disabling the electricity powering the minicars; and enforce various riding instructions and safety rules.

But once the ride commences, patrons exercise independent control over the steering and acceleration of the cars. Unlike roller coaster riders, they do not surrender their freedom of movement and actions. Rue le Dodge riders have control over the entertainment element of the ride, the bumping, as they determine when to turn and accelerate. [Citation.] A rider of a roller coaster has no control over the elements of thrill of the ride; the amusement park predetermines any ascents, drops, accelerations, decelerations, turns or twists of the ride.”

Riders on Rue le Dodge, in other words, are not passively carried or transported from one place to another. They actively engage in a game, trying to bump others or avoid being bumped themselves. The rationale for holding the operator of a roller coaster to the duties of a common carrier for reward—that riders, having delivered themselves into the control of the operator, are owed the highest degree of care for their safety—simply does not apply to bumper car riders' safety from the risks inherent in bumping. “The rule that carriers of passengers are held to the highest degree of care is based on the recognition that ‘ “[t]o his diligence and fidelity are intrusted the lives and safety of large numbers of human beings.” ’ ” (*Gomez, supra*, 35 Cal.4th at p. 1136, 29 Cal.Rptr.3d 352, 113 P.3d 41.) A bumper car rider, in contrast, does not entrust the operator with his or her safety from the risks of low-speed collisions.

### **A HOT AIR BALLOON OPERATOR IS NOT A COMMON CARRIER:**

See: *Grotheer v. Escape Adventures, Inc.* (2017) 14 Cal.App.5th 1283, 1299

We conclude a hot air balloon operator like Escape is not a common carrier as a matter of law. In general, every person owes a duty to exercise “reasonable care for the safety of others,” however, California law imposes a heightened duty of care on operators of transportation who qualify as “common carriers” to be as diligent as possible to protect the safety of their passengers. (Civ. Code, §§ 1714, subd. (a), 2100, 2168.) “A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.” (Civ. Code, § 2100.) Contrary to Escape's contention, it is necessary to resolve whether Escape is a common carrier because the heightened duty of care in Civil Code section 2100 precludes the application of the primary assumption of risk doctrine. (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1161, 150 Cal.Rptr.3d 551, 290 P.3d 1158 (*Nalwa*).

Whether a hot air balloon operator is a common carrier is an issue of first impression in California.

It is also a question of law, as the material facts regarding Escape's operations are not in dispute.<sup>3</sup> (*Huang v. Bicycle Casino, Inc.* (2016) 4 Cal.App.5th 329, 339, 208 Cal.Rptr.3d 591 (*Huang*).

A common carrier of persons is anyone “who offers to the public to carry persons.” (Civ. Code, § 2168.) The Civil Code treats common carriers differently depending on whether they act gratu-

itously or for reward. ( **\*\*640** *Gomez v. Superior Court* (2005) 35 Cal.4th 1125, 1130, 29 Cal.Rptr.3d 352, 113 P.3d 41 (*Gomez*).) “A carrier of persons without reward must use ordinary care and diligence for their safe carriage.” (Civ. Code, § 2096.) But “[c]arriers of persons for reward have long been subject to a heightened duty of care.” (*Gomez*, at p. 1128, 29 Cal.Rptr.3d 352, 113 P.3d 41.) Such carriers “must use the utmost care and diligence for [passengers'] safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.” (Civ. Code, § 2100; accord, *Gomez*, at p. 1130, 29 Cal.Rptr.3d 352, 113 P.3d 41.) While common carriers are not insurers of their passengers' safety, they are required “ ‘to do all that human care, vigilance, and foresight reasonably can do under the circumstances.’ ” (*Squaw Valley Ski Corp. v. Superior Court* (1992) 2 Cal.App.4th 1499, 1507, 3 Cal.Rptr.2d 897.) This duty originated in English common law and is “based on a recognition that the privilege of serving the public as a common carrier necessarily entails great responsibility, requiring common carriers to exercise a high duty of care towards their customers.” (*Ibid.*)

Common carrier status emerged in California in the mid-nineteenth century as a narrow concept involving stagecoaches hired purely for transportation. (*Gomez, supra*, 35 Cal.4th at p. 1131, 29 Cal.Rptr.3d 352, 113 P.3d 41.) Over time, however, the concept expanded to include a wide array of recreational transport like scenic airplane and railway tours, ski lifts, and roller coasters. (*Id.* at pp. 1131-1136, 29 Cal.Rptr.3d 352, 113 P.3d 41.) This expansion reflects the policy determination that a passenger's purpose, be it recreation, thrill-seeking, or simply conveyance from point A to B, should not control whether the operator should bear a higher duty to protect the passenger. (*Id.* at p. 1136, 29 Cal.Rptr.3d 352, 113 P.3d 41.)

