

FIXED SITE AMUSEMENT RIDES: DUTY OF CARE – AN ORDINARY NEGLIGENCE STANDARD OR COMMON CARRIER LIABILITY?

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State courts have adopted differing approaches with respect to the standard of care required to be exercised by fixed site ride operators. The courts are split on the issue of whether or not fixed site amusement rides are common carriers. The determination of common carrier status impacts the degree or standard of care owed patrons. As common carriers, fixed site ride operators would be subjected to a heightened or utmost care standard; if not common carriers, the ordinary negligence standard of the reasonably prudent person. This article examines how Courts have emphasized and weighted differing criteria in determining whether fixed site amusement ride operators are common carriers. Understanding the differences in approaches has both operational and educational value.

KEYWORDS: *Negligence, duty of care, common carrier, fixed site amusement rides*

INTRODUCTION

The authority to regulate the safety of fixed site amusement rides for the protection of consumers is spread among State regulatory agencies (SaferParks.org: Inventory of State Ride Regulations), Industry Associations and the judiciary. The non-judicial regulatory environment consists of administrative agencies within the 50 States, voluntary industry self-regulation by the International Association of Amusement Parks and Attractions (IAAPA), in partnership with the American Society for Testing Materials (ASTM) (ASTM International: F-24 On Amusement Rides and Devices). The judiciary's role in regulating ride safety for the protection of patrons is limited to the application of negligence law and necessarily, an after the fact, ad hoc approach. As with other aspects of the law, tort law varies from state to state and there are differences among jurisdictions in its application to amusement ride incidents when patrons are injured.

While the law is settled that amusement parks and ride operators therein owe a duty of care to their invitee patrons (Cournoyer, Marshall, & Morris 2004), the State courts have adopted differing approaches with respect to the degree or standard of care owed to patrons by fixed site amusement ride operators. In some jurisdictions the common law ordinary negligence rule of the reasonably prudent person standard of care has been applied by the courts; while in other jurisdictions courts have ruled that amusement rides meet the definition of common carriers and have imposed the heightened degree of care associated with common carriers. Within each approach, courts have used differing rationales in arriving at the applicable duty owed a ride patron. This article examines how Courts have emphasized and weighted differing criteria in determining that duty owed to ride patrons.

Ordinary Negligence vs. Common Carrier Liability

Before investigating how each standard of care has been adopted by the various State courts a short explanation of each is appropriate. The common law ordinary negligence rule requires a defendant to exercise the degree of care of a reasonable person of ordinary prudence under similar circumstances. The inquiry may involve such factors as reference to industry standards of practice, state of the art and science criteria, compliance with government regulatory schemes, issues of known or reasonably discoverable dangerous conditions, as well as providing warnings to the invitee of actual and potential hazards.

Traditional notions of common carrier liability dictated that common carriers owed their patrons a *greater* duty of care than that proscribed by general negligence principles. A common carrier is generally defined as one who as a regular business or by virtue of their calling offers to the public at large the carriage of goods or persons over a fixed or designated route, for reward or

compensation (Basdow, 1983). The rule is founded upon principles of bailment wherein a carrier was absolutely responsible for property voluntarily accepted for carriage (Basdow, 1983). In American law during the early 18th century (Bennet v. Dutton, 1839) the rule was modified so that a carrier did not “warrant the safety of passengers at all events but required the carrier to exercise the utmost prudence and caution” (Stokes v. Saltonstall, 1830). Hence, while common carriers are not insurers of passenger safety, they are required to use extra ordinary diligence regarding their passengers’ safety (Sheffield v. Lovering, 1935). The extraordinary extent of the degree of care owed by a common carrier is exemplified by a California statute addressing the matter:

“A carrier of persons for reward is bound to provide vehicles safe and fit for the purpose to which they are put, and is *not excused for default in this respect by any degree of care*”. (California Civil Code Section 2101)

Common carrier liability is usually associated with the transportation function (getting from point “A” to point “B”); however, in many jurisdictions the definition has been applied to amusement ride operators. The rationale for classifying an amusement ride, such as a roller coaster, as a common carrier is its operation on a fixed route, carrying passengers and being open to the public for an admission fee. Hence the operator of such a ride, by strict interpretation of the definition, is a common carrier.

No Common Carrier Status - Ordinary Negligence Standard of Care

The courts in jurisdictions rejecting the notion that amusement ride operators are common carriers have strived to maintain the long standing distinction between the traditional common carriers (such as railways, ships, stage coaches) whose services were purely in the nature of transportation, from those operators who offered services which while fitting the

technical definition of a common carrier, were not primarily for the purpose of getting from point “A” to point “B”. In jurisdictions that conclude ride operators are not common carriers, the courts focus on the purpose of the passenger in seeking the services of the carrier (ride); or by narrowing the “regular business” aspect of the common carrier definition.

