

---

January 2020

## Grotheer v. Escape Adventures, Inc.

Paisley Piasecki  
*New York Law School*

Follow this and additional works at: [https://digitalcommons.nyls.edu/nyls\\_law\\_review](https://digitalcommons.nyls.edu/nyls_law_review)



Part of the [Legal History Commons](#), [Legal Remedies Commons](#), [Torts Commons](#), and the [Transportation Law Commons](#)

---

### Recommended Citation

Paisley Piasecki, *Grotheer v. Escape Adventures, Inc.*, 64 N.Y.L. SCH. L. REV. 223 (2019-2020).

This Case Comments is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

PAISLEY PIASECKI

*Grotheer v. Escape Adventures, Inc.*

64 N.Y.L. SCH. L. REV. 223 (2019–2020)

ABOUT THE AUTHOR: Paisley Piasecki is a Legal Scholarship Editor of the 2019–2020 *New York Law School Law Review*, J.D. candidate, New York Law School, 2020.

GROTHEER v. ESCAPE ADVENTURES, INC.

*“Then suddenly the wind changed, and the balloon floated down into the heart of this noble city, where I was instantly acclaimed Oz, the First Wizard de Luxe!”*  
– The Wizard<sup>1</sup>

Though many first impressions of hot air balloons likely arise from the iconic finale of *The Wizard of Oz*,<sup>2</sup> the world’s first encounter with ballooning occurred over two centuries ago in Versailles, France.<sup>3</sup> In 1783, two brothers designed a model under the supervision of King Louis XVI for three inaugural passengers: a sheep, a duck, and a rooster.<sup>4</sup> Hot air balloons were the precursor to modern aviation<sup>5</sup> and are still enjoyed by many for sightseeing and sport.<sup>6</sup>

In *Grotheer v. Escape Adventures, Inc.*, passenger Erika Grotheer (“Grotheer”) experienced the wonder of ballooning on a tour at a California vineyard—but her adventure did not end with a magical trip back to Kansas.<sup>7</sup> What started out for Grotheer as a typical hot air balloon tour with Grape Escape (“Escape”) turned into an unplanned sideways descent, collision with a fence, and a fractured leg from a harsh landing.<sup>8</sup>

When Grotheer sued for her injury, the California Court of Appeal was required to decide, as a matter of first impression, whether a hot air balloon operator was a common carrier.<sup>9</sup> Passenger vehicles such as bumper cars, stagecoaches, roller coasters, ski lifts, and airplane tours are all common carriers under California law.<sup>10</sup> Common carrier status subjects the operators of those vehicles to a heightened duty of care.<sup>11</sup> Accordingly, operators designated as common carriers cannot use the

- 
1. Noel Langley et al., *Wizard of Oz, The (1939)*, SCREENPLAYS FOR YOU, [https://sfy.ru/script/wizard\\_of\\_oz\\_1939](https://sfy.ru/script/wizard_of_oz_1939) (last visited Mar. 25, 2020).
  2. Jimmy Stamp, *Hot Air Balloon Travel for the Luxury Traveler of the 1800s*, SMITHSONIAN MAG. (Mar. 5, 2013), <https://www.smithsonianmag.com/arts-culture/hot-air-balloon-travel-for-the-luxury-traveler-of-the-1800s-496002/>.
  3. Ernie Tretkoff, *November 783: Intrepid Physicist is First to Fly*, 15 APS NEWS 2, 2 (2006).
  4. *Id.*
  5. *See Balloon Flying Handbook*, FED. AVIATION ADMIN. 2-1 (2008), [https://www.faa.gov/regulations\\_policies/handbooks\\_manuals/aircraft/media/faa-h-8083-11.pdf](https://www.faa.gov/regulations_policies/handbooks_manuals/aircraft/media/faa-h-8083-11.pdf) (explaining that hot air balloons are the oldest human flight technology).
  6. *See* Stamp, *supra* note 2 (discussing the modern recreational uses of hot air balloons).
  7. *See* 222 Cal. Rptr. 3d 633, 635 (Cal. Ct. App. 2017); *Wizard of Oz*, KANSAS HISTORICAL SOC’Y: KANSAPEDIA (Apr. 2013), <https://www.kshs.org/kansapedia/wizard-of-oz/12240>.
  8. *Grotheer*, 222 Cal. Rptr. 3d at 635–36.
  9. *Id.* at 635, 639. Under California Civil Code Section 2168, “a common carrier of persons is anyone ‘who offers to the public to carry persons.’” CAL. CIV. CODE § 2168 (Deering, 2018). This Case Comment discusses common carriers solely in the context of the California Civil Code and will not analyze the definition of common carriers under the Public Utilities Code, which is a separate legal issue. *See WILLIAM LINDSLEY ET AL.*, § 15. COMMON CARRIERS UNDER PUBLIC UTILITIES CODE—PERSONS AND CORPORATIONS EXCLUDED, *in* 11A CAL. JUR. 3D CARRIERS § 15 (2019).
  10. *Grotheer*, 222 Cal. Rptr. 3d at 640 (citing *Gomez v. Superior Court*, 113 P.3d 41, 44–48 (Cal. 2005)).
  11. *Gomez*, 113 P.3d at 43.

primary assumption of risk doctrine as a defense to negligence claims.<sup>12</sup> Ultimately, the court concluded that hot air balloon operators are not common carriers, finding that Escape could rely on a primary assumption of risk defense to Grotheer's negligence claims.<sup>13</sup> The court refused to apply a heightened duty of care to hot air ballooning, an activity that the court reasoned contains inherent risks like wind turbulence and collisions.<sup>14</sup>

This Case Comment contends that the *Grotheer* court erred on two grounds when it held that a hot air balloon operator is not a common carrier. First, the court ignored California precedent that would have demonstrated such operators are certainly common carriers.<sup>15</sup> Second, the court should have placed more emphasis on *Gomez v. Superior Court*<sup>16</sup> in reaching its decision, because Grotheer's case is analogous to cases involving confined amusement attractions<sup>17</sup> rather than participatory activities.<sup>18</sup> The *Grotheer* court has not only denied the possibility of relief for future injured plaintiffs,<sup>19</sup> but it has also limited the scope of California's common carrier doctrine, which has consistently been applied to cover a broad variety of activities, vehicles, and modes of transportation.<sup>20</sup> This decision creates a