In *Gomez*, the California Supreme Court concluded roller coasters are common carriers, despite their purely recreational purpose, because they are **\*1295** “operated in the expectation that thousands of patrons, many of them children, will occupy their seats” and are “held out to the public to be safe.” (*Gomez, supra*, 35 Cal.4th at p. 1136, 29 Cal.Rptr.3d 352, 113 P.3d 41.) As with other recreational transportation like ski lifts, airplanes, and trains, “the lives and safety of large numbers of human beings” are entrusted to the roller coaster operator's “diligence and fidelity.” (*Ibid.*, quoting *Treadwell v. Whittier* (1889) 80 Cal. 574, 591, 22 P. 266.)

Despite the consistent trend toward broadening the common carrier definition to include recreational vehicles, almost a decade after *Gomez* the California Supreme Court refused to apply the heightened duty of care to operators of bumper cars, finding them “dissimilar to roller coasters in ways that disqualify their operators as common carriers.” (*Nalwa, supra*, 55 Cal.4th at p. 1161, 150 Cal.Rptr.3d 551, 290 P.3d 1158.) Crucial to the analysis in *Nalwa* was that bumper car riders “exercise independent control over the steering and acceleration,” whereas roller coaster riders “ha[ve] no control over the elements of thrill of the ride; the amusement park predetermines any ascents, drops, accelerations, decelerations, turns or twists of the ride.” (*Ibid.*)

This difference in control convinced the court that “[t]he rationale for holding the operator of a roller coaster to the duties of a common carrier for reward—that riders, *having delivered themselves into the control of the operator*, are owed the highest degree of care for their safety—simply does not apply to bumper car riders' safety from the risks inherent in bumping.” (*Ibid.*, italics added.)

This precedent teaches that the key inquiry in the common carrier analysis **\*\*641** is whether passengers expect the transportation to be safe because the operator is reasonably capable of controlling the risk of injury. (*Gomez, supra*, 35 Cal.4th at p. 1136, 29 Cal.Rptr.3d 352, 113 P.3d 41; *Nalwa, supra*, 55 Cal.4th at p. 1161, 150 Cal.Rptr.3d 551, 290 P.3d 1158.) While a bumper car rider maintains a large degree of control over the car's speed and direction, a roller coaster rider recognizes the thrills and unpredictability of the ride are manufactured for his amusement by an operator who in reality maintains direct control over the coaster's speed and direction at all times. (*Gomez*, at p. 1136, 29 Cal.Rptr.3d 352, 113 P.3d 41.)

As our high court explained, the roller coaster rider “ ‘expects to be surprised and perhaps even frightened, but not hurt.’ ” (*Ibid.*)

It is in this critical regard we find a hot air balloon differs from those recreational vehicles held to a common carrier's heightened duty of care. Unlike operators of roller coasters, ski lifts, airplanes, and trains, balloon pilots do not maintain direct and precise control over the speed and direction of the balloon.

A pilot directly controls only the balloon's altitude, by monitoring the amount of heat added to the balloon's envelope. A pilot has no direct control over the balloon's latitude, which is determined by the wind's speed and direction. A balloon's lack of power and steering poses risks of mid-air collisions and crash landings, making ballooning a risky activity. (See **\*1296** *Hulsey v. Elsinore Parachute Center* (1985) 168 Cal.App.3d 333, 345-346, 214 Cal.Rptr. 194 [hot air ballooning “involve[s] a risk of harm to persons or property” because pilots cannot “direct their paths of travel ... [or] land in small, targeted areas”]; Dylan P. Kletter, *Negligence in the (Thin) Air: Understanding the Legal Relationship Between Outfitters and Participants in High Risk Expeditions Through Analysis of the 1996 Mount Everest Tragedy* (2008) 40 Conn. L.Rev. 769, 772 [“hot air ballooning” is a “high-risk activity”].) As Kitchel, Grotheer's expert, put it, a balloon pilot “is at the mercy of the wind speed and direction.” (See Holt, *On a Wind and a Prayer* (1997) 83 A.B.A.J. 94, 95 [“winds ... can transform a wondrous journey into a life-or-death struggle”].)

The mere existence of risk is not sufficient to disqualify a vehicle as a common carrier, however. Roller coasters, ski lifts, airplanes, and trains all pose “inherent dangers owing to speed or mechanical complexities.” (*Gomez, supra*, 35 Cal.4th at p. 1136, 29 Cal.Rptr.3d 352, 113 P.3d 41.)

But there is a significant difference between the dangers of riding those conveyances and the dangers involved in ballooning.

The former can be virtually eliminated through engineering design and operator skill, whereas the latter cannot be mitigated without altering the fundamental nature of a balloon.

Operators of roller coasters, ski lifts, airplanes, and trains can take steps to make their conveyances safer for passengers without significantly altering the transportation experience. For example, roller coaster operators can invest in state of the art construction materials and control devices or task engineers with designing a ride that provides optimal thrills without sacrificing

passenger safety. With a balloon, on the other hand, safety measures and pilot training go only so far toward mitigating the risk of mid-air collisions and crash landings. The only way to truly eliminate those risks is by adding power and steering to the balloon, thereby rendering vestigial the very aspect of the aircraft that makes it unique and desirable to passengers.