In Bregel v. Busch Entertainment Corp. (1994), the plaintiff was a passenger on the “Skyride”, a small gondola transporting visitors around the defendant’s amusement park. The plaintiff entered the cabin and rested her arm on the back of the seat. An attendant tilted the cabin backward and the plaintiff grabbed the seat, extending her elbow outside the rear edge of the cabin when another cabin made contact with her cabin and pinned her elbow between the two causing her injury. Despite the fact that the ride was used by passengers for transportation between locations within the park, and on a fixed route, the court instead focused on two factors to distinguish the defendant’s duty of care from that of a traditional common carrier. The court emphasized that a common carrier is one who “*by virtue of his calling and as a regular business undertakes for hire to transport persons*” (Bregel v. Busch Entertainment Corp. 1994). The court reasoned that an amusement park was not in the regular business of transporting persons for hire. The ride was one of many rides in the park and the plaintiff’s purpose in boarding the ride was not primarily transportation, but for entertainment in the form of an aerial view of the park. The court found that the transportation function provided the plaintiff was *incidental* and therefore by implication not the regular business of Busch Entertainment Corp., which was primarily in the entertainment business. In determining the nature of the “regular business” of Busch Entertainment, the court pointed out that patrons do not pay admission to the park to obtain transportation but rather to be entertained. The plaintiff in arguing her case for common carrier status relied heavily on another Virginia decision, Murphy’s Hotel. Inc. v. Cuddy’s

Administrator (1919), which held that the operator of a passenger elevator in a hotel was a common carrier and therefore the rider was owed the highest duty of care. The plaintiff in Bregel argued the elevator in a hotel is analogous to a ride within the amusement park, both being devices used as transportation within the context of the defendants' business, and therefore the court should follow the precedent set in the Murphy's Hotel Inc. case. However, the court in Bregal distinguished the Murphy decision from the case before them on the basis that the operation of an elevator in moving guests from floor to floor was purely a transport function having no entertainment purpose, as did the ride in Bregal. The court's reasoning did not end there but also linked the "regular business" requirement for common carrier status, indicating that the operation of the elevator in transporting individuals from floor to floor was integral to the "calling and regular business" of hotels (Bregel v. Busch Entertainment Corp., 1994). This placed the emphasis for the common carrier determination on the transportation function as being integral to the regular business of a common carrier and not just an incidental activity. The distinction however begs the question: Is not the operation of an amusement ride, which necessarily transports individuals to achieve the provider's amusement objective, integral to the regular business of an amusement park?

In a similar case, Wright v. Midwest Old Settlers and Threshers Association, (1996), wherein the purpose of the transport was mixed, both for transportation and entertainment, the plaintiff, Wright, was injured while exiting from a passenger train at a reunion conducted by the defendant Midwest Old Threshers Association, a non-profit organization. The event was open to the public for a fee with an additional fee being charged to ride the train that allowed passengers to see the grounds and be transported from one area to another. The court in refusing to apply common carrier liability pointed out that under Iowa law the "distinctive characteristic of a

common carrier is that it holds itself out as ready to engage in the transport of goods or persons for hire, as *public employment*, and not as a casual occupation” (Wright v. Midwest Old Settlers and Threshers Association, 1996). In denying plaintiff’s claim that the defendant was a common carrier the court relied on the fact that the Association’s event was limited in scope and duration and that the Association’s “public employment” or regular business was not transportation.

In the Massachusetts case of Brennan v. Ocean View Amusement Co. (1935), the court determined that the defendant amusement park was not a common carrier simply upon the basis that the defendant did not provide public transportation in the traditional sense that was ordinarily associated with common carriers. It held that the amusement park was not a common carrier since it did not perform a public service in transporting passengers from one point to differing points of location, but merely provided transport on its own premises. While the court did take into account the fact that carriage involved entertainment, it was clear that the traditional transport function of a common carrier was foremost in the deciders’ minds when the court indicated, “It would hardly be contended that the proprietor of a merry go round is a common carrier” (Brennan v. Ocean View Amusement Co., 1935).