- 
12. *Grotheer*, 222 Cal. Rptr. 3d at 639–40. Under California law, a “carrier for persons without reward must use ordinary care and diligence for their safe carriage.” *Id.* at 640 (quoting CAL. CIV. CODE § 2096). On the other hand, a carrier who carries goods or passengers for reward, or compensation, “must use the utmost care and diligence” when transporting its passengers. *Id.* (quoting CAL. CIV. CODE § 2100). This standard is considered a “heightened duty of care” and “precludes the application of the primary assumption of risk doctrine.” *Id.* at 639–40. Primary assumption of risk can be invoked when the defendant does not owe a duty of care to the plaintiff and thus cannot be held negligent in his conduct because the plaintiff understood the risk created by that defendant's actions but proceeded with the activity anyways. Scott Giesler, Comment, *The Uncertain Future of Assumption of Risk in California*, 28 Loy. L.A. L. REV. 1495, 1501–02 (1995).
  13. *Grotheer*, 222 Cal. Rptr. 3d at 639.
  14. *Id.* at 641.
  15. *Treadwell v. Whittier*, 22 P. 266, 270 (Cal. 1889); *McDaniel v. Dowell*, 26 Cal. Rptr. 140, 143 (Cal. Ct. App. 1962); *McIntyre v. Smoke Tree Ranch Stables*, 23 Cal. Rptr. 339, 340–41 (Cal. Ct. App. 1962).
  16. 113 P.3d 41 (Cal. 2005).
  17. *See id.* at 48 (discussing how common carrier analysis applies to entertainment activities such as amusement park attractions).
  18. *See Nalwa v. Cedar Fair, L.P.*, 290 P.3d 1158, 1166 (Cal. 2012) (outlining how a bumper car operator was not a common carrier due to the participatory nature of the activity); *Swigart v. Bruno*, 220 Cal. Rptr. 3d 556, 559 (Cal. Ct. App. 2017) (discussing how a horseback riding operator was not a common carrier due to the participatory nature of the activity); *Griffin v. Haunted Hotel, Inc.*, 194 Cal. Rptr. 3d 830, 834 (Cal. Ct. App. 2015) (detailing how a haunted house operator was not a common carrier due to the participatory nature of the activity).
  19. As a defense, the primary assumption of risk doctrine completely eliminates the possibility of recovery in negligence cases. 1 CAL. TORTS § 4.03, at 2(b)(ii) (2019).
  20. *Gomez*, 113 P.3d at 44; *see also* Mark A. Franklin, *California's Extension of Common Carrier Liability to Roller Coasters and Similar Devices: An Examination of Gomez v. Superior Court of Los Angeles*, 24 W. ST. U. L. REV. 29, 37 (2006) (explaining that the *Gomez* decision expanded the definition of “carrier of persons for reward” to vehicles that are not considered “traditional transportation devices,” such as roller

challenging standard for future common carrier cases and ignores relevant legal precedent that should serve as a guide in deciding this issue.<sup>21</sup>

Grotheer's adventure began when her son, Thorsten, purchased her a ticket for an Escape hot air balloon tour while visiting California as a present for her seventy-eighth birthday.<sup>22</sup> Grotheer was "a non-English speaking German citizen,"<sup>23</sup> so when Thorsten brought Grotheer to Escape's meeting location at a winery, he tried to inform the staff of his mother's language barrier so that they make sure she understood the safety instructions.<sup>24</sup> The staff informed Thorsten that he could not be in the launch area without a ticket, and at some point during the check-in period, Grotheer signed Escape's liability waiver, which released the company from claims based on "ordinary negligence."<sup>25</sup> Grotheer and Thorsten then traveled together to the launch location in Thorsten's vehicle.<sup>26</sup> Grotheer never received any safety instructions before lift-off, despite having contact with Escape staff members both before and after the ride to the launch location.<sup>27</sup>

Grotheer's hot air balloon tour proceeded without incident until it came time for the landing.<sup>28</sup> As the balloon descended, it increased in speed, floated sideways, crashed into a fence, and made a hard impact with the ground before skidding almost forty yards.<sup>29</sup> Grotheer recalled holding on to a metal rod when the balloon basket hit the fence and feeling her leg break during the subsequent impact with the ground.<sup>30</sup> When the balloon finally stopped, the basket rested on its side and not its bottom.<sup>31</sup>

---

coasters); Stephen M. Sullivan, Note, *Of Thrill Rides and Bar Fights: Gomez v. Superior Court, Delgado v. Trax Bar & Grill, and the Expanding Duty of Care in California*, 36 Sw. U. L. REV. 59, 63 (2007).

21. See, e.g., *Treadwell v. Whittier*, 22 P. 266, 270 (Cal. 1889); *McDaniel v. Dowell*, 26 Cal. Rptr. 140, 143 (Cal. Ct. App. 1962); *McIntyre v. Smoke Tree Ranch Stables*, 23 Cal. Rptr. 339, 340–41 (Cal. Ct. App. 1962).
22. *Grotheer v. Escape Adventures, Inc.*, 222 Cal. Rptr. 3d 633, 635 (Cal. Ct. App. 2017).
23. *Id.*
24. *Id.* at 635–36. Thorsten tried to explain his mother's language barrier but the pilot "responded by waving him away and saying, 'Everything is going to be fine.'" *Id.* He also tried informing two other Escape employees, but "they appeared to be in a rush and told him he could not be in the immediate launch vicinity if he had not purchased a ticket." *Id.* at 636.
25. *Id.* at 636. Grotheer still signed the liability waiver despite being unable to understand any of its terms. Respondents' Brief at 34–35, *Grotheer*, 222 Cal. Rptr. 3d 633 (No. E063449). As this was Grotheer's first experience on a hot air balloon, one of her son's concerns was her inability to speak or read English. Appellant's Opening Brief at 7, *Grotheer*, 222 Cal. Rptr. 3d 633 (No. E063449).
26. *Grotheer*, 222 Cal. Rptr. 3d at 636.
27. Appellant's Reply Brief at 14–15, *Grotheer*, 222 Cal. Rptr. 3d 633 (No. E063449); *Grotheer*, 222 Cal. Rptr. 3d at 644. Peter Gallagher, Escape's balloon pilot, drove the other passengers to the launch location separately, but those passengers also claimed that he did not provide any safety instructions prior to the flight. *Grotheer*, 222 Cal. Rptr. 3d at 636.
28. *Id.*
29. *Id.*
30. *Id.* at 637.
31. *Id.* at 636.

Grotheer sued Escape, Gallagher,<sup>32</sup> and Wilson Creek Vineyards in the Superior Court of Riverside County.<sup>33</sup> She sued Escape and Gallagher for negligent or reckless operation of the balloon in failing to “properly slow its descent during landing” and provide “safe landing instructions.”<sup>34</sup> Grotheer argued that as an operator, Escape was a common carrier and therefore “owed its passengers a heightened duty of care.”<sup>35</sup> During the presentation of evidence in the case, Gallagher contended that the crash occurred due to a false lift,<sup>36</sup> which requires additional heat to keep the balloon afloat.<sup>37</sup> Grotheer’s expert in the case, James Kitchel—a balloon pilot of over twenty-five years—disagreed.<sup>38</sup> Providing his expert opinion, Kitchel explained that the balloon likely experienced a wind shear.<sup>39</sup> Kitchel elaborated that Gallagher could have “avoided the crash entirely” by adding more heat to safely control the balloon’s descent.<sup>40</sup> Kitchel described ballooning as a potentially “violent, high speed [event] with tragic results” because a pilot only has control over the balloon’s altitude and is thus “at the mercy of the wind speed.”<sup>41</sup> Furthermore, Kitchel criticized Escape’s failure to provide pre-flight instructions, noting that commercial hot air balloon

---

32. Gallagher was both an agent of Escape Adventures, Inc. and the pilot who was operating the balloon when it made a crash landing and injured Grotheer. *Id.* at 635.

