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RECOVERY FOR INJURIES SUFFERED ON AMUSEMENT DEVICES

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America's rapidly expanding society is providing continually lengthened hours of leisure for its citizens. Coupled with this availability of free time is the citizens' desire to seek entertaining ways of spending it. America's ingenuity in all activities is evidenced by the rapidly growing amusement and sports industry which each year takes in tremendous sums in dollar volume.

It is to be expected that as more persons participate in amusement and pleasure activities, more of them will suffer injuries which will be compensable at law. Liability for injuries suffered in places of public amusement has long been established in America.[1] However, this paper will not attempt to survey such a general area of the law; discussion will be restricted in the main to cases arising out of injuries suffered on amusement devices such as roller coasters, merry-go-rounds, and the like. Reference will be made to other areas in the amusement field where comparison is thought to be valuable.

I. BASIS OF LIABILITY

Needless to say liability will result from an intentional tort committed by the owner or operator of an amusement device as well as by anyone else.[2] In such cases it may well be that the plaintiff in bringing an action need not show damages;[3] this is in line with the historical development of the law of intentional torts.

When the owner of an amusement device is sought to be held liable for the intentional torts of his servant, such liability of course flows from the principles of the master-servant relationship and the doctrine of respondeat superior once it is established that the servant was acting in the scope of his employment.[4] If during the scope of his employment the servant intentionally injures a patron, the master may well be held liable. Thus, if employees are stationed in or near a place of amusement to prevent malicious damage done by patrons, the master will be liable for an assault by these persons on an innocent patron.[5]

Most of the situations involving intentional torts by servants occur with regard to the servants' attempts to maintain order. Frequently, the servant involved is a special police officer or a regular police officer on special duty. If he is hired by the operator of the

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1 Most of the early cases involve injuries sustained in an exhibition hall or theater; see, for example, Currier v. Boston Music Hall Ass'n, 135 Mass. 414 (1883). However, recovery was allowed for injury suffered in collapse of grandstand at a bicycle race in Fox v. Buffalo Park, 47 N.Y.Supp. 788, 57 N.E. 1109 (Ct. App. 1897); recovery was allowed for injury suffered because of faulty construction of toboggan slide in Barrett v. Lake Ontario Beach Imp. Co., 174 N.Y. 310, 66 N.E. 968 (1902).

2 Restatement, Torts § 13 (1934).

3 Prosser, Torts 28 n.17 (1955).

4 See text, IV. Who Is Liable.

5 Servants placed in a tunnel to prevent vandalism by persons riding on ride were acting within the scope of their employment when they mistakenly assaulted a person on the ride. Healey v. Playland Amusements, 199 So. 682 (La. App. 1941).

park or the operator of the device or ride there seems to be little question that the master is liable for an intentional assault by the officer—his employee.[6]

A question arises as to the status of these special officers when it is difficult to tell whether their actions are designed to preserve peace and order or constitute an arrest for the commission of a crime. It seems that it is for the jury to decide, under all the evidence of the case, in which capacity the officer is acting at the time of the incident.[7]

Turning to the area of negligence, liability may be based either on the specific negligence of the operator of the amusement device or upon a general allegation of negligence with resort to the doctrine of *res ipsa loquitur*.

If the plaintiff bases his claim upon a specific act of negligence, naturally that particular negligence must be proved; this requirement places upon the plaintiff the burden of showing the defendant's knowledge of the defect complained of.[8] Knowledge on the part of the defendant may be shown by actual or constructive notice.[9]

In a case involving injury resulting from a fall when the plaintiff stepped on a board which broke under her weight, the court acknowledged there was no actual notice of the defect but said constructive notice was present because the condition had existed (according to the testimony) for a long period of time; the de-

6 Alamo Downs, Inc. v. Briggs, 106 S.W.2d 733 (Tex. Civ. App. 1937); Hirst v. Fitchburg & L. St. Ry., 196 Mass. 353, 82 N.E. 10 (1907).
7 Neallus v. Hutchinson Amusement Co., 126 Me. 469, 139 Atl. 671 (1928).
8 Berberet v. Electric Park Amusement Co., 319 Mo. 275, 3 S.W.2d 1025 (1928). As to the duty owed, the violation of which constitutes the negligence, see text, IV. Who Is Liable.
9 Junkermann v. Tilyou Realty Co., 213 N.Y. 404, 108 N.E. 190 (1915).

fendant's employees should have discovered the defect in time to remedy it.[10]

In a case for injuries suffered by a bowler in a fall on a wet runway, the court said the proprietor, to be liable, must have either actual or constructive notice of the existence of the water on the floor, and constructive notice is chargeable only where the defect has existed for a sufficient length of time.[11]

The injury complained of in a case may be the result of intentional or careless conduct of third persons, and in such cases the negligence of the defendant consists of a failure to provide reasonably safe premises for public use.[12] Most of such cases involve action amusements such as skating. If the defendant or his employees are on duty at the place of amusement, they will be deemed to have notice of the dangerous conduct of participants.[13] Also, without presence of the defendant or his employees in viewing the dangerous conduct, actual complaint registered by participants will place the defendant on notice.[14]

