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Recreational Equipment

Quiet Settlements Close Out Many Theme Park Ride Cases

Recent jury verdicts in amusement park ride litigation, ranging from $0 up to $2 million, play an important role by providing exemplars for future industry liability.

For a serious accident, like the one involving a boy who died on a waterslide at Schlitterbahn water park in August, ''if liability is proved, damages should be in the multi-million dollar range,'' Professor Christopher J. Robinette of the Widener University Commonwealth Law School in Harrisburg, Pa., told Bloomberg BNA.

Plaintiffs' attorney Robert A. Clifford, founder and senior partner at Clifford Law Offices in Chicago, told Bloomberg BNA that his firm has settled several amusement park cases confidentially for sums ranging from several hundred thousand dollars to $2 million, depending upon the gravity of injuries.

But most suits stemming from serious injuries result in confidential settlements, an outcome favored by media shy theme parks.

Settlement is often favored because it doesn't come with an admission of any liability, Professor James Kozlowksi of George Mason University's School of Recreation, Health, and Tourism in Manassas, Va., told Bloomberg BNA.

It's ''simply a business decision to avoid the significant cost and uncertainty associated with litigation,'' he said.

''Moreover, a quiet settlement avoids potential public relations fallout associated with protracted litigation and attendant media attention,'' Kozlowski said.

To Settle or Not to Settle. A series of verdicts allows parties and insurers to peg how much a case might be worth if it advances to trial, and to compare that with the costs of litigating or settling a case,

Damages awards cited by litigators in amusement park litigation include, on the low end, $5,000 and $23,300 awards in a pair of go-kart cases that involved an ankle fracture and a broken leg respectively (*Martins v. Festival Fun Parks LLC*, Fla. Cir. Ct., No. 50-2013-CA9290, 2016; *Abdullah v. Andy Alligators Fun Park, LLC*, Okla. Dist. Ct., No. CJ-2013-937, 2015).

On the higher end are a $1.5 million award in a roller coaster case involving a plaintiff with a neck injury (*Noone v. City of New York & Astroland Kiddie Park, Inc.*, N.Y. Sup. Ct., 2015). In addition, the plaintiffs' law firm Cellino & Barnes reported a plaintiff's verdict of $4 million in a roller coaster accident case that ultimately resulted in a $2.85 million settlement (*Dwaileebe v. Six Flags Darien Lake*, 801 N.Y.S.2d 172 (2006)).

In *Dwaileebe*, the plaintiff suffered permanent injuries after being ejected from the Superman roller-coaster ride at Six Flags Darien Lake in Darien, N.Y.

Although verdicts provide exemplars, ''most claims are settled, rather than litigated,'' Robinette said.

And usually at the ''11th hour,'' Clifford added.

Michael Talve, managing director of The Expert Institute in New York, which helps litigators find expert witnesses, also said most of the amusement park cases he sees result in a settlement.

It's ''unusual for an amusement park operator to allow such a case to drag on in the public domain. Their insurance carriers usually prepare for this,'' Talve told Bloomberg BNA.

Most plaintiffs also prefer settlements because they don't want to re-live their experience in a courtroom setting, Clifford said.

So, if the settlement amount is ''fair with the guarantee of getting the damages check within 30 or 60 days, then it is appropriate to settle to avoid a costly trial and perhaps even an appeal,'' he said.

Settlements may be good for injured plaintiffs and media shy defendants, but Clifford saw risks to the public when recurring dangers are obscured through confidentiality agreements.

When these lawsuits are settled for a confidential amount the ''real risks of amusement parks is never really known by the public,'' he said.

Standard of Care Crucial. Although many litigants anticipate a settlement, they prepare for trials.

In most injury lawsuits that advance, plaintiffs must successfully link their harm to the defendant's violation of a standard of care.

Litigation over amusement park rides is no different, but it comes with its own set of twists and turns.

Four-Part Series on Ride Safety and Industry Liability

Part 1 and 2: Amusement park rides are generally safe, but diffused regulation and lack of reliable data on ride safety raise concerns

Part 3 and 4: How do lawsuits over amusement park rides fare, and what role do liability releases and assumption of the risk play?

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The applicable legal standard of care is not only significant, but conclusive in determining liability in amusement park ride cases, Kozlowksi said.