33. *Id.*

34. *Id.* Grotheer alleged that Wilson Creek, the vineyard site during the tour, was vicariously liable for Escape and Gallagher’s negligence because their business affiliations created a special relationship with the company. *Id.* Vicarious liability is the imposition of liability on one person for the actionable conduct of another, based solely on the relationship between the two persons. *Vicarious Liability*, BLACK’S LAW DICTIONARY (11th ed. 2019).

35. *Grotheer*, 222 Cal. Rptr. 3d at 635. Specifically, Grotheer claimed that Escape was a “common carrier for reward,” as defined in California Civil Code § 2100, which states that “[a] carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.” *Id.* at 639 (quoting CAL. CIV. CODE § 2100 (Deering 2018)).

36. *Grotheer*, 222 Cal. Rptr. 3d at 637. A false lift may occur during the initial takeoff and acceleration when the balloon blocks the natural wind and creates a change in wind speed, bringing the balloon into the air. Robert L. Ruppenthal, *Balloon Safety Tips*, FED. AVIATION ADMIN. 1, [https://www.faa.gov/regulations\\_policies/handbooks\\_manuals/aviation/media/balloon\\_safety\\_tips.pdf](https://www.faa.gov/regulations_policies/handbooks_manuals/aviation/media/balloon_safety_tips.pdf) (last visited Mar. 25, 2020). This creates a false lift that will abruptly cease after takeoff and therefore requires the pilot to constantly add heat until the balloon ascends properly. *Id.* This occurred during Gallagher’s descent when the air speed suddenly dropped. While this initially created a “false lift effect,” the balloon continued to descend and lost that momentum, making the balloon descend “more quickly than anticipated.” *Grotheer*, 222 Cal. Rptr. 3d at 636.

37. *Grotheer*, 222 Cal. Rptr. 3d at 637.

38. *Id.*

39. *Id.* A wind shear occurs when a balloon is airborne, and the wind unexpectedly increases in speed. The gust can distort the vertical axis of the balloon, cause severe turbulence, and alter the balloon’s path of descent and landing location if it is not properly managed by the pilot. Ruppenthal, *supra* note 36, at 2.

40. *Grotheer*, 222 Cal. Rptr. 3d at 637.

41. *Id.*

GROTHER v. ESCAPE ADVENTURES, INC.

operators must provide such safety instructions in accordance with industry standards.<sup>42</sup>

In response, the defendants moved for summary judgment on two issues.<sup>43</sup> They asserted that Grotheer assumed the risk of injury under the primary implied assumption of risk doctrine<sup>44</sup> and that Grotheer signed a liability waiver relieving them of responsibility.<sup>45</sup> The trial court conducted a hearing and concluded that “Grotheer assumed the risk of injury by voluntarily riding in the balloon, and [the] defendants owed no duty whatsoever to protect her.”<sup>46</sup> The court initially denied the defendants’ motion of summary judgment on the liability waiver issue but ultimately granted the motion, reasoning that Escape and Gallagher did not owe Grotheer any duty of care.<sup>47</sup> Grotheer appealed to the California Court of Appeal and argued that the trial court’s granting of the motion was improper because “it failed to consider whether the ‘heightened duty’ standards, imposed on a ‘common carrier,’ materially [affected] the application of the primary assumption of risk doctrine.”<sup>48</sup>

In the late seventeenth century England, negligence arose as a legal claim when plaintiffs accused defendants of failing to take appropriate care when performing a task or duty.<sup>49</sup> English courts began to apply the concept of “duty” to common carriers in

---

42. *Id.* Kitchel also referenced the Federal Aviation Administration’s Balloon Flying Handbook, which states that pre-flight safety instructions must be given, and provides suggestions on how to properly conduct these “passenger briefings” to “explain correct posture and procedure to passengers.” *Grotheer*, 222 Cal. Rptr. 3d at 337; *Balloon Flying Handbook*, *supra* note 5, at 6–12.

43. *Grotheer*, 222 Cal. Rptr. 3d at 638. A defendant brings a motion for summary judgment to assert that “one or more elements of [the plaintiff’s] cause of action . . . cannot be established, or that there is a complete defense to that cause of action.” CAL. CIV. PROC. CODE § 437c(a), (p)(2) (West 2017). The court will “[grant] summary judgment when there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law.” *Id.* § 437c(c).

44. *Grotheer*, 222 Cal. Rptr. 3d at 639.

45. *Id.* at 638. Grotheer argued that the liability waiver was invalid because she could not speak or understand English, the primary assumption of risk doctrine does not apply to common carriers, and that Escape still had a duty to provide both a safe landing and safety instructions. *Id.* Grotheer also alleged that because the defendants were in a “symbiotic business relationship,” Wilson Creek was vicariously liable for Escape’s conduct. *Id.*

46. *Id.* The trial court also found that “Wilson Creek was not vicariously liable for Escape and Gallagher’s conduct,” but there was a genuine dispute on the enforceability of the liability waiver. *Id.* This Case Comment does not discuss the issues pertaining to Wilson Creek or the liability waiver.

47. *Id.*

48. Appellant’s Reply Brief, *supra* note 27, at 2.

49. James C. Plunkett, *The Historical Foundations of the Duty of Care*, 41 MONASH U. L. REV. 716, 717–18 (2015). Negligence is defined as “the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.” *Negligence*, BLACK’S LAW DICTIONARY (11th ed. 2019). To succeed in a negligence action, the plaintiff must first establish that the defendant owed him or her a duty of care. *Id.*

the 1800s.<sup>50</sup> Unlike the use of ordinary care that was required in negligence suits,<sup>51</sup> common carriers—or “carriers of goods for reward”—were held to a heightened duty of care, making them entirely responsible for any loss of, or damage to, the goods that they transported.<sup>52</sup> The first “expression” of this heightened duty in American law was seen in the 1839 Supreme Court decision of *Stokes v. Saltonstall*,<sup>53</sup> which required a coach driver to act “with reasonable skill, and with the utmost prudence and caution.”<sup>54</sup>

In 1859, the Supreme Court of California applied common carrier status to stagecoaches, reasoning that drivers are required to provide safe transportation to their passengers.<sup>55</sup> Section 2168 of the California Civil Code defines a common carrier as someone “who offers to the public to carry persons, property, or messages.”<sup>56</sup> Carriers providing services without charge are only held to an ordinary standard of care,<sup>57</sup> but under Section 2100 of the California Civil Code, “[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.”<sup>58</sup> Courts have since expanded common carrier status to include operators of vehicles such as airplanes, elevators, and ski lifts.<sup>59</sup>

Holding common carriers to a higher duty of care is legally significant because it bars the defendant carrier from using the primary assumption of risk doctrine as a defense in negligence suits.<sup>60</sup> The primary assumption of risk defense to negligence claims may be raised in cases where the defendant never owed a duty of care to the plaintiff in the first place, under the rationale that the plaintiff knowingly acted in the

---

50. Plunkett, *supra* note 49, at 722.

51. *See id.* at 732 (illustrating that ordinary care refers to the amount of reasonable care a defendant would take to avoid danger and harm to another, given the circumstances of each situation).