If the amusement involves the bumping of others as part of the game (such as on self driver "Dodgem" cars), recovery may not be allowed for injuries alleged to have been received as a result of being bumped.[15] However, the facts of a particular case may warrant recovery against the proprietor of such a device where he or his employees know of particularly dangerous conduct on the part of some drivers.[16]

Another point should be made with regard to the situation where the plaintiff's case is based on some specific act of negligence. A judgment for the plaintiff was reversed in a recent case because the instructions to the jury were at variance with the allegation and the proof in the case.[17] The complaint was based on the fact that the operator had speeded up the device and caused it to jerk thereby injuring the plaintiff; the evidence tended to prove this negligent operation. However, the instructions were worded to predicate liability on negligent maintenance of the device to prevent injury. No proof had been offered on this, and the inclusion of such instruction was reversible error.

II. USE OF THE DOCTRINE OF RES IPSA LOQUITUR

Pleading acts of specific negligence such as negligent operation, maintenance or construction or failure to inspect, and the offer of proof on these allegations will not prevent the plaintiff from also relying on the doctrine of *res ipsa loquitur*.[18] If the plaintiff offers sufficient evidence of specific negligence to satisfy his burden of

10 Long v. Savin Rock Amusement Co., 141 Conn. 150, 104 A.2d 221 (1954). In this case the court pointed out that the greater the likelihood of danger, the greater the amount of care which is required. The board in question here was in a damp area; it was subject to continued wetting; and it was unpainted. From these facts the jury could reasonably find that a reasonable inspection would reveal the defect in question, and therefore constructive notice could be imputed to the defendant.

11 Reiher v. Mandernack, 234 Wis. 568, 291 N.W. 758 (1940).

12 As to the duty owed, the violation of which constitutes the negligence, see text, IV. Who Is Liable.

13 Thomas v. Studio Amusements, Inc., 50 Cal.App.2d 538, 123 P.2d 552 (Dist. Ct. App. 1942).

14 Murphy v. Winter Garden & Ice Co., 280 S.W. 444 (Mo. App. 1926).

15 Gardner v. G. Howard Mitchell, Inc., 107 N.J.L. 311, 153 Atl. 607 (Ct. Err. & App. 1931).

16 Connolly v. Palisades Realty & Amusement Co., 11 N.J. Misc. 841, 168 Atl. 419 (Sup. Ct. 1933). In this case the court pointed out that a person takes the chance of injury through normal operation, but he does not take the chance of conduct of others in violation of the rules and which is known by the proprietor to endanger safety.

17 Bee's Old Reliable Shows, Inc. v. Maupin's Adm'x, 311 Ky. 837, 226 S.W.2d 23 (1950).

18 Harrison v. Southeastern Fair Ass'n, 104 Ga.App. 596, 122 S.E.2d 330 (1961).

proof including that to withstand the defendant's rebuttal, naturally the plaintiff need not rely on *res ipsa loquitur* to get to the jury.[19] His case should in that situation go to the jury on specific negligence.

Confusion seems to arise in those cases where plaintiff pleads some acts which could be classified as specific negligence, such as negligent maintenance, and also attempts to rely on the doctrine of *res ipsa loquitur*. In one case the plaintiff received a severe burn on her hip which was allegedly inflicted when she was forced against the side of a metal car on the device on which she was riding. There was specific testimony as to the cause of the heat at that point on the car—faulty guide wheels on the outside rubbed against the car generating heat from the friction. The introduction of much evidence did not remove the plaintiff's right to use the doctrine of *res ipsa loquitur* also.[20]

In another case the defendant received a directed verdict in its favor at the close of the plaintiff's case. The grounds were that the plaintiff's evidence failed to prove any knowledge on the part of the defendant of the defect complained of and therefore was insufficient to satisfy the plaintiff's burden of proof. The case was reversed on appeal.[21] The court indicated that the plaintiff need not plead the facts to establish *res ipsa loquitur* as long as the court and opposing party are apprised of its applicability, and the elements necessarily present to justify its use are adduced by the plaintiff.[22]

The doctrine of *res ipsa loquitur* may be effectively used where there are multiple defendants.[23] Frequently, the plaintiff will join the lessee or concessionaire operating an amusement device as well as the owner of the park or premises. In a New York case,[24] although the independent contractor was not joined as a defendant, the suit against the proprietor, state of New York, was allowed on the basis of *res ipsa loquitur* even though the independent contractor operated the device. The court said, "It is not necessary . . . that there be but a single person in control of that" instrument causing the damage.

It should be pointed out, however, that the doctrine of *res ipsa loquitur* is no cure-all for a doubtful case. Two recent cases may be examined to illustrate this in regard to two aspects—a case of possible mechanical failure and a case wherein the injury was due to no mechanical defect.

In the first of these situations, the plaintiff was severely burned while riding on a Loop-O-Plane.[25] The seat caught fire. The plaintiff

19 None of the cases examined discuss the possible difference in the use of the doctrine of *res ipsa loquitur* as to whether it is treated as raising a presumption or creating an inference. Since none of the cases examined on amusement injuries makes the point, no effort will be made here to discuss the question of evidence presented.