These standards ''provide a yardstick against which an actor's behavior or decision-making can be measured,'' plaintiffs' attorney Daniel G. Kagan, with Berman & Simmons in Lewiston, Maine, told Bloomberg BNA.

But such standards are rare for theme parks and/or carnival rides, Kozlowski said. If they exist at all, they're ''the exception, rather than the rule, within a thin patchwork of state and local law,'' he said.

In the absence of a legislated mandatory safety standard, the applicable legal standard will arise from the generally accepted customs, practices, and usages within an industry or community, like amusement park ''thrill'' rides, Kozlowski said.

That means the standard of care is largely being determined by the same courtroom experts who testify in injury cases, Talve said.

In addition to their litigation work, these experts ''sit on boards for relevant trade associations,'' like the International Association of Amusement Parks and Attractions, ''they publish and lecture on the topic of amusement park safety, and collectively they're establishing industry norms and safety standards that most operators will adhere to,'' Talve said.

''If amusement parks don't follow these best practices, they'll be vulnerable to lawsuits,'' Talve said.

Differing Standards Confuse Jurors. When negligence is alleged in a typical amusement park ride case, most courts ask whether the defendant acted reasonably under the circumstances, Robinette said.

But some jurisdictions use a heightened ''extraordinary care'' standard for common carriers, Robinette said.

The common carrier standard is ''much harder'' for a defendant to prove compliance with because it requires a showing that it it took extraordinary, rather than ordinary, care, he said.

In a midway or carnival ride case, the standard of care might examine how best to disassemble/reassemble a ride, how often the ride should be inspected, what that inspection entails, how often to replace worn parts, and with what, Kagan said.

But rules and standards are only helpful if the description that jurors are told makes sense to the ''normal, everyday human beings who give their valuable time to serve as jurors,'' Kagan said.

Whether the amusement park owes a patron the ''highest duty of care'' or a lesser ''reasonable duty of care'' may be paramount to litigators, but the distinctions often make little difference to juries, according to

A Look at 15 Recent Amusement Park Injury Cases

Here's a roundup of 15 recent amusement park ride injury cases:

■ Go-Kart injury at Celebration amusement park in Oklahoma City. Status: Judgment for defense in 2015 (*Weaver v. Celebration Station Properties, Inc.*, S.D. Tex. 2015, No. 4:14-cv-02233).

■ Waterslide injury at Six Flags Hurricane Harbor in Jackson, N.J. Status: Active case (*Conroy v. Six Flags Theme Parks, Inc.*, N.J. Super. Ct. Law Div., No. L-004177-13).

■ Go-Kart injury at Adventure Racing Park in Queensbury, N.Y. Status: Settlement in 2015 *(Corneli v. Adventure Racing Co., LLC*, N.D.N.Y., No. 1:12-cv-01303).

■ Waterslide injury at Great Wolf Lodge in Scotrun, Pa., Status: Active case (*Perez v. Great Wolf Lodge of the Poconos, LLC*, M.D. Pa., No. 3:12-cv-01322).

■ Waterslide injury at Sahara Sam's Oasis Water Park in West Berlin, N.J. Status: Active case (*Steinberg v. Sahara Sam's Oasis, LLC*, N.J., 2016 BL 272989, No. 075294, 8/23/16).

■ Waterslide injury at Great Wolf Lodge in Scotrun, Pa., Status: Dismissal (*Rabadi v. Great Wolf Lodge of Poconos, LLC*, M.D. Pa., 2016 BL 257308, No. 3:15-cv-00101, 8/9/16).

■ Ride injury at Six Flags Great Adventure in Jackson, N.J. Status: Dismissal (*Bomtempo v. Six Flags Great Adventure LLC*, N.J. Super. Ct. App. Div., 2016 BL 296019, No. A-3341-14T1, 9/12/16).

■ Ride injury on Monsters Inc. at Disney California Adventure Park in Anaheim, Calif. Status: Active case (*Graves v. Walt Disney Co.*, Texas Dist. Ct., No. DC-16-12037).

■ Ride injury at Haunted Mansion at Disneyland Resort in Anaheim, Calif. Status: Active (*Galliazzo v. Walt Disney Parks and Resorts U.S., Inc.*, C.D. Cal., No. 8:16-cv-01140).

■ Waterslide injury at Disneyland Resort in Anaheim, Calif. Status: 2014 verdict award of no damages (*Wilson v. Walt Disney Co.* , C.D. Cal., No. 2:13-cv-03388).