52. *Gomez v. Superior Court*, 113 P.3d 41, 43 (Cal. 2005).

53. 38 U.S. 181 (1839).

54. *Id.* at 193.

55. *Fairchild v. Cal. Stage Co.*, 13 Cal. 599, 602 (Cal. 1859) (“It is true that proprietors of stagecoaches are common carriers, and that common carriers are insurers or warrantors . . . of the goods they undertake to carry.”).

56. CAL. CIV. CODE § 2168 (Deering 2018).

57. *Id.* § 2096 (“A carrier of persons without reward must use ordinary care and diligence for their safe carriage.”); *Franklin*, *supra* note 20, at 35 (quoting *Hall v. Conn. River S. B. Co.*, 13 Conn. 319, 326 (1839) (“The reason for this lower duty is that a carrier of goods has absolute control over its cargo, whereas a passenger is capable of contributing to the harm, making the determination of liability more difficult.”)).

58. CAL. CIV. CODE § 2100.

59. *See Smith v. O'Donnell*, 12 P.2d 933, 935 (Cal. 1932) (holding that a flight operator transporting customers between the ocean and an airport by plane “should be held to the same degree of responsibility . . . as a common carrier”); *Treadwell v. Whittier*, 22 P. 266, 269 (Cal. 1889) (finding that an elevator operator was a common carrier); *Squaw Valley Ski Corp. v. Superior Court*, 3 Cal. Rptr. 2d 897, 900 (Cal. Ct. App. 1992) (finding that a ski resort’s chair lift facility was a common carrier under California Civil Code Section 2168).

60. *Grotheer v. Escape Adventures, Inc.*, 222 Cal. Rptr. 3d 633, 639 (Cal. Ct. App. 2017).



GROTHER V. ESCAPE ADVENTURES, INC.

face of an obvious risk.<sup>61</sup> This doctrine is often used in claims arising from recreational contexts, because imposing a duty of care on all defendant operators or organizers—rather than recognizing the plaintiff’s cognizant undertaking of risks involved in such activities—could lead to “chilling vigorous participation in or sponsorship” of those activities.<sup>62</sup> For example, baseball stadium operators are not currently held responsible for injuries caused by foul balls that fly beyond the stadium’s designated safety nets.<sup>63</sup> It would be unreasonable for spectators to assume—given the size of the stadium and the relatively limited nature of the safety netting around a typical baseball diamond—that they are completely safeguarded from that risk.<sup>64</sup> Furthermore, by holding common carriers that provide transportation to a higher duty of care, California courts have ensured that passengers will not be legally barred from seeking recovery for harm that the carrier was fully expected to prevent.<sup>65</sup>

While these legal foundations are still relevant, the Supreme Court of California recently decided two common carrier cases illustrating evolution within the law.<sup>66</sup> In 2005, the court in *Gomez* held that a roller coaster operator is a common carrier.<sup>67</sup> The court reasoned that although the ride’s purpose was to provide entertainment rather than transportation, roller coasters “are operated for profit . . . and in the expectation that thousands of patrons . . . will occupy” them, subjecting the operators to the heightened duty of care.<sup>68</sup> Seven years later, in *Nalwa v. Cedar Fair, L.P.*, the court held that a bumper car operator was not a common carrier.<sup>69</sup> The *Nalwa* court reasoned that bumper car operators should not be held to a heightened duty of care because, unlike roller coaster passengers, bumper car drivers exercise independent

---

61. Giesler, *supra* note 12, at 1502.

62. See *Nalwa v. Cedar Fair, L.P.*, 290 P. 3d 1158, 1163 (Cal. 2012); *Grottheer*, 222 Cal. Rptr. 3d at 642 (explaining the policy behind the primary assumption of risk doctrine).

63. Sarah Farrell, *Sports Leagues Taking Steps to Further Protect Fans from Balls, Bats and Pucks*, CRONKITE NEWS (Aug. 26, 2019), <https://cronkitenews.azpbs.org/2019/08/26/sports-fan-safety-protective-nets/>.

64. See Giesler, *supra* note 12, at 1501–02 (explaining that event center owners do not have a duty to protect spectators from every errant ball as long as they provide screenings for those seated behind goals or home plates).

65. See G. Todd Withy, *Effect of Comparative Negligence Principles on Defense of Assumption of the Risk*, 1 CAL. TORTS § 4.03(2)(b)(ii) (2019).

66. See generally *Grottheer*, 222 Cal. Rptr. 3d at 640 (explaining the historical trend towards a broad interpretation of the statute but then illustrating competing decisions in which the Supreme Court of California found roller coasters were common carriers).

67. *Gomez v. Superior Court*, 113 P.3d 41, 51 (Cal. 2005).

68. *Id.* at 48. In *Gomez*, a patron suffered a severe brain injury leading to death after riding the Indiana Jones attraction at Disneyland. *Id.* at 42. It should also be noted that this holding is dissimilar from finding that an entire amusement park is a common carrier, as the California Court of Appeal has held that Disneyland, as an entity, is not a common carrier. *Simon v. Walt Disney World Co.*, 8 Cal. Rptr. 3d 459, 460–66 (Cal. Ct. App. 2004).

69. 290 P.3d 1158, 1160 (Cal. 2012). In *Nalwa*, the plaintiff took her children to Great America amusement park, owned by Cedar Fair, and fractured her wrist on a bumper car’s steering wheel when her car was bumped on both sides. *Id.*

control over the steering of the car and expose themselves to “the risks inherent in bumping.”<sup>70</sup> The *Nakwa* court did not preclude the possibility that different types of amusement ride operators could still be common carriers for reward in the future.<sup>71</sup> However, going forward, the primary assumption of risk doctrine would apply to both sports and “recreational activities,” such as rides, that “[involve] inherent risk of injury to voluntary participants . . . where the risk cannot be eliminated without altering the fundamental nature of the activity.”<sup>72</sup> The *Grotheer* court was therefore faced with an issue of first impression<sup>73</sup> that would determine whether California would continue with the broad reading of the common carrier statutes, or begin to shield defendant operators from liability in light of *Nakwa*’s decision.<sup>74</sup>

In its review of Grotheer’s case, the California Court of Appeal analyzed the common carrier issue first because, if Escape was a common carrier as matter of law, it would be held to the heightened duty of care “that precludes the application of the primary assumption of risk doctrine.”<sup>75</sup> The defendants argued that Grotheer’s entire negligence claim failed because she assumed the risk of injury.<sup>76</sup> Grotheer argued that: (1) the primary assumption of risk doctrine did not apply to common carriers, (2) Escape was not relieved from providing safe landing and emergency instructions, and (3) the liability waiver was invalid because Grotheer did not understand it.<sup>77</sup> On the common carrier issue, Grotheer specifically contended that the trial court erred when it failed to

---

70. *Id.* at 1166.