20 Harrison v. Southeastern Fair Ass'n, 104 Ga.App. 596, 122 S.E.2d 330 (1961).

21 Pierce v. Gooding Amusement Co., 90 N.E.2d 585 (Ohio App. 1949). Plaintiff was holding a baby on a merry-go-round horse. The horse came loose and knocked plaintiff to the ground.

22 In the *Pierce* case, *supra* note 21, the court listed three elements as necessary for reliance on the doctrine of *res ipsa loquitur*: (a) the instrumentality be under the exclusive control and management of the defendant; (b) the means of explaining the accident and the availability of the evidence be accessible only to the defendant; and (c) upon the facts adduced, the accident be of a type which the jury could find would ordinarily occur only as a result of the defendant's negligence. It is interesting to note that the court makes no mention of a fourth element usually required in *res ipsa loquitur* cases; that is, no contribution by the plaintiff to the happening. Prosser, Torts 208 (1955).

23 Harrison v. Southeastern Fair Ass'n, 104 Ga.App. 596, 122 S.E.2d 330 (1961).

24 Covey v. State, 200 Misc. 340, 106 N.Y.S.2d 18 (Ct. Cl. 1951).

25 Hicks v. Fontaine Ferry Enterprises, Inc., 247 S.W.2d 493 (Ky. App. 1952).

relied on *res ipsa loquitur*. That there was an unusual occurrence was not questioned; nor was the exclusive control of the device by the defendant contradicted. However, in spite of expert testimony by witnesses for the plaintiff that the fire could have resulted from hot oil flowing along the shaft of the device from the engine, the court directed a verdict for the defendant. The decision was based on the fact that the plaintiff failed to prove that the accident more likely than not was a result of the defendant's negligence.

It seems that with the testimony as to a possible cause of the fire, the plaintiff had established his case well enough to get to the jury on *res ipsa loquitur*. What more could plaintiff do in such a situation? It is highly likely that such an unusual occurrence would result only from the negligence of someone. By showing that the fire was possibly caused by a defective mechanism in the motor, the plaintiff has tied the negligence closely enough to the defendant. For this reason, it seems the opinion may be questioned.

In a recent Colorado case,[26] the plaintiff was denied recovery for injuries to her back allegedly incurred as a result of the negligent maintenance and operation of a Loop-O-Plane. The evidence showed that the plaintiff was unable to hold onto a safety bar in front of her, but this resulted from the natural effect of the forces produced by the device.[27] She contended that the accident resulted from the defendants' failure to securely fasten the seat belt. However, evidence on the insecure fastening of the seat belt was unclear.

In discussing the application of the doctrine of *res ipsa loquitur* the court said that it was inapplicable because of:

> the insufficiency of the circumstantial evidence to establish the ingredients of the claim. In order for the doctrine to fill the breach—it must appear (1) that the instrumentality is under the exclusive control of the defendant, (2) that the accident is of a kind which ordinarily does not occur in the absence of defendant's negligence, (3) that it must not have been due to any voluntary act or contribution on the part of the plaintiff.[28]

Plaintiff failed to satisfy (2) and (3) above. The accident was not a kind to bespeak negligence; and it was explainable in terms

26 Hook v. Lakeside Park Co., 142 Colo. 277, 351 P.2d 261 (1960).

27 The Loop-O-Plane is a device consisting of a two seated car in which the passengers sit back to back—attached to a long arm which rotates in a circle on a vertical plane. It operates both clockwise and counterclockwise.

28 Hook v. Lakeside Park Co., 142 Colo. 277, 288, 351 P.2d 261, 268 (1960).

of causes which were not tortious. In fact, "the happening is not such as to point to negligence as the predominant or even the equal explanation, and so the vagueness and ambiguousness of plaintiff's evidence operates to defeat her claim, and the doctrine of *res ipsa loquitur* does not serve to supply the deficiencies."[29]

III. DEFENSES AVAILABLE

The operator of an amusement device has available the defense of plaintiff's own conduct to defeat liability. The two common defenses, of course, are contributory negligence and assumption of risk. Mention will later be made of another defense sometimes asserted—contractual limitation.

Turning first to contributory negligence, recovery has often been denied on this ground. In the cases involving roller coasters, the conduct of the plaintiff is usually that of failing to properly seat himself in the car. In one case the plaintiff sat on the arm of the seat and was thrown off the roller coaster on a curve; this was held to be contributory negligence.[30] Again, if a patron is riding on a roller coaster with only one hand on the safety bar and the other hand around his companion's shoulder, even without knowledge of the hazards of the ride this may amount to contributory negligence.[31]

It should be pointed out, however, that the existence of other factors may still allow recovery by the plaintiff. There may be evidence of mechanical failure or negligent operation as well as evidence of contributory negligence. In one case the plaintiff was injured as a result of a violent jerk of a roller coaster.[32] The defendant pleaded contributory negligence in that the plaintiff allegedly failed to make proper use of a safety bar. Since there was credible evidence as to both contentions, the appellate court refused to disturb the finding that the defendant's negligence was the proximate cause of the injury.

