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The African safari Cape buffalo case

Who's at fault when your client is attacked by a Cape buffalo? What about liability releases and assumption of risk?

BY RONALD H. ROUDA

One of the most unique cases I handled during my 50 years specializing in personal injury and wrongful death litigation involved the sudden charge by a rogue Cape buffalo into sightseeing guests on a walking safari in Kenya, East Africa.

Under any circumstances Cape buffalo are considered among the most

dangerous animals in Africa. Despite their placid cow-like appearance, Cape buffalo are among the famous "Big 5" animals, particularly prized by hunters because they are so dangerous. The other members of the Big 5 are elephants, lions, leopards and rhinoceros. According to some, Cape buffalo are responsible for more human deaths in Africa than any other large animal, although some argue that hippos and crocodiles are the most dangerous. Cape buffalo congregate in

herds than can exceed several hundred members. They spend most of the day and night grazing. Older or wounded males in the herds will often leave the herd and spend their remaining days as solitary wanderers. It is these "rogue" Cape buffalo who are the most dangerous. The buffalo can reach top speeds of 35 mph, and can even outrun lions if given a head start.

Africa tour and safari operators are well aware of the danger posed by a



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rogue Cape buffalo. When they arrange wildlife safaris, they must exercise caution to ensure that the people remain in the safety of their vehicles while viewing the animals in the African wilderness. Staying within the vehicle is a very important safety measure, particularly when it is known that there is a “rogue” buffalo in the region. Acclimated to the vehicles, the animals, even a rogue Cape buffalo, will not attack a vehicle.

It is critically important for tour and safari operators to have a well-trained staff and knowledge of the country, keeping in mind passenger safety and ease of game viewing.

Great emphasis must be put into the planning and implementation of a safari, including attention to detail to ensure maximum safety. Tour and safari operators offer walking safaris escorted by a tour guide, an armed ranger and a spear carrier. Tour and safari operators recognize the need to constantly monitor the region and stay in touch with each other via cell phones, and the Internet.

Safari camps include the exotic and luxurious Maasai Mara Camp near the Maasai River in Kenya. It was from this camp that a walking safari was arranged by the tour and safari operator for about 15 guests, including 50 year-old Barbara, and 51 year-old Doryce.

The guests were told that they would be driven to the river where they would get out of the vehicles, stretch their legs and view the hippos in the river.

What you don't know, can hurt you

The guests did not know that the tour guide had previously been notified that a rogue Cape buffalo was in the region, and to be on the lookout for the dangerous animal.

The guests did not know that the armed ranger had never fired a rifle and that the rifle he was carrying was inoperable.

The guests did not know that the spear carrier was actually the camp dish-

washer, and that he had never thrown a spear in his life.

The tour guide was unarmed.

Once outside their parked vehicles near the river, the guests stretched their legs and began walking toward the Maasai Mara River to view the hippos.

Barbara and Doryce walked closest to the tour guide leading the group.

The armed ranger and the spear carrier walked behind the guests as they walked toward the river.

None of the guests was warned that there was a rogue Cape buffalo in the area, and that they were to remain in the safety of their vehicles.

As the guests, tour guide, armed ranger and spear carrier walked approaching the river, a rogue Cape buffalo suddenly bounded up the river embankment and charged the group. Barbara was struck in the chest and suffered a pneumothorax (a collapsed lung, the collection of air in the space between your lungs and chest wall, creating pressure against the lungs. [A pneumothorax can be caused by a traumatic chest injury.] When the pneumothorax is larger, the excess air may be removed by inserting a tube or needle between your ribs and slowly removing the air over a few days).

The tour guide grabbed the tail of the Cape buffalo, but the animal turned and gored Doryce, who survived the attack, but she suffered a terrible wound from one of the horns of the Cape buffalo penetrating deep into her thigh.

A medical evacuation airplane was called, but it was too late for Barbara. She died when the airplane arrived and landed in an open area near the river. Doryce was taken by air ambulance to Nairobi, and hospitalized for treatment of her horrendous thigh wounds inflicted by the Cape buffalo.