A similar rationale respecting the traditional transportation function of common carriers was expressed in Waguespack v. Playland Corp. (1940). The court found that a proprietor of a place of amusement is not an insurer of the safety of his patrons but owes only what under the circumstances is ordinary or reasonable care; “nor is the undertaking so similar to that of a common carrier as to call for the application of the same rule of responsibility” (Waguespack v. Playland Corp., 1940). In this case the court’s focus was on the public service aspect of the common carrier definition in moving individuals from one locale to another. Since transport on an amusement ride served no public service, that aspect of a common carrier was absent. The

court's emphasis appeared to be on the distinction that a traditional common carrier provides point to point transportation (A to B) where the passenger arrives at a different location from the starting point versus the "fixed route" variable which is shared by both amusement rides and common carriers wherein a passenger departs and arrives at virtually the same location. This is evident from the opinion as the court indicated a proprietor of a railway that transported patrons within an amusement park should be held to same standard of care as required of a common carrier (Waguespack v. Playland Corp.).

In Sergermeister v. Recreation Corporation of America (1975), the court declined to impose common carrier liability, distinguishing between those passengers who place themselves in the hands of carriers voluntarily, and those "who must use ordinary transportation and are practically compelled to do so for other business or personal purposes" (Sergermeister v. Recreation Corporation of America). The plaintiff in this instance sought damages on behalf of a minor injured while exiting a ride known as the "Lover's Coach". According to the complaint the minor injured her hand when it was pinched during the opening and closing of the safety gate. The plaintiff's requested a jury charge, addressing common carrier liability that the defendant operated the amusement park for a profit and must exercise a high degree of care to provide a safe ride free from defects and other conditions which create dangerous or unsafe rides. The court declined and charged the jury under ordinary negligence principles. The implication here is that the necessity aspect of the passenger's purpose in having to travel for business or personal reasons satisfies the public service/employment requirement of common carrier status, whereas the provision of pleasure or entertainment does not.

Other courts that have rejected imposing common carrier liability on amusement park ride operators have focused on the plaintiff's expectation to be thrilled or exhilarated by the

experience in utilizing the services of the “carrier”. In a Georgia case, Harlan v. Six Flags (1982), the court stated “an amusement ride is unlike a public conveyance, in that passengers intend to be conveyed thrillingly and seek the sensation of speed and movement” (Harlan v. Six Flags). The court pointed out that amusement patrons have a dissimilar expectation than persons using buses or elevators and therefore common carrier liability is not applicable. The Court distinguished between the amusement ride and an elevator (as argued by the plaintiff) based upon the fact that elevators like busses and trains are “instruments of travel” and passengers have “dissimilar expectations” (Harlan v. Six Flags). Passengers in trains, busses and elevators expect to be carried safely and securely while amusement riders expect to be carried thrillingly to a place at or near a point of origin so that carriage is incidental (Harlan v. Six Flags). It appears that the concept of being exposed to thrills, speed and excitement carries with it an assumption of risk which would serve to mitigate the common carrier liability to a point where the duty is such that of ordinary care. A similar view was also expressed in the New York case, Grauer v. State of New York (1959), wherein the plaintiff was injured while loading on a ski lift. Here the court found the State was a common carrier even though the use of the lift involved a thrilling recreational pursuit. The court based its’ finding on the notion that the primary purpose of the chair lift was for transportation to the top of the mountain and not for amusement or thrills.

In summary, courts in various jurisdictions have emphasized different criteria in arriving at the same conclusion that operators of amusement rides are not common carriers subject to a heightened standard of care. The determinative factors appear to fall into one of three categories or combinations thereof. Courts have found that amusement ride operators are not common carriers when: the rider was not physically transported from point to point (A to B) for the purpose of public transportation such as going to work or for personal business; or the carrier’s

calling or regular business was not transporting individuals and the carriage was incidental to a larger or dominate business purpose, and finally when the rider's purpose or expectation of carriage was entertainment and or thrills, rather than for public transport.

Other courts finding no common carrier status:

Beavers v. Fed. Ins.Co., 113 N.C. App. 254 (1994); Lamb v. B&B Amusements Corp., 869 P.2nd 926 (Utah 1993); U.S. Fidelity & Guaranty Co. v. Brian, 337 F.2nd 881 (5th Circuit – Louisiana 1964); Firszt v. Capitol Park Realty Co., 98 Conn. 627 (1923)