This holding and another[33] illustrate the rule that the question of contributory negligence is for the jury. In the latter case recovery by the plaintiff was sustained even though she stepped into the path of a miniature train which allegedly sounded its whistle. It was possible that the warning blended into the sounds from the other concessions and went unheard.

Naturally, the defense of contributory negligence should not be presented to the jury if the defendant has not introduced evidence to establish it. In a recent case involving injury on a "Shoot The Chute" device, the trial court gave four contributory negligence instructions concerning the plaintiff's posture in the device; and the verdict was for the defendant.[34] This was reversed on appeal because the defendant had introduced no evidence as to what might be correct posture or that the plaintiff had been told how to sit. The court had merely instructed the jury that if it believed the plaintiff had failed to seat himself correctly, he could not recover. This was error.

29 *Id.* at 289, 351 P.2d at 268.
30 State *ex rel.* Hamel v. Glen Echo Park Co., 137 Md. 529, 113 Atl. 85 (1921).
31 Pointer v. Mountain Ry. Constr. Co., 269 Mo. 104, 189 S.W. 805 (1916).
32 Sanderson v. Bob's Coaster Corp., 133 Conn. 677, 54 A.2d 270 (1947).
33 Bates v. Siebrand Bros. Circus & Carnival, 71 Idaho 318, 231 P.2d 747 (1951).
34 Reynolds v. Phare, 365 P.2d 328 (Wash. 1961).

Frequently, of course, the defense of contributory negligence will be of no avail because of the fact the plaintiff is a minor. The general rule is that a child is bound only to use that degree of care which ordinarily prudent children of a like age and like intelligence are accustomed to use under the circumstances.[35] In the case cited above the child's conduct was such that under the circumstances, similar conduct on the part of an adult might have constituted contributory negligence, but since the child was nine years old, his care and foresight were measured by a rule different from that applicable to an adult.

As the age of the plaintiff increases, however, the degree of care required of him also approaches that required of an adult, and recovery may be barred by the plaintiff's own conduct.[36] In an illustrative case the injured child was only ten years old, but fully capable of reading a sign of warning.[37]

Turning next to the defense of assumption of risk, often where such defense is used, it too will be ineffective if the plaintiff is a child. A child assumes the risk only of dangers the existence of which he knew, or which in the exercise of a degree of care applicable to children of the same age and intelligence, he ought to have known.[38]

The classic illustration of the application of the doctrine of assumption of risk in general was presented by Judge Cardozo in the New York case of *Murphy v. Steeplechase Amusement Co.*[39] In that case the plaintiff was thrown from a moving belt device called "The Flopper," and he suffered a broken knee cap. The plaintiff's case rested on the negligence of the defendant's operation of the device which produced a sharp or sudden jerk. Judgment for the plaintiff was reversed.

There was in this case no question of an obscure or unobserved danger. People were observed to fall; the belt was in constant motion. In such cases where the dangers are obvious to all and, in fact, are part of the amusement sought, the patron takes the chance of injury upon himself. As Judge Cardozo stated: "The timorous may stay at home."[40]

The situation of observable dangers is also well illustrated by a recent case of injury on a Loop-O-Plane ride.[41] The plaintiff was denied recovery because she had observed the ride and knew how it operated. There was no negligence in the operation of the device. Because the risks of such a ride are natural and obvious, no special warnings need be given to patrons.

Proceeding from this situation to others less clear, the efficacy of the defense of assumption of risk may not be great. The general rule is that a patron assumes the usual risks ordinarily to be encountered but not those risks engendered by negligence in operation or resulting from defective equipment.[42]

35 Brown v. Rhoades, 126 Me. 186, 137 Atl. 58 (1927).
36 See, for example, the case of a fifteen year old boy climbing on a merry-go-round, Abbot v. Alabama Power Co., 214 Ala. 281, 107 So. 811 (1926).
37 Ainsworth v. Murphy, 5 La.App. 103 (1926).
38 Brown v. Rhoades, 126 Me. 186, 137 Atl. 58 (1927).
39 250 N.Y. 479, 166 N.E. 173 (1929).
40 *Id.* at 483, 166 N.E. at 174.
41 Vance v. Obadal, 256 S.W.2d 139 (Tex. Civ. App. 1953). See also Hook v. Lakeside Park Co., 142 Colo. 277, 351 P.2d 261 (1960).
42 Stockweather v. Buck, 277 App.Div. 835, 97 N.Y.S.2d 857 (1950); Beaulieu v. Lincoln Rides, Inc., 328 Mass. 427, 104 N.E.2d 417 (1952).

In one New York case the intermediate appellate court held that a patron on a miniature automobile ride assumed the risk of even a defective steering wheel, but the decision was reversed on appeal to the court of appeals, and judgment for plaintiff was reinstated.[43]

Two cases involving rides on a "whip" device[44] illustrate another situation where the defense of assumption of risk may not be effective.[45] The plaintiffs were injured as a result of being thrown from the device. In both cases it is indicated that a patron does not, as a matter of law, assume such a risk by merely riding on the device. Being thrown out of the car was not part of the game.