Because no amount of pilot skill can completely counterbalance a hot air balloon limited steerability, ratcheting up **\*\*642** the degree of care a tour company must exercise to keep its passengers safe would require significant changes to the aircraft and have a severe negative impact on the ballooning industry. For that reason, we conclude Escape is not a common carrier as a matter of law.

**DISNEYLAND, AS THE OPERATOR OF A RIDE KNOWN AS “INDIANA JONES” IS A  
COMMON CARRIER**

See: See *Gomez v. Superior Court* (2005) 35 Cal.4th 1125 —

The estate of a passenger who died as a result of injuries allegedly sustained while riding on the Indiana Jones attraction at Disneyland brought causes of action based upon Civil Code section 2100, which requires a “carrier of persons for reward” to “use the utmost care and diligence” for the safety of its passengers, and Civil Code section 2101, which imposes a duty upon such a carrier to provide “vehicles” that are “safe and fit for the purposes to which they are put.” The superior court sustained a demurrer to these causes of action, reasoning that the operator of an amusement park ride cannot be a carrier of persons, but the Court of Appeal reversed.

For the reasons that follow, we agree with the Court of Appeal and conclude that the operator of a roller coaster or similar amusement park ride can be a carrier of persons for reward within the meaning of Civil Code sections 2100 and 2101.

As the cases cited above make clear, our conclusion that the operator of a roller coaster or similar amusement park ride can be a carrier of persons for reward is consistent with the authority holding that operators of ski lifts are common carriers, despite the fact that the skiers who ride such lifts are engaged in recreation. (*Squaw Valley Ski Corp. v. Superior Court, supra*, 2 Cal.App.4th 1499, 3 Cal.Rptr.2d 897.) A passenger's purpose in purchasing transportation, whether it be to get from one place to another or to travel simply for pleasure or sightseeing, does not determine whether the provider of the transportation is a carrier for reward. The passenger's purpose does not affect the duty of the carrier to exercise the highest degree of care for the safety of the passenger.

Certainly there is no justification for imposing a lesser duty of care on the operators of roller coasters simply because the primary purpose of the transportation provided is entertainment. As one federal court noted, “amusement rides have inherent dangers owing to speed or mechanical complexities. They are operated for profit and are held out to the public to be safe. They are operated in the expectation that thousands of patrons, many of them children, will occupy their seats.” (*U.S. Fidelity & Guaranty Co. v. Brian* (5th Cir.1964) 337 F.2d 881, 883.) Rid-



ers of roller coasters and other “thrill” rides seek the illusion of danger while being assured of their actual safety. The rider expects to be surprised and perhaps even frightened, but not hurt. The rule that carriers of passengers are held to the highest degree of care is based on the recognition that “ [t]o his diligence and fidelity are intrusted the lives and safety of large numbers of human beings.’ ” (*Treadwell v. Whittier, supra*, 80 Cal. 574, 591, 22 P. 266.) This applies equally to the rider of a roller coaster as it does to the rider of a bus, airplane, or train.

See also:

A federal district court in California held that the operators of the “Pirates of the Caribbean” amusement ride at Disneyland were common carriers. (*Neubauer v. Disneyland, Inc.* (C.D.Cal. 1995) 875 F.Supp. 672.) The plaintiffs in *Neubauer* were injured when the boat in which they were riding was struck from behind by another boat. The federal district court held: “Under plaintiffs' allegations, Disneyland's amusement park boat ride falls within California's broad statutory definition of a common carrier. At the ‘Pirates of the Caribbean,’ defendant offered to the public to carry patrons. Under these allegations, the duty of utmost care and diligence would apply to Disneyland.” (*Id.* at p. 674.)

### **CONCLUSION**

It thus appears that the “unbroken line” in California as to holding amusement ride operators to be “common carriers” and held to the utmost duty of care has been broken. Operators of hot air balloons and bumper cars are not “common carriers”, but operators of rides such as “Pirates of the Caribbean” and “Indiana Jones” are “common carriers”.

The key inquiry in the common carrier analysis is whether passengers expect the transportation to be safe because the operator is reasonably capable of controlling the risk of injury.

Unlike operators of roller coasters, ski lifts, airplanes, and trains, balloon pilots do not maintain direct and precise control over the speed and direction of the balloon. A pilot directly controls only the balloon's altitude, by monitoring the amount of heat added to the balloon's envelope. A pilot has no direct control over the balloon's latitude, which is determined by the wind's speed and direction. A balloon's lack of power and steering poses risks of mid-air collisions and crash landings, making ballooning a risky activity.

While a bumper car rider maintains a large degree of control over the car's speed and direction, a roller coaster rider recognizes the thrills and unpredictability of the ride are manufactured for his amusement by an operator who in reality maintains direct control over the coaster's speed and direction at all times.