Common Carrier Status: Heightened or Utmost Standard of Care

The jurisdictions that have imposed common carrier liability upon amusement ride operators and thus requiring a heightened degree of care are just as numerous as those not requiring such, and just as diverse in their rationale in arriving at their conclusions. In Oklahoma, the case Sand Springs Park v. Schrader (1921) involved a "scenic railway" (descriptively a roller coaster) where the plaintiff was injured when a car rolled backwards colliding with her car causing injury to her left foot and lower limb. The defendant asserted that the ride was constructed according to approved standards, had been in good repair and operated by experienced personnel, as well as being under careful and continuous inspection. It was an undisputed fact that the wheels of the forward car had come off and a cotter pin which held the wheels on the axel was missing. The trial court defined the duty owed by the defendant to the plaintiff in a charge to the jury as follows:

"The operator of a scenic railway is bound to use the highest degree of care, skill, foresight and caution for the safety of his patrons, and do all that human care and foresight can reasonably do" (Sand Springs Park v. Schrader). In finding the operator of the ride was a

common carrier, the court refused to make a distinction between passengers of a “scenic railway” and those riding a passenger train. It pointed out that a passenger seeking pleasure on a passenger train would not make his status any different from that of one riding the train for transportation purposes (Sand Springs Park v. Schrader). In either case, the operator of the train would be deemed a common carrier. The purpose of the passenger’s carriage was not relevant. The defendant objected to the utmost degree of care charge to the jury that is associated with common carriers and requested an ordinary negligence charge. No doubt the defendant had good cause to attempt to limit its duty. The undisputed facts were that the defendant’s employees had inspected the ride at earlier times during the day and it was found to be in proper working condition thereby demonstrating the exercise of ordinary care. In jurisdictions that follow this reasoning, simply fulfilling the traditional common carrier criteria; holding out to the public a willingness to engage in *any* kind of transportation of persons, for hire, on a fixed route would subject the provider to common carrier liability.

Other courts that have imposed common carrier liability on amusement ride operators have focused on the issue of control. In Lewis v. Buckskin Joe’s Inc. (1964), the plaintiffs were paying passengers of a stage coach ride patterned after the stage rides in the Old West. Buckskin operated a “mining ghost town” and built a road that was rutted and banked upon which the horses were driven at a walk, trot, jog and a gallop in order to give the passengers a thrill and excitement as the coach would sway back and forth quite a bit. As they neared the end of the ride the coach capsized injuring all 12 passengers. The plaintiff claimed negligence in design and operation. The defendant asserted contributory negligence and an assumption of risk defense. The trial court gave the jury an ordinary care instruction, rejecting the plaintiff’s requested highest duty of care instruction. The Colorado appeals court ruled the trial court’s charge was in

error indicating that it is not important whether the defendant was serving as a carrier (in the traditional sense) or for amusement, but that the important factors were the plaintiff's surrender of themselves to the care and custody of the defendant; giving up the freedom of movement and there was nothing they could do to cause or prevent the accident. The defendant having exclusive possession and control should therefore be held to the highest degree of care (Lewis v. Buckskin Joe's Inc.). The Lewis case was cited and relied upon in the Texas case of Elmer v. Speed Boat Leasing, Inc and Paradise Gulf Cruises, Inc. (2002). In doing so, the court placed Texas among those jurisdictions attaching common carrier liability to amusement rides based upon the surrender of the patron's safety to the control of the operator.

Yet another justification for imposing common carrier liability by courts relates to the degree of risk or peril to which the plaintiff is exposed as a result of being a passenger on the ride. In an Alabama case Best Par & Amusement Company v. Rollins (1915), the plaintiff's roller coaster car ran into the rear of another car that failed to make it over an incline. The court charged the jury "the relationship of the parties was that of common carrier and passenger and the defendant owed a duty to exercise the highest degree of skill and care known to common carriers of passengers" (Best Par & Amusement Company v. Rollins. "The law imposes upon common carriers of passengers for hire the highest degree of care, and holds common carriers responsible for the *slightest* negligence resulting in injury to one of its passengers" (Best Par & Amusement Co. v. Rollins. The decision cited an Illinois case, that "sharp curves and great speed necessarily are sources of peril" and "on reason and sound public policy should be held to the same degree of responsibility as a common carrier" (O'Callaghan v. Dellwood Park, Park Co. (1909). In O'Callaghan the court indicated that the standard of care is commensurate with the reasonably foreseeable risk of harm for negligence is essentially a matter of the risk of

recognizable danger of injury. O’Callaghan was also cited in a later New Jersey case, Kahalili v. Rosecliff Realty (1958), wherein the plaintiff was injured when she was thrown from a roller coaster at defendant’s Palisades Amusement Park, as the car “lurched in an unusual manner”. In jurisdictions that subscribe to the public policy proposition as set forth in O’Callaghan, a ride by ride inquiry as to the degree of peril presented the passengers would be necessary in making the determination of common carrier status.

