

## **Booth v Santa Barbara Biplanes, LLC**

### Common Carrier; Release of Liability.

Plaintiffs paid for an aerial sightseeing tour of Santa Barbara. Their plane lost power and made an emergency landing. Plaintiffs were injured and sued for negligence and breach of warranty.

Thirty minutes before the flight, plaintiffs signed a **High Risk Activity Release, Waiver and Assumption of Risk Agreement**. The tour company defendant moved for summary judgment based on the release and waiver of liability agreement.

On appeal, the 2<sup>nd</sup> DCA, Sixth Division, evaluated several issues. A **Common Carrier** is described in the Civil Code at section 2168 as ...everyone who offers to the public to carry persons, property or messages. The statute includes planes, trains, amusement rides and ski lifts. A common carrier may limit its liability (section 2174) by special contract, *except for gross negligence*. Thus, the defendant was legally able to bind its customers to the release document signed thirty minutes before boarding the plane for the tour.

The court also analyzed whether **public interest** may vitiate a **contract exculpating a person from liability** for violation of law. Civil Code section 2175 does permit such agreements in the context of a common carrier. The leading case of **Tunkl v Regents of University of California** (1963) 60 Cal. 2d 92, dealt with a hospital's use of a general release to exculpate itself from liability for the negligent treatment of patients. The Supreme Court found that release contract violated public policy because the hospital performed important services of practical necessity to the public.

Although recreational activities, including sightseeing, are not essential services, common carriers do perform an important public service. But not all common carriers are the same. Sightseeing is different than transporting passengers for compensation between points. A recreational airplane ride is **not** an essential service affecting the public interest that falls within **Tunkl**. **The issue is tested objectively by activities important to the general public, not by its subjective importance to the particular plaintiff.**

Had the plaintiffs sued for ***gross negligence or recklessness***, the release would not be a bar to recovery. Under negligence and breach of warranty, though, these claims are barred by the pre-flight release. The summary judgment was affirmed.