71. *Id.* at 1152, 1166.

72. *Id.* at 1160–63 (quoting *Beninati v. Black Rock City, LLC*, 96 Cal Rptr. 3d 105, 109 (Cal. Ct. App. 2009)). Before *Nakwa*, California courts often applied the primary assumption of risk doctrine to activities involving sports and similar situations where the other participants had a duty to not increase the risk of injury inherent in the activity. *Nakwa*, 290 P.3d at 1162. *Nakwa* acts as an extension of *Knight v. Jewett*, which also discussed “inherent risk” and an operator’s duty of care. 834 P.3d 696, 708–12 (Cal. 1992). The *Nakwa* court further emphasized that this doctrine includes recreational activities. *See Nakwa*, 290 P.3d at 1162–64 (finding that the policy behind primary assumption of risk applies to injuries from physical recreation and not to activities of daily life because otherwise there would be a potential chilling effect on recreational activity through the overapplication of tort liability for ordinary negligence connected to such recreational activities).

73. *Grotheer v. Escape Adventures, Inc.*, 222 Cal. Rptr. 3d 633, 639 (Cal. Ct. App. 2017). The only case to have determined common carrier liability for hot air balloons is *Balloons Over the Rainbow, Inc. v. Dir. of Revenue*, decided by the Supreme Court of Missouri. 427 S.W. 3d 815, 827 (Mo. 2013). The Court held that a hot air balloon operator was not a common carrier because there was no evidence that it offered itself to the public without limitations and therefore, did not fit within the state’s statutory definitions. *Id.*

74. *Nakwa*, 290 P.3d at 1166. The *Nakwa* court recognized *Gomez*’s broad application when including roller coaster rides as common carriers but chose to narrow the common carrier definition by interpreting *Gomez* as limiting its holding solely to roller coaster attractions. *Id.* This decision has been criticized for starting a trend of denying monetary relief to injured plaintiffs. *See Year-in-Review, Nakwa v. Cedar Fair, L.P.*, 55 Cal. 4th 1148 (2012), 40 W. St. U. L. Rev. 245, 248 (2013).

75. *See Grotheer*, 222 Cal. Rptr. 3d at 639.

76. *Id.* at 635.

77. *Id.* at 638.

GROTHER v. ESCAPE ADVENTURES, INC.

consider her common carrier claim since the decision would have significantly impacted the court’s analysis of Escape’s duty when considering primary assumption of risk.<sup>78</sup>

In response, the court outlined provisions of the California Civil Codes and explained that, “while common carriers are not insurers of . . . safety, they are required ‘to do all that human care, vigilance, and foresight reasonably can do under the circumstances.’”<sup>79</sup> The court then compared the *Nalwa* and *Gomez* decisions,<sup>80</sup> finding that “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.”<sup>81</sup> The court concluded that a hot air balloon operator is not a common carrier because balloon pilots have no “direct and precise control over the speed and direction of the balloon.”<sup>82</sup> The court further concluded that collision risks of hot air balloons cannot be mitigated “without significantly altering the transportation experience.”<sup>83</sup> The court reasoned that requiring balloon operators to use additional power and steering to avoid collisions would negatively impact the industry by demanding unreasonable control of a risk that is within the “fundamental nature” of ballooning.<sup>84</sup> Although the court found that Escape had a duty to provide safety instructions to each participant,<sup>85</sup> it held that the primary assumption of risk defense applied to ballooning<sup>86</sup> and ultimately affirmed the lower court’s grant of summary judgment.<sup>87</sup>

The court erred on two grounds when holding that hot air balloon operators are not common carriers. First, the court ignored applicable California precedent that would have demonstrated that a hot air balloon operator—as the entity controlling the balloon flight for its passengers—is a common carrier.<sup>88</sup> Second, the court should have

---

78. Appellant’s Reply Brief, *supra* note 27, at 9.

79. *Grotheer*, 222 Cal. Rptr. 3d at 640 (quoting *Squaw Valley Ski Corp. v. Superior Court*, 3 Cal. Rptr. 2d 897, 899 (Cal. Ct. App. 1992)).

80. *Compare* *Nalwa v. Cedar Fair, L.P.*, 290 P.3d 1158, 1166 (Cal. 2012) (holding that a bumper car operator is not a common carrier), *with* *Gomez v. Superior Court*, 113 P.3d 41, 51 (Cal. 2005) (holding that a roller coaster operator is a common carrier).

81. *Grotheer*, 222 Cal. Rptr. 3d at 640–41.

82. *Id.* at 641–42.

83. *Id.*

84. *Id.* at 641.

85. *Id.* at 644.

86. *Id.* at 643.

87. *Id.* at 648. To reach this conclusion, the court needed to determine whether Escape owed Grotheer any duty of care whatsoever. *Id.* at 642. Since crash landings due to limited steering capabilities are an inherent risk of ballooning, Escape did not have any duty to provide a smooth descent to its passengers. *Id.* at 643. This Case Comment does not seek to minimize the validity of the primary assumption of risk as a secondary legal step to the common carrier analysis.

88. *See, e.g.*, *Treadwell v. Whittier*, 22 P. 266, 270 (Cal. 1889); *McDaniel v. Dowell*, 26 Cal. Rptr. 140, 143 (Cal. Ct. App. 1962); *McIntyre v. Smoke Tree Ranch Stables*, 23 Cal. Rptr. 339, 340–41 (Cal. Ct. App. 1962).

given more weight to *Gomez v. Superior Court*<sup>89</sup> because the facts in *Nakwa v. Cedar Fair L.P.*,<sup>90</sup> and similar case law,<sup>91</sup> are clearly distinguishable from Grotheer's case.

First, the court ignored important precedent that would have clearly illustrated that a hot air balloon operator is a common carrier.<sup>92</sup> California courts have held that a vehicle operator is a common carrier when its passenger has no physical control over the activity in which he or she is participating.<sup>93</sup>

In *Treadwell v. Whittier*, the plaintiff was injured in a hydraulic elevator accident in the defendant company's business building.<sup>94</sup> The Supreme Court of California ruled that an elevator is a common carrier and emphasized that elevator operators should be held to a higher duty of care, reasoning that elevator passengers "are subjected to great risks to life and limb [when] . . . [t]hey are hoisted vertically, and are unable, in the case of the breaking of machinery, to help themselves."<sup>95</sup> The court further held that common carrier "responsibility attaches . . . [when] human beings submit their bodies to their control by which their lives or limbs are put at hazard."<sup>96</sup> While the court emphasized the importance of using modern machinery and maintaining safe equipment, the elevator passengers' inability to exercise control over their movement or the machinery was clearly a factor in the court's common carrier analysis when it determined that "lifting human beings from one level to another" justified higher duty of care.<sup>97</sup>

In *McDaniel v. Dowell*, the plaintiff was knocked over by another skier as she was reaching for a tow rope on a ski slope.<sup>98</sup> The plaintiff argued that the ski tow operator was a common carrier because the ski tow served as an elevator carrying skiers up the hill.<sup>99</sup> The court concluded that the ski tow rope did not have the characteristics of a

---

89. 113 P.3d 41 (Cal. 2005).