Even where the injury is not a result of such a comparatively unusual accident as being thrown from a device, it is for the jury to decide if the plaintiff assumed the risk encountered.[46] In the cited case the injury was sustained as a result of a sudden jerk on a roller coaster. In another case where the defendant raised the defenses of contributory negligence and assumption of risk, recovery for the plaintiff was sustained in spite of evidence that the plaintiff was riding backwards without using the safety strap. The controverted question of fact is for the jury to decide.[47]

However, in yet another case very similar to those just discussed, it was held that the plaintiff had assumed the risks of a roller coaster ride.[48] The lurch of the car which threw the plaintiff from the coaster was not shown to be unusual.

It is interesting to compare the use of the doctrine of assumption of risk in amusement park cases with its use in a case of an injury from a sport involving a much greater hazard. In a 1949 New York case involving an injury suffered on a bobsled run, the lower court indicated that the plaintiff assumed not only the risk of bobsledding, but also the risk of consequential injuries or damages, whether or not he could have foreseen them.[49] "It may well be that known dangers of exposure to cold and the possibilities of delay in hospitalization were inherent in the risk assumed."[50] The plaintiff claimed that his injuries were aggravated because of lack of prompt medical treatment, the use of a pickup truck as an ambulance, and the failure of the defendant's agents to properly warm him while transporting him to a hospital. Dismissal of the plaintiff's claim was affirmed on appeal.[51]

Sometimes the tickets used at amusement parks have a statement printed thereon which attempts to limit the liability of the owner on account of injuries suffered by patrons riding a device. Although such limitations may lawfully exempt the owner from liability for negligence in the operation of the device, such limitation must be so communicated to the patron to bring it to his attention.[52] If the ticket has the appearance of a mere check or token

43 Branch v. Bug Ride, Inc., 297 N.Y. 623, 75 N.E.2d 634 (1947).
44 A "Whip" is a device consisting of several small cars which whirl in either direction as the car proceeds along a winding track.
45 Stockweather v. Buck, 277 App.Div. 835, 97 N.Y.S.2d 857 (1950); Beaulieu v. Lincoln Rides, Inc., 328 Mass. 427, 104 N.E.2d 417 (1952).
46 Schnoor v. Palisades Realty & Amusement Co., 112 N.J.L. 506, 172 Atl. 43 (Ct. Err. & App. 1934). Also see note 16, *supra*.
47 Moore v. Rosecliff Realty Corp., 88 F.Supp. 956 (D. N.J. 1950).
48 Lumsden v. L.A. Thompson Scenic R.R., 130 App.Div. 209, 114 N.Y.Supp. 421 (1909).
49 Clark v. State, 276 App.Div. 10, 93 N.Y.S.2d 28 (1949).
50 *Id.* at 13, 93 N.Y.S.2d at 31.
51 Clark v. State, 302 N.Y. 795, 99 N.E.2d 300 (1951).
52 Kushner v. McGinnis, 289 Mass. 326, 194 N.E. 106 (1935).

and is to be collected by the owner on admission to the ride, the chances are that the attempted limitation of liability will not be effective. It must be brought home to the patron in such a manner that a person of ordinary intelligence would understand it.[53]

IV. WHO IS LIABLE

Having established a basis for liability, a claimant has to decide against whom suit should be brought. The balance of this discussion will direct attention to this question.

Naturally the owner of an amusement device should be a defendant. His liability flows from a violation of the duty owed by a proprietor of such device to invitees on his premises. The proprietor is required to exercise that degree of care to prevent injury to his invitees which a reasonably prudent person would exercise under the same circumstances.[54] Failure to do so is negligence.

The courts in the early cases refrained from charging a proprietor of a place of public amusement with a higher duty than that of reasonable care.[55] However, he is held to a stricter accounting than the owners of private property in general. This stricter accounting involves the obligation to know that the premises are safe for public use.[56]

With the passage of time and the increase in the number of cases there appears to have been a modification of the ordinary care standard. In a case of injury suffered on a slide device the court said that the degree of care required of one operating an amusement device is higher than ordinary care.[57] It is care proportionate to the risk involved and the circumstances, and one of the circumstances is that he invites people to ride on the device, and by that impliedly holds out that they can do it with safety.[58]

This raising of the degree of care required of operators of amusement rides is not general, however. Some jurisdictions still adhere to the prevailing rule that the standard is a reasonable precaution to avoid injury, or ordinary care.[59]

53 Brennan v. Ocean View Amusement Co., 289 Mass. 587, 194 N.E. 911 (1935).
54 New Bay Shore Corp. v. Lewis, 193 Va. 400, 69 S.E.2d 320 (1952).
55 Williams v. Mineral City Park Ass'n, 128 Iowa 32, 102 N.W. 783 (1905).
56 Smith v. Cumberland County Agricultural Soc'y, 163 N.C. 346, 79 S.E. 632 (1913).
57 Kehoe v. Central Park Amusement Co., 52 F.2d 916 (3d Cir. 1931).
58 *Ibid.*
59 See, for example, Hook v. Lakeside Park Co., 142 Colo. 277, 351 P.2d 261 (1960); Jeroma v. McNally, 324 Mass. 385, 86 N.E.2d 638 (1949).