In summary, jurisdictions that impose common carrier liability do so based upon the finding that amusement ride operators simply fit the technical definition of a common carrier in that they are open to the public, for carriage upon a fixed route and operated for reward. These courts see no distinctions resulting from the passenger’s purpose in submitting to carriage. Other findings of common carrier are based upon the passenger’s ceding of control to the carrier and the passenger’s inability at that point to do anything to prevent an injury. Lastly, given the degree of risk and peril incurred by the passenger, public policy demands a heightened common carrier standard of liability.

Other courts finding common carrier status:

Lyons v. Wagers, 55 Tenn. App. 667 (1966); Pajak v. Mamsch, 338 Ill. App 337 (1949); Coaster Amusement Co. v. Smith, 141 Fla. 845 (1940); Bibeau v. Fred W. Pearce Corp., 173 Minn (1928); Cooper v. Winnwood Amusement Co., 227 Mo. App. 608 (1932)

Legislating the Standard

At least two states have used the legislative process to address the issue of the appropriate standard of care. An Oregon statute (ORS 460.310) specifically excludes amusement ride operators from common carrier status. According to the statute, an amusement ride is defined as:

“Any vehicle, boat, or other mechanical device moving upon or within a structure, along cables or rails, through the air by centrifugal force or otherwise, or across water, that is used to convey one or more individuals for amusement, entertainment, diversion or recreation” (ORS 460.310 (1)).

The statute further mandates:

“The owner or operator of such devices shall be deemed not a common carrier (ORS 460.310 (2)).

The statute does however require the operator to exercise the highest degree of care for safety of persons compatible with the practical operation of the device (ORS 460.310 (2)).

The California Supreme Court, in the case Gomez v. The Walt Disney Company (2005), reviewing a California statute addressing common carriers and duty of care could find no exceptions or limitations in the legislative history or other California law that would preclude operators of amusement rides such as a roller coaster from being excused from common carrier liability. The California Civil Code defines common carriers broadly and inclusively as:

“Everyone who offers to the public to carry persons, property or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry” (California Civil Code Section 2168).

Hence, it would seem that California is adhering to a non-traditional common carrier approach, classifying as a common carrier anyone who on face value meets the definition, regardless of the passenger’s purpose for the carriage; or whether the carriage is the primary business of the carrier or simply incidental thereto. With regard to the degree or duty of care required by the statute there seems to be little room for debate, as the statute further mandates:

“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 reasonable degree of skill (California Civil Code Section 2100).

Clearly, the traditional common carrier heightened duty of care is being imposed. With respect to the extent of that duty the statute provides:

“A carrier of persons for reward is bound to provide vehicles safe and fit for the purpose to which they are put, and is not excused for default in this respect by any degree of care” (California Civil Code Section 2101).

The language of *Section 2101* regards the extent of that heightened duty is particularly compelling in that default is not excused by “any degree of care”.

IMPLICATIONS

As with many aspects of the law, variations in application occur from state to state and it is incumbent upon industry to ensure compliance appropriate within each jurisdiction in which operations occur. An understanding of the rationale in a particular jurisdiction also helps to extrapolate and evaluate potential risk exposure which may not readily be apparent in other operational areas. For instance, how many hotel or conference facilities understand that elevators or escalators provided guest and attendees may be considered common carrier vehicles? Or transporting amusement park attendees throughout a property via a scenic tramway may impose a different standard of care than providing more traditional transport via a shuttle service? Furthermore, an understanding of the degree of risk exposure in a particular jurisdiction may help to clarify and formulate policy positions with regards to any pending legislation that may directly impact the standard of care issue, as well as safety regulations in general.

As an educational and instructional tool, the differing approaches of the various jurisdictions, at a minimum, provides an excellent vehicle for demonstrating how the law in a decentralized system may result in different conclusions despite similar factual circumstances. Perhaps even more importantly the different and nuanced rationales of the courts provide excellent material for critical thinking exercises which may facilitate the progression of student learning and thinking. By examining and discussing the strengths and weaknesses of each

rationale and potential implementation issues, students can progress from the “remembering” and “definitional” mode of learning about the law, to the understanding, analysis and synthesis hierarchy of Bloom’s taxonomy. This critical thinking practice and process, ultimately encourages them to apply similar techniques and thought processes to legal issues in other areas that impact the hospitality industry, as well as in overall managerial decision making.

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Submitted July 24, 2009

First Revision Submitted February 16, 2010

Accepted February 18, 2010

Refereed Anonymously

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