90. 290 P.3d 1158, 1160–61 (Cal. 2012).

91. See generally *Swigart v. Bruno*, 220 Cal. Rptr. 3d 556, 559–61 (Cal. Ct. App. 2017); *Griffin v. The Haunted Hotel, Inc.*, 194 Cal. Rptr. 3d 830, 834–38 (Cal. Ct. App. 2015).

92. See, e.g., *Treadwell*, 22 P. at 270 (outlining various modes of transportation that are held to be common carriers); *Grotheer*, 222 Cal. Rptr. 3d at 640–41 (discussing why rollercoasters are considered common carriers); *McDaniel*, 26 Cal. Rptr. at 143 (discussing why a ski lift tow rope operator is not a common carrier); *McIntyre*, 23 Cal. Rptr. at 340–41 (detailing why a mule rental company is a common carrier).

93. See *Treadwell*, 22 P. at 271; but see *McDaniel*, 26 Cal. Rptr. at 143 (finding that a ski tow rope operator is not a common carrier because the rope "does not physically carry the plaintiff," and because of the user's active role in the use of the ski tow rope).

94. 22 P. 266, 267 (Cal. 1889).

95. *Id.* at 271.

96. *Id.*

97. *Id.* Furthermore, the court reached its conclusion by stating that "the care and diligence required is proportioned to the danger to the persons carried." *Id.* Therefore, elevator operations required "a higher degree of care and diligence." *Id.*

98. 26 Cal. Rptr. 140, 142 (Cal. Ct. App. 1962).

99. *Id.* at 143.

GROTHER v. ESCAPE ADVENTURES, INC.

common carrier because it “did not physically carry the plaintiff.”<sup>100</sup> The court in *McDaniel* distinguished a ski tow from an elevator, explaining that as she gripped the ski tow rope, the plaintiff’s body was “under her own control,” and she “did not entrust the carriage of her person to the operator” as she would have when riding in an elevator.<sup>101</sup> A significant factor in the court’s analysis in *McDaniel* was that, like the elevator passenger in *Treadwell*,<sup>102</sup> the plaintiff exerted physical control over her actions in the activity.<sup>103</sup>

Had the *Grotheer* court applied the *Treadwell* and *McDaniel* courts’ reasoning, it would have found that Escape was a common carrier.<sup>104</sup> Despite any lack of control that Gallagher may have had over the wind or possible collisions, Grotheer did not have any independent physical control over the hot air balloon.<sup>105</sup> Like the plaintiff in the elevator in *Treadwell*,<sup>106</sup> Grotheer was entirely in the hands of an operator and was being “hoisted vertically” by a mode of transportation.<sup>107</sup> As Kitchel explained, it was Gallagher’s responsibility to add more heat during a wind shear.<sup>108</sup> Unlike the ski tow rope in *McDaniel* that the plaintiff grasped to convey herself up the ski slope,<sup>109</sup> Grotheer’s hot air balloon was controlled by a pilot for a commercial operator who ultimately had the ability to avoid the collision.<sup>110</sup> Thus, the *Grotheer* court’s reliance on the presence of wind and collision risks to justify its holding that a hot air balloon is not a common carrier was incorrect. The key inquiry in the common carrier analysis should not focus on the operator’s control of the risk of injury, but rather, on the passengers’ role in the activity and its potential risks.<sup>111</sup> Grotheer did

---

100. *Id.*

101. *Id.*

102. *Treadwell*, 22 P. at 271.

103. See *McDaniel*, 26 Cal. Rptr. at 143. *McIntyre v. Smoke Tree Ranch Stables* is also instructive. 23 Cal. Rptr. 339, 341 (Cal. Ct. App. 1962). In *McIntyre*, the court held that a mule train operator was a common carrier and emphasized that the tour company was responsible for “[exercising] the utmost care” in organizing its rides since the plaintiff would have no control of the mules chosen or route taken during the ride. *Id.* This further demonstrates that California courts seriously consider the amount of control exerted when analyzing a common carrier issue. *Id.*

104. Compare *Grotheer v. Escape Adventures, Inc.*, 222 Cal. Rptr. 3d 633, 640–41 (Cal. Ct. App. 2017), with *Treadwell*, 22 P. at 270, and *McDaniel*, 26 Cal. Rptr. at 143.

105. See *Grotheer*, 222 Cal. Rptr. 3d at 636–37.

106. *Treadwell*, 22 P. at 271.

107. *Id.*; see also *Grotheer*, 222 Cal. Rptr. 3d at 637.

108. See *Grotheer*, 222 Cal. Rptr. 3d at 637.

109. *McDaniel*, 26 Cal. Rptr. at 143.

110. *Grotheer*, 222 Cal. Rptr. 3d at 637.

111. Compare *id.* at 640–42, with *Treadwell*, 22 P. at 270, and *McDaniel*, 26 Cal. Rptr. at 143. Furthermore, following this precedent would have also been consistent with the reasoning in *Nalwa v. Cedar Fair, L.P.*, which the *Grotheer* court uses to justify its conclusion. See *Nalwa v. Cedar Fair, L.P.*, 290 P.3d 1158, 1166 (Cal. 2012); *Grotheer*, 222 Cal. Rptr. 3d at 640–41. Although the court characterized *Nalwa* as focusing on the operator’s “risk management,” it failed to cite a key factor in *Nalwa*’s analysis. *Grotheer*, 222 Cal. Rptr. 3d. at 640–41. *Nalwa* held that a bumper car operator was not a common carrier because

not have any physical control over the activity<sup>112</sup>—unlike a bumper car rider,<sup>113</sup> or a skier using a tow rope<sup>114</sup>—regardless of whether Gallagher was “reasonably capable of controlling the risk of” crash landings.<sup>115</sup> Had the *Grotheer* court considered precedent that clearly emphasized the participant’s role in the activity, it would have held that Escape was a common carrier.<sup>116</sup>

The *Grotheer* court’s second error was not relying more heavily on *Gomez*<sup>117</sup> because the facts in *Nakwa*<sup>118</sup> and similar cases<sup>119</sup> are quite different from the facts of *Grotheer*. When applying common carrier law to amusement-related attractions, courts should use *Gomez*’s reasoning that the rider “[surrenders] their freedom of movement and actions”<sup>120</sup> to the attraction and thus, has no part in creating their resulting injury.<sup>121</sup>

In *Griffin v. Haunted Hotel, Inc.*, the plaintiff participated in a haunted house attraction “where actors jump[ed] out of dark spaces often inches away from patrons, holding prop knives, axes, chainsaws, or severed body parts.”<sup>122</sup> At the end of the haunted house’s predetermined path, which was controlled by the operator,<sup>123</sup> an actor frightened the plaintiff, who subsequently ran, fell, and incurred injuries for which he sued the operator of the attraction.<sup>124</sup> A representative of the haunted house attraction testified that, while the point of the attraction was to scare the guests “as much as you possibly can,” the plaintiff ultimately “chose to run” in that instance.<sup>125</sup> Following *Nakwa*, and deciding that primary assumption of risk would shield the

---

any inherent risks of bumping were caused by participants who are “not passively carried or transported . . . [but are] actively [engaged] in a game,” and thus do “not entrust the operator with his or her safety.” *Nakwa*, 290 P.3d at 1166. The *Grotheer* court did not seem to consider this finding in *Nakwa*. *Grotheer*, 222 Cal. Rptr. 3d at 640–42.