The standards just discussed have not applied generally to operators of roller coasters. These devices have been recognized as sources of great peril, and the proprietors have been held to the standard of exercising the highest care.[60] It is the same degree of care required of common carriers.[61]

That this standard of highest care may be extended to the owners of devices other than roller coasters is indicated by a recent case involving injuries suffered when a cable broke on an "airplane ride."[62] In that case the defendant objected to an instruction charging him with the duty to operate the ride with the highest degree of care of a very prudent person engaged in a like business. On appeal, the instruction was held to be proper.

In one case the operator attempted to relieve himself of the liability for injuries suffered on his amusement device because of the fact that the plaintiff had received a free ride.[63] The defendant operator received a directed verdict in the trial court which was reversed on appeal. The court pointed out that the offer of free rides was not a pure gratuity but was used to induce people to patronize the device. Therefore, there was business advantage enough to the defendant to charge him with ordinary negligence.

In large amusement parks the situation is most likely that the owner's (operator's) servant, rather than the owner himself, is in actual physical control of the device. If an injury results from the intentional act or the negligence of such servant, the servant is liable under elementary tort law.[64] As indicated in the early part of this paper the owner also could be joined as a defendant in a suit for such torts of one of his servants if the act occurred while the servant was acting within the scope of his authority; liability of the master is based on the doctrine of respondeat superior.[65]

It is beyond the scope of this paper to discuss the agency problems concerned with the determination of whether or not the master-servant relationship exists. General agency law indicates that there needs to be a contract of employment (express or implied) between competent parties resulting in the master's direction and control of the servant's performance of services for compensation. The determination in a given case is a question of fact.

As a practical matter it would appear that when a servant's actions are involved, he should be joined as a party so that all of the parties may be before the court in the first place. Recovery may be had against all of them.[66] Thus, the plaintiff has a greater opportunity for satisfaction of his judgment. It may very well work out that the servant has no assets to reach, but he should be joined.[67]

In addition to the owner of the amusement device and the servant, if he is involved, the owner of the premises or land may

60 Sand Springs Park v. Shrader, 82 Okla. 244, 198 Pac. 983 (1921).
61 Best Park & Amusement Co. v. Rollins, 192 Ala. 534, 68 So. 417 (1915); Bibeau v. Fred W. Pearce Corp., 173 Minn. 331, 217 N.W. 374 (1928).
62 Gromowsky v. Ingusal, 241 S.W.2d 60 (Mo. App. 1951).
63 Beaulieu v. Lincoln Rides, Inc., 328 Mass. 427, 104 N.E.2d 417 (1952).
64 See text, I. Basis of Liability.
65 Annot., 59 A.L.R.2d 1066 (1958).
66 Davidson v. Long Beach Pleasure Pier Co., 99 Cal.App.2d 384, 221 P.2d 1005 (Dist. Ct. App. 1950).
67 There will be no discussion of the effects of insurance in a case. That may influence plaintiff's choice of procedure, but it does not technically affect liability.

well be a proper party to join as a defendant. Ordinarily a lessor is not liable for the injuries sustained by a tenant's invitees on the leased premises.[68] However, there has been developed an exception to this rule which might be called an amusement park exception. The proprietor of a place of public amusement is required to maintain in a reasonably safe condition all the devices used on the premises, and to reasonably inspect and supervise them.[69] The duty imposed upon the lessor is not discharged because the injury resulted from the activity of an independent concessionaire or lessee.[70]

The cases generally point out the fact that the lessor or owner of the park receives an admission fee from all patrons, and liability, in consequence, is established from this arrangement.[71] The same result is established where the owner receives a rental involving a percentage of the gross receipts of the concessionaire.[72] It seems, also, that a lessee who subleases premises to an independent sublessee will be held liable on the same basis.[73]

The extent of the duty owed by the lessor deserves yet further emphasis. As indicated by the Restatement of the Law of Torts, cited above, the lessor's care must extend not only to construction and installation of safe equipment but also to seeing to its proper use even if an independent contractor is involved. As stated by the Pennsylvania Supreme Court: "The important fact is that the [device] was operated in the park owned and operated by the [lessor], who invited the public to become patrons of the amusement devices."[74] The court went on to point out that the duty owed was reasonable care in the construction, maintenance, and management of the device.

There are possible grounds by which the lessor or landowner may escape liability. In the first instance, the landowner may donate the use of the land to the amusement operator. In a Massachusetts case for damages for the death of a child at a charity carnival, the landowner was not held liable even though the child was killed on part of the land not used by the carnival.[75] The benefit to the landowner of receiving admissions or rental was removed; and at best the persons attending were in the position of licensees, and the landowner could not be charged with knowledge that the child would use a portion of the land not intended for use by the carnival.[76]

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68 Gentry v. Taylor, 182 Tenn. 223, 185 S.W.2d 521 (1945).

