Hot Air Balloon Passengers Are Not Owed A Heightened Duty Of Care
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As a matter of first impression, the Court of Appeal recently ruled a hot air balloon operator is not a common carrier and therefore does not have a heightened duty to protect the safety of passengers.

In this matter, Plaintiff Erika Grotheer took a hot air balloon ride in the Temecula wine country and suffered a fractured leg when the basket carrying her and others crash landed into a fence. Grotheer alleged the balloon tour company negligently or recklessly operated the balloon by (1) failing to properly slow its descent during landing and (2) failing to give the passengers safe landing instructions before the launch. Grotheer also alleged the hot air balloon company was a common carrier, and as such, owed its passengers a heightened duty of care.

In response to the complaint, the defendants moved for summary judgment, arguing Grotheer could not establish the element of duty, finding Grotheer had assumed the risk of her injury under the primary assumption of risk doctrine and, as a result, the tour company owed her no duty of care. The trial court entered judgment in favor of defendants, and Grotheer appealed.

On appeal, Grotheer argued the trial court erred in concluding her claim was barred by the primary assumption of risk doctrine and reasserted on appeal the tour company was a common carrier. The Court of Appeal affirmed the judgment, but on a different ground than relied upon by the trial court. In this regard, the Court of Appeal held as follows: (1) a balloon tour company is not a common carrier subject to a heightened duty of care; (2) the primary assumption of risk doctrine bars Grotheer’s claim the balloon pilot negligently failed to slow the balloon’s descent to avoid a crash landing; and (3) While the tour company does have a duty to provide safe landing instructions to its passengers, the undisputed evidence regarding the crash demonstrated that any failure on the tour company’s part to provide such instructions was not the cause of Grotheer’s injury.

With regard to the appellate court’s initial finding, Grotheer claimed the tour company was a common carrier and therefore owed its passengers a heightened duty of care to ensure their safe carriage during the balloon tour.

As background, 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 . . . 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.” This determination is important because the heightened duty of care precludes the application of the primary assumption of risk doctrine.

The court explained “a common carrier of persons is anyone who offers to the public to carry persons . . . Carriers of persons for reward have long been subject to a heightened duty of care. 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. 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.”
The origin of common carrier status is found in California in the mid-nineteenth century as a narrow concept involving stagecoaches hired purely for transportation. 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. This expansion reflects the policy determination 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.

Instead, 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. The court noted it is in this critical regard where 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.

The court also pointed out the mere existence of risk is not sufficient to disqualify a vehicle as a common carrier. “Roller coasters, ski lifts, airplanes, and trains all pose inherent dangers owing to speed or mechanical complexities. 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.”

In sum, because no amount of pilot skill can completely counterbalance a hot air balloon’s limited steerability, increasing 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, the court concluded the balloon tour company was not a common carrier as a matter of law.

This decision presents important considerations when defending negligence actions that involve the transportation of passengers in inherently dangerous situations.

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