112. See *Grotheer*, 222 Cal. Rptr. 3d at 636–38 (finding that plaintiff was a passenger being guided by a pilot).

113. *Nakwa*, 290 P.3d at 1166.

114. *McDaniel*, 26 Cal. Rptr. at 143.

115. *Grotheer*, 222 Cal. Rptr. 3d at 641.

116. *Id.* at 641–42.

117. See generally *Gomez v. Superior Court*, 113 P.3d 41 (Cal. 2005).

118. *Nakwa*, 290 P.3d at 1166.

119. See generally *Swigart v. Bruno*, 220 Cal. Rptr. 3d 556, 559 (Cal. Ct. App. 2017) (finding that a horseback riding plaintiff’s negligence claim was barred by primary assumption of the risk); *Griffin v. The Haunted Hotel, Inc.*, 194 Cal. Rptr. 3d 830, 834 (Cal. Ct. App. 2015) (granting the jump-scare attraction defendant’s motion for summary judgment based on a primary assumption of risk theory).

120. *Gomez*, 113 P.3d at 49.

121. Compare *id.*, with *Swigart*, 220 Cal. Rptr. 3d at 559, and *Griffin*, 194 Cal. Rptr. 3d at 847; see also *Nakwa*, 290 P.3d at 1166.

122. 194 Cal. Rptr. 3d 830, 834 (Cal. Ct. App. 2015).

123. See *id.* at 842.

124. *Id.* at 834.

125. *Id.* at 837.

GROTHEER v. ESCAPE ADVENTURES, INC.

operator from liability, the *Griffin* court held that running and falling out of fright is an inherent risk of visiting a haunted house.<sup>126</sup> The court reasoned that these attractions rely on guests' active participation, and therefore guests may have a role in creating their own injuries.<sup>127</sup> *Griffin* implies that frightened guests would still be responsible for their actions despite being within an operator-controlled attraction.<sup>128</sup>

Furthermore, the majority of case law has since applied *Nalwa* in recreational contexts without consideration of operator-controlled environments, leaving the risk of injury fully in the participant's hands.<sup>129</sup> For example, in *Swigart v. Bruno*, the plaintiff was participating in a horseback riding event when she was struck from behind by the defendant's horse.<sup>130</sup> Following *Nalwa*,<sup>131</sup> the *Swigart* court held that the plaintiff's negligence claim was barred because there was an inherent risk of being struck by a co-participant's horse.<sup>132</sup> In *Swigart*, an operator was not present, and horse-riding is an activity that involves active rider participation leaving riders responsible for their actions.<sup>133</sup>

Had the *Grotheer* court properly distinguished its case from *Nalwa* and similar precedent relating to amusement-related attractions—both in terms of the type of ride involved and how this affects the rider's potential fault in causing their own injury—it would have followed *Gomez* in reaching its decision.<sup>134</sup> The *Grotheer* court improperly followed *Nalwa* despite indications that it should be limited in application to cases involving physical activity.<sup>135</sup>

*Grotheer's* holding that balloon operators were not common carriers was centered on the rationale that hot air balloon pilots cannot adequately control the inherent risks of wind and collisions.<sup>136</sup> However, the *Nalwa* court's holding that a bumper car operator is not a common carrier utilized a rationale more complex than finding that the activity at issue involved "bumping" risks outside of the operator's control.<sup>137</sup> *Nalwa's* reasoning was that a bumper car attraction does not involve being "passively carried or transported from one place to another," but entails the participant's role in

---

126. *Id.* at 845, 847.

127. *See id.* at 847.

128. *See id.* at 842.

129. *See Swigart v. Bruno*, 220 Cal. Rptr. 3d 556, 559, 565 (Cal. Ct. App. 2017).

130. 220 Cal. Rptr. 3d 556, 559 (Cal. Ct. App. 2017).

131. *Id.* at 564 n.10 (citing *Nalwa v. Cedar Fair, L.P.*, 290 P.3d 1158, 1163 (Cal. 2012)).

132. *Swigart*, 220 Cal. Rptr. 3d at 567.

133. *See id.*

134. *See Broderick v. State*, No. F073710, 2018 WL 3032365, at \*14–17 (Cal. Ct. App. June 19, 2018) (citing *Nalwa*, 290 P.3d at 1156–58) (examining "[w]hether the activity in question is a form of physical recreation of which each participant assumes the inherent risks").

135. *See generally Swigart*, 220 Cal. Rptr. 3d at 559; *Griffin*, 194 Cal. Rptr. 3d at 846; *Nalwa*, 290 P.3d at 1157.

136. *Grotheer v. Escape Adventures, Inc.*, 222 Cal. Rptr. 3d 633, 641 (Cal. Ct. App. 2017).

137. *Nalwa*, 290 P.3d at 1166.

“actively [engaging] in a game . . . [determining] whether to turn and accelerate.”<sup>138</sup> Like a haunted house, an operator “maintains” the ride and has “control over an emergency switch,”<sup>139</sup> for example, but bumper car riders are responsible for driving the vehicles and thus create any injury through their own actions.<sup>140</sup>

The rollercoaster in *Gomez*—unlike the attractions in *Nalwa*<sup>141</sup> and *Griffin*<sup>142</sup>—was found to be a common carrier because the riders were strapped in and were thus “assured of their actual safety” as they were traveling in a controlled space.<sup>143</sup> Other jurisdictions have also confirmed that passengers “[giving] up . . . freedom of movement of actions” is a relevant factor in the common carrier analysis in the context of amusement rides.<sup>144</sup> The court in *Nalwa* even distinguished these different attractions by using the reasoning of *Gomez*—while “[a] roller coaster is constrained to a track and subject to the exclusive control of an operator,” bumper car “riders have control over the entertainment of the ride” and thus actively participate in creating any injury that may arise.<sup>145</sup> Indeed, *Nalwa* has rarely been applied to the common carrier issue, which may indicate that a showing of physical activity or recreation is required.<sup>146</sup>

The *Grotheer* court—rather than relying on wind speed and lack of operator capabilities as key factors to reach its conclusion<sup>147</sup>—should have placed more emphasis on *Gomez* because the hot air balloon experience is far more analogous to a confined, rollercoaster-type attraction<sup>148</sup> than to a bumper car or haunted house. Passengers in hot air balloons and roller coasters enter vehicles that govern their physical movements, regardless of inherent risks.<sup>149</sup> During the normal course of operations, there is generally neither reason nor opportunity for passengers of hot air balloons or roller coasters to cause their own injuries. By focusing the common carrier analysis on the type of attraction at issue and how the attraction affected

---

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Griffin v. The Haunted Hotel, Inc.*, 194 Cal. Rptr. 3d 830, 834 (Cal. Ct. App. 2015).