69 Davidson v. Long Beach Pleasure Pier Co., 99 Cal.App.2d 384, 221 P.2d 1005 (Dist. Ct. App. 1950); Gibson v. Shelby County Fair Ass'n, 241 Iowa 1349, 44 N.W.2d 362 (1950).

70 Engstrom v. Huntley, 345 Pa. 10, 26 A.2d 461 (1942); Wodnik v. Luna Park Amusement Co., 69 Wash. 638, 125 Pac. 941 (1912). The former case cites with approval Restatement, Torts §§ 344, 415 (1934). Section 344 reads: "A possessor of land who holds it open to the entry of the public for his business purposes is subject to liability to members of the public entering for such purposes for bodily harm caused to them by his failure to exercise a reasonably careful supervision of the appliances or methods of an independent contractor or concessionaire whom he has employed or permitted to carry on upon the land an activity which is directly or indirectly connected with his business use thereof." Section 415 states: "A possessor of land who in the course of his business holds it open to members of the public, is subject to liability for bodily harm caused to them, on a part of the land retained in his possession or upon a part thereof leased to a concessionaire, by his failure to exercise reasonable care to secure the use of reasonably safe equipment and methods by an . . . (b) independent contractor or concessionaire employed or permitted to carry on upon the land an activity in furtherance of the possessor's business use thereof."

71 Stickle v. Riverview Sharpshooters Park Co., 250 Ill. 452, 95 N.E. 445 (1911); Covey v. State, 200 Misc. 340, 106 N.Y.S.2d 18 (Ct. Cl. 1951).

72 Davidson v. Long Beach Pleasure Pier Co., 99 Cal.App.2d 384, 221 P.2d 1005 (Dist. Ct. App. 1950); Wodnik v. Luna Park Amusement Co., 69 Wash. 638, 125 Pac. 941 (1912).

73 Murphy v. Electric Park Amusement Co., 209 Mo.App. 638, 241 S.W. 651 (1922).

74 Engstrom v. Huntley, 345 Pa. 10, 12, 26 A.2d 461, 463 (1942).

75 Karlowski v. Kissock, 275 Mass. 180, 175 N.E. 500 (1931).

76 *Id.* at 183, 175 N.E. at 501.

In the second place where the lessor parts with all control over the premises he has been held not liable. A recent case illustrates this. The plaintiff was injured by a defective stool in a lunch room at an amusement park. It was shown the lessor received no percentage of the receipts, and that the lunchroom was in the exclusive control of the defendant.[77] It seems that this holding may be criticized because the plaintiff was an invitee of the landlord to the park grounds. Where so many people are congregated on the landowner's grounds and he receives admission fees from them, it would appear that the duty of continuing inspection should run to all the facilities of the park. However, the court declined to apply the amusement park exception in the plaintiff's favor.[78]

A third instance of nonliability is provided by another Massachusetts case.[79] The plaintiff was injured while riding a "Whip" device on a "free ride." In the lower court the defendant operator and defendant park company received directed verdicts. As to the operator, this was reversed on appeal because the free ride was an inducement to get people to ride—similar to free samples. Only some business advantage need be shown to charge the defendant with negligence. This was not a pure gratuity; some business advantage was here found. However, the court said there was no evidence that the park company was in any way responsible for the plaintiff's injury. Outside of this statement no authority was given to excuse the landowner from liability. Contrary to the outcome, there was evidence that all the rides in the park were free, and that the free rides were used to induce people to attend. The resulting benefit extended to the landlord, and the liability attached to the benefit should have been the park company's burden as well as the operator's.[80]

In some situations there may yet be another escape from liability, and that is by means of the doctrine of sovereign immunity.

77 Gentry v. Taylor, 182 Tenn. 223, 185 S.W.2d 521 (1945).

78 The court in the *Gentry* case, *ibid.*, indicated that the liability of the landowner is limited to these cases: (a) where he has an interest more or less substantial; (b) where he exercises, or has the right to exercise, some control over the operation; (c) where he holds out to the public that he is interested in the ownership or control to induce patronage; (d) where the lessee operates an inherently dangerous device which creates a nondelegable duty on the part of the landowner; and (e) where a defect existed at the time of the lease. It seems the court could have favored the plaintiff by applying (a) or (c) above.

79 Beaulieu v. Lincoln Rides, Inc., 328 Mass. 427, 104 N.E.2d 417 (1952).

80 Massachusetts' landlords have been charged with and found liable for the torts of their independent contractors: Brandolino v. Carrig, 312 Mass. 295, 44 N.E.2d 788 (1942).

