

Making A Splash...Court of Appeal Rules That Operator Of An Amusement Park
Water Slide Is A Common Carrier Which Owes Riders A Heightened Standard Of Care

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Nearly 15 years ago, the California Supreme Court ruled in Gomez v. Superior Court (2005) 35 Cal.4th 1125, 1127 ("Gomez") that operators of roller coasters come within the definition of "[c]arriers of persons for reward", thereby subjecting amusement park operators to the heightened standard of care which applies to common carriers. See, Civil Code §§ 2100-2101.¹ The Gomez case, involving claims by the estate of a passenger who died as a result of injuries allegedly sustained while riding on the Indiana Jones attraction at Disneyland, is significant in that the Court ruled that there is no justification for imposing a lesser duty of care on operators of roller coasters simply because the primary purpose of the transportation provided is entertainment.

But what about water slides at amusement parks where there is no seat, no seat belt or restraint mechanism and the rider has more discretion as to how to use the slide? Does the common carrier standard apply there? That question and others were addressed in the case of Sean Sharufa v. Festival Fun Parks, LLC (2020) Westlaw WL 2739859 ("Sharufa case").

The facts of the Sharufa case are relatively routine. Plaintiff Sean Sharufa was injured at a waterslide theme park known as Raging Waters, operated by Defendant, Festival Fun Parks, LLC ("Festival Fun"). While going down a waterslide, Sharufa inadvertently slipped from a seated position on an inner tube onto his stomach. When he entered the splash pool below, his feet hit the bottom with enough force to cause injuries. Sharufa sued Festival Fun asserting negligence, products liability (including breach of express and implied warranties) and negligent misrepresentation. Festival Fun moved for summary judgment. Sharufa's opposition included a declaration from a mechanical engineer who implied that going down the slide on one's stomach could lead to injury because it would cause a person to enter the water with more velocity than when sliding on one's back. The Trial Court found the engineer did not qualify as an expert witness on the relevant subject matter and ruled the declaration inadmissible. The Trial Court granted summary adjudication for Festival Fun on all but the negligent misrepresentation

¹ Quoting Civil Code § 2100: "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." Quoting Civil Code § 2101: "A carrier of persons for reward is bound to provide vehicles safe and fit for the purposes to which they are put, and is not excused for default in this respect by any degree of care."

claim. Sharufa then dismissed the negligent misrepresentation cause of action without prejudice to allow judgment and appeal.

On appeal, and insofar as the negligence claim, the parties did not dispute that Sharufa suffered an injury. However, Sharufa asserted that a waterslide is the equivalent of a roller coaster at an amusement park, making Festival Fun a common carrier subject to a higher standard of care. Festival Fun countered that the duty it owed is actually lower than ordinary care, because riding a waterslide carries with it certain inherent risks that Sharufa assumed by engaging in the activity. See, Nalwa v. Cedar Fair, LP (2012) 55 Cal.4th 1148, 1154.

In its opinion, the Court of Appeal first considered the question of whether a waterslide operator is a common carrier. The Court of Appeal noted that no California court had decided that question, and determined that it was a pure question of law for the Court of Appeal to determine on a first impression basis. The Court of Appeal acknowledged that riding a waterslide is more participatory than a "passive" activity of riding a rollercoaster. However, the Court of Appeal commented that, "[w]e do not see that as enough to make a waterslide appreciably different from a rollercoaster for purposes of the common carrier analysis." The Court of Appeal further stated that a rider having slight control over the transportation does not eliminate the common carrier relationship that exists with roller coasters. Based on that slight level of control, the Court of Appeal then concluded that a waterslide is akin to a rollercoaster and it follows that a waterslide operator owes the riders the heightened duty of a common carrier. Based on that, the Court of Appeal further ruled that, "[w]e necessarily find the Doctrine of Primary Assumption of Risk is inapplicable."

Notwithstanding the enhanced duty of care (and the elimination of the Doctrine of Primary Assumption of Risk as respects Sharufa's claims), the Court of Appeal further ruled that the duty of a common carrier in this case did not amount to strict liability and, in Sharufa's case, summary judgment was still properly granted as to the negligence claim.

As for the strict product liability claim asserted by Sharufa, Festival Fun argued that the products liability claim failed because its patrons receive a service, not a product. As to that claim, the Court of Appeal ruled that the record was unclear as to whether the primary objective was a product or a service and reversed summary judgment and remanded to the Trial Court on that cause of action (the Court of Appeal also rejected Festival Fun's argument that it was an end user not subject to strict products liability claims and also distinguished water parks from exercise gyms).

The Sharufa case at least opens the door for common carrier status for water rides. However, the level of participation is still important and common carrier status may not apply to all water rides. Also, even if a common carrier duty is owed, negligence is still required. The Sharufa case is also important for products liability claims in that it suggests that, based on the primary objective of the participant, a water amusement park operator may also potentially be subject to a strict products liability claim.

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