143. *Gomez v. Superior Court*, 113 P.3d 41, 48 (Cal. 2005).

144. *Id.* at 49 (citing *Lewis v. Buckskin Joe's, Inc.*, 396 P.2d 933 (Colo. 1964)).

145. *Nalwa v. Cedar Fair, L.P.*, 290 P.3d 1158, 1166 (Cal. 2012) (citing *Gomez*, 113 P.3d at 47–48).

146. Outside of *Grotheer*, *Nalwa* appears to have only been cited within an explicit common carrier analysis on one occasion, when a Nevada court addressed a river rafting accident. *Sewell v. Capital One Corp.*, No. 3:18-cv-00016-RCJ-CBC, 2019 WL 3754215, at \*10 (D. Nev. Aug. 8, 2019).

147. *Grotheer v. Escape Adventures, Inc.*, 222 Cal. Rptr. 3d 633, 641 (Cal. Ct. App. 2017).

148. *Gomez*, 113 P.3d at 48. The *Gomez* court also likened a roller coaster to a “helicopter sightseeing ride” as a means of transportation and further implied that such sightseeing rides could be held to be common carriers. *Id.* at 50–51.

149. *See id.* at 48–49 (explaining that riders are “assured of their actual safety” and relying on other jurisdictions to demonstrate the importance of passengers surrendering themselves to the operator). Additionally, California has found that inherent risk should be irrelevant in the common carrier analysis. *See Squaw Valley Ski Corp. v. Superior Court*, 3 Cal. Rptr. 2d 897, 901–05 (Cal. Ct. App. 1992).



GROTHER V. ESCAPE ADVENTURES, INC.

Grotheer's participation, the court would have correctly deemed a hot air balloon to be a common carrier.

Finally, in holding that hot air balloon operators are not common carriers,<sup>150</sup> *Grotheer* has unduly narrowed the traditionally broad definition of common carrier status in California law.<sup>151</sup> This narrowing of the common carrier doctrine prevents plaintiffs, like Grotheer, from obtaining relief when faced with the primary assumption of risk defense.<sup>152</sup> Excluding hot air balloon operators from common carrier status goes squarely against the California legislature's desire for a liberal interpretation of common carrier law.<sup>153</sup>

As early as 1932, the Supreme Court of California held that almost any mode of transportation can be considered a common carrier.<sup>154</sup> That court also confirmed that "there is an unbroken line of authority in California classifying recreational rides as common carriers."<sup>155</sup> California courts originally created common carrier status when passengers, situated in enclosed stagecoaches controlled and driven by an operator, could not create or avoid harm.<sup>156</sup> This followed the policy that "human cargo is *the* most precious commodity."<sup>157</sup> Considering this historically broad application and interest in protecting passengers, the *Grotheer* court erred by holding that hot air balloon operators are not common carriers. After all, a hot air balloon tourist is arguably no different than a passenger in a stagecoach, as both travel in an enclosed vehicle that is controlled by an operator.

Excluding hot air balloons from common carrier status means that the doctrine of primary assumption of risk would potentially preclude passengers injured during sightseeing flights, or other similar activities, from recovering damages for those injuries.<sup>158</sup> The *Grotheer* decision only serves to expand the applicability of primary assumption risk, which "has been twisted into an all-purpose tool for exculpating wrongdoers from responsibility for the consequences of their carelessness."<sup>159</sup> The *Grotheer* court's decision allows even the most unscrupulous defendants, who oversaw

---

150. *Grotheer*, 222 Cal. Rptr. 3d at 642.

151. *Gomez*, 113 P.3d at 45.

152. *See Grotheer*, 222 Cal. Rptr. 3d at 639 (explaining the preclusion of the primary assumption of risk doctrine when common carrier status is granted).

153. Franklin, *supra* note 20, at 40 (quoting CAL. CIV. CODE § 4 (Deering 2018) ("[P]rovisions are to be liberally construed with a view to . . . promote justice.")).

154. *Smith v. O'Donnell*, 12 P.2d 933, 935 (Cal. 1932) (applying common carrier status to "[s]tage coaches, busses, automobiles, hackeys . . . sleds, elevators and in fact almost every vehicle which can be employed for that purpose").

155. *Gomez*, 113 P.3d at 45.

156. Paul Mose, *Wet n' Wild: When Water Rides Should be Subject to the Highest Duty of Care*, 63 KAN. L. REV. 787, 831 (2015).

157. Franklin, *supra* note 20, at 37 (emphasis added).

158. *See Withy*, *supra* note 65 (explaining that the primary assumption of risk doctrine is a "complete bar to the plaintiff's recovery").

159. Dilan A. Esper & Gregory C. Keating, *Abusing "Duty"*, 79 S. CAL. L. REV. 265, 299–300 (2006).

accidents that could have been managed and avoided by the operators, to utilize this defense.<sup>160</sup>

The *Grotheer* court's decision to ignore relevant case law, the implications of the California Supreme Court's decisions, and historical bases of common carrier liability will now contribute to the narrowing of opportunities for relief in a once expansive area of California law.<sup>161</sup> The *Grotheer* court erred in holding that Escape, a hot air balloon operator, was not a common carrier,<sup>162</sup> and should have denied summary judgment. Unfortunately, even when California precedent and tradition strongly suggest otherwise,<sup>163</sup> California courts may rely on this decision to further limit the application of common carrier status. Denying application of common carrier status to attractions akin to rollercoasters and other rides will impair the legal rights of plaintiffs, like Grotheer, who are injured while seeking enjoyment, entertainment, and new experiences. While we cannot guarantee a trip to Oz, by reassessing today's common carrier law trends, we can help to reassure passengers and tourists that their participation in these adventures is both protected and encouraged.

---

160. *See Grotheer v. Escape Adventures, Inc.*, 222 Cal. Rptr. 3d 633, 639 (Cal. Ct. App. 2017).

161. *Gomez v. Superior Court*, 113 P.3d 41, 45 (Cal. 2005).

162. *Grotheer*, 222 Cal Rptr. 3d at 642.

163. *See Webster v. Ebright*, 4 Cal. Rptr. 2d 714, 718 (Cal. Ct. App. 1992). The California Supreme Court has always refused to extend the "rigorous" law applicable to common carriers "to persons who have not expressly assumed that character, or by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it." *Id.*