This doctrine, of course, applies to situations in which there is a governmental unit acting as the landowner or lessor of the park in question. It is not the purpose here to explore the whole area of sovereign immunity, but to illustrate how it affects liability in the area under discussion.[81]

Turning first to the situation in which a state is the lessor involved and the state has given its consent to be sued in tort, it may be liable under the same principles as a private landowner in an amusement park case.[82] In a recent New York case the plaintiff recovered from the state for injuries sustained while she was observing a "scooter ride" in a state park. The state had collected an admission fee. The court pointed out that the liability for the negligence of the concessionaire falls on an owner who charges a general admission, in this case the state of New York, acting through its agriculture department.[83]

Although the doctrine of governmental immunity is falling into disfavor in some jurisdictions, where it does exist it is applicable to suits against state agencies as well as against the state itself.[84] In those jurisdictions a recovery for any tort injury would be precluded by the doctrine.[85]

When one finds a subsidiary governmental unit such as a county or a municipality running an amusement park, the problem becomes complicated because of the need to determine whether or not a governmental function is being performed by the county or municipality. Under the rules applicable in this field of sovereign immunity, such sub-units of government occupy a dual position—they are endowed with strict governmental powers as a branch of the state government, and yet they are also corporate entities subject, in a way, to the same requirements as private corporations.[86] Determining which function is served in the case of a city maintaining a park with amusement devices therein presents a nice question.

The early cases seem to show a pronounced split of authority as to what function a municipality performs in the establishment and maintenance of public parks in general. Illustrative of the rule that this is a governmental function is the statement in a Kentucky case that parks are essentially public places established for public purposes, and municipal corporations are not liable in tort for injuries to visitors.[87] Even when the injuries are inflicted by animals in a zoo or on playground equipment, such has been the holding.[88]

However, the contrary view that the city is performing a proprietary function has much support.[89] This has frequently been held when the injuries complained of resulted from the failure of the city to construct or maintain amusement equipment in a reasonably safe manner. An early Colorado case held that if the city via

81 For a resume of the entire area of sovereign immunity refer to Prosser, Torts § 109 (1955).
82 *Id.* at 773.
83 Covey v. State, 200 Misc. 340, 106 N.Y.S.2d 18 (Ct. Cl. 1951).
84 Taylor v. New Jersey Highway Authority, 22 N.J. 454, 126 A.2d 313 (1956).
85 Prosser, Torts 771 (1955).
86 *Id.* at 774.
87 Park Comm'rs v. Prinz, 127 Ky. 460, 105 S.W. 948 (1907).
88 As to animals, see Hibbard v. Wichita, 98 Kan. 498, 159 Pac. 399 (1916); as to playground equipment, see Bernstein v. Milwaukee, 158 Wis. 576, 149 N.W. 382 (1914).
89 Carey v. Kansas City, 187 Mo. 715, 86 S.W. 438 (1905).

its agents was negligent in the maintenance of a merry-go-round in a public park, the city would be liable if such negligence was the proximate cause of the injury.[90]

Where the municipality conducts its public parks for revenue, it seems clear that the city will be held liable for defective conditions existing in the park.[91]

Two cases involving miniature train rides provide interesting illustrations. In a California case the plaintiff was denied recovery from the defendant city; the court held that under the facts of the case the city was clearly acting in a governmental capacity and hence was not liable for injuries resulting from negligence[92] The case makes no mention as to whether the city charged a fee for rides on the train.

A Michigan case involving similar facts was decided in favor of the plaintiff who had paid a fare for riding on the train, although she had been charged no admission to the park itself.[93] The court in this case very nicely divided the operation of running the park as governmental from the operation of the train which was held to be a proprietary function even though the total fares received from rides did not offset the total operating deficit of the park. The court noted that although governmental immunity is lost when a city receives income from one of its functions, that is not the case where the income is merely incidental to the overall purpose.[94] This exception did not apply in this case because the ride itself did operate at a profit in spite of the loss sustained on the overall operation of the park.

It would seem that in those cases where the municipality is operating strictly as a lessor and receives rental from concessionaires the rule applying to state governments would be applied to the cities.[95] Clearly, the city is acting in a proprietary capacity. If, however, the city is not operating the park but leases the entire facility to an outsider there may be some doubt. There are cases indicating that either result may be reached.[96]

90 Canon City v. Cox, 55 Colo. 264, 133 Pac. 1040 (1913).
91 Cornelisen v. Atlanta, 146 Ga. 416, 91 S.E. 415 (1917).
92 Meyer v. City & County of San Francisco, 9 Cal.App.2d 361, 49 P.2d 893 (Dist. Ct. App. 1935).
93 Matthews v. City of Detroit, 291 Mich. 161, 289 N.W. 115 (1939).
94 *Id.* at 165, 289 N.W. at 117.
95 See Covey v. State, 200 Misc. 340, 106 N.Y.S.2d 18 (Ct. Cl. 1951).
96 See, for example, Dean v. Board of Trustees, 65 Ohio App. 362, 29 N.E.2d 910 (1940), indicating that the benefit of the rentals would be enough to hold the city liable because it was acting in a proprietary capacity. For the opposite result in a case involving injuries suffered in a city recreation hall leased to a private group for a fee, see Ramirez v. Ogden City, 3 Utah 2d 102, 279 P.2d 463 (1955).