Action for damages for personal injury

We were retained to bring an action for damages for personal injuries on behalf of Doryce, and an action for the

wrongful death of Barbara was brought by her statutory heirs.

After consulting with tour and safari operator experts, we sued the tour operator for negligently failing to protect the guests from the danger of the rogue Cape buffalo.

The guests had booked the safari tour in San Francisco, and we were successful in winning jurisdiction against the tour and safari operator in the San Francisco Superior Court.

We obtained a court order allowing us to take videotaped depositions in Nairobi, East Africa, and to introduce the videotaped depositions at the time of trial in the San Francisco Superior Court. An Administrative Law Judge in Nairobi presided over the deposition proceedings.

The Nairobi newspapers reported the deposition proceedings every day. Our case had attracted enormous local interest.

Armed with admissible evidence, including the admissions by the tour guide, the park ranger, the spear carrier and graphic photographs, diagrams and illustrations of the scene of the tragic incident, we were able to work out a favorable confidential settlement with the insurer for the tour and safari operator.

I will never forget conducting a site inspection at the banks of the Maasai River with defense counsel. We both ventured a bit farther away from the safety of our Land Rover vehicle than we should have, but it was clear that neither one of us wanted to appear “chicken” to the other. After the case settled we talked about the foolishness of walking with no armed guard, no tour guide, and no spear carrier to protect us from a rogue Cape buffalo who might have been lurking in the area. Ironically, defense counsel claimed that he was following me, when I truly thought that I was following him.

The law applicable to the liability of a tour and safari operator is fairly straightforward. Fortunately the releases



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that had been signed by the guests were wholly inadequate, as a matter of law, to immunize the tour and safari operator defendant from liability.

A tour operator may be obligated, under some circumstances, to warn a traveler of a dangerous condition unknown to the traveler but known to it... This doctrine applies to situations where a tour operator is aware of a dangerous condition not readily discoverable by the plaintiff. It simply does not apply to an obvious dangerous condition equally observable by plaintiff. [*Kalter v. Grand Circle Travel*, 631 F.Supp.2d 1253, citing to *Passero v. DHC Hotels & Resorts*, 981 F.Supp. 742, 744 (D.Comm.1996).]

In order for a signed release to relieve a defendant from liability for its own negligence, the release must clearly, explicitly and comprehensibly set forth to an ordinary person untrained in the law that the intent and effect of the document is to release his claims for his own personal injuries and to indemnify the defendants from and against liability to others which might occur in the future as a proximate result of the negligence of the defendants.

[*Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476.]

"A tour operator may be held liable for the consumer's physical injuries if the tour operator promised, either expressly or implicitly, that the tour would be delivered in a safe and careful manner. Brochure language such as "safe and enjoyable cycling area," "Marengo's administration and staff work together to make your stay comfortable, safe," "suitable for handicapped individuals," "perfectly safe" canoeing conditions and "safe buses" may generate liability under a breach of warranty theory. Alternatively, the tour operator may assume a duty to deliver safe travel services (See e.g., *Elsis v. Trans World Airways*, 22 CCH Aviation Cases 17, 806, 17,807-17,808 (N.Y. Sup. 1989). Assumed duties may more readily overcome written disclaimers than a warranty (See e.g., *Klakis v. Nationwide Leisure Corp.*, 73 A.D. 2d 521, 422 N.Y.S. 2d 407, 411 (1979) (2-1/2 day flight delay; tour operator disclaimer of liability for negligence of charter air carrier may not be enforceable because of assumed duty to provide air transportation). Tour operators may be also held liable for unnecessarily exposing consumers to risk or designing itineraries in a negligent manner, and

consumer injuries caused by the negligence of the tour guide may support claims against the tour operator for negligent selection and supervision of tour guides and misrepresentation of their training, expertise and knowledge of the tour locale."

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