■ Ride injury on Great Movie Ride at Disney's Hollywood Studio in Orlando, Fla. Status: Dismissed in 2013 (*Staeheli v. Walt Disney Parks and Resorts U.S. Inc*, D. Minn., No. 0:13-cv-00306).

■ Waterslide injury at Six Flags Hurricane Harbor in Jackson, N.J. Status: Active status (*Pierre v. Six Flags Great Adventure LLC*, D.N.J. No. 3:16-cv-06696).

■ Waterslide injury at Six Flags Hurricane Harbor in Jackson, N.J. Status: Active status (*Maldonado v. Six Flags Great Adventure LLC*, D.N.J., No. 3:16-cv-05741).

■ Waterslide injury at Six Flags Over Georgia Hurricane Harbor Water Park in Austell, Ga. Status: Active status (*Razey v. Six Flags Entertainment Corp.*, N.D. Ga., No. 1:16-cv-02533).

■ Waterslide injury at Six Flags Hurricane Harbor in Jackson, N.J. Status: Most claims dismissed in 2016 (*J.Z. v. Six Flags Great Adventure, LLC*, D.N.J., No. 3:16-cv-03621).

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defense attorney Jordan Lipp, a patner at Davis, Graham & Stubbs in Denver.

Judges are the ones who examine the standard of care most closely, Lipp told Bloomberg BNA .

In states that have higher duties of care, that makes it ''harder for defendants to win on the motions, but not necessarily harder to win in front of a jury,'' Lipp said.

Another concern is that the standard of care is often a ''moving target,'' according to defense attorney Michael J. LeVangie, with the LeVangie Law Group in Sacramento, Calif.

In 2005 the California Supreme Court held that operators of roller coasters and similar rides should be treated like common carriers, in *Gomez v. California*, 35 Cal. 4th 1125 (2005), he said.

But the standard is different for driver-operated bumper cars, a distinction that parties ''often'' misunderstand, LeVangie told Bloomberg BNA.

And some states, such as Illinois, have used state laws to require that ride operators meet the heightened standard of care demanded of common carriers, Clifford said.

Costly Expert Witnesses Essential. In complex lawsuits involving amusement park rides, one or more seasoned expert witnesses will be needed to ''present and explain highly technical aspects of engineering, inspection and maintenance,'' Kagan said.

''Given the mechanical nature of these rides and the physics of a given accident, these cases usually require expert witnesses with an engineering degree, and particular experience and expertise in biomechanical engineering and/or human factors analysis,'' Kozlowski added.

Experts are needed to tell juries what measures ''could have or should have been taken to avoid the plaintiff's injuries or even death,'' Clifford said.

Often, ''additional protection or restraint for riders' necks, back, feet or hands'' might ''amount to a relatively minimal amount of money that could save people's limbs or lives,'' he said.

Experts also address the appropriate standard of care, the propriety of the operator's actions, and the design and warnings of the ride, Lipp said.

And where injuries are serious, damage experts, like doctors, life care planners and vocational rehabilitation specialists, are often utilized by the parties, he said.

Experts are needed even where negligence seems obvious on its face—such as for a machine that was continuously used for 100 hours without inspection even though it should have been inspected every five hours, Kagan said.

In such cases an expert must explain why it was important to maintain inspection frequency, he said.

Litigators don't necessarily need a midway ride-specific expert, because the themes of maintenance, upgrades and inspections are common to all matters involving complex machinery, he said.

''An individual juror may never ride on a roller coaster, but she probably has used an elevator—both

create serious risk of harm or death if maintenance, upgrades and inspections are ignored,'' he said.

Talve said the expert witnesses he looks for must be specialists in the areas of design and installation.

''Many of these experts own and operate ride manufacturing companies or amusement park outfits. Others have previously owned or operated such entities, and now spend their time consulting on safety guidelines,'' he said.

The stakes couldn't be higher.

''Some of these installations cost tens of millions of dollars. And the rides are meant to be flagship draws for the parks that construct them, as well as major revenue generators,'' Talve said.

But retaining a credentialed expert isn't enough. The expert must also withstand intense judicial scrutiny.

If a plaintiff's expert is disqualified under the rigorous judicial standards for evaluating expert evidence ''the case is over,'' Robinette said.

Defendants Win More Often. LeVangie said ''95 percent of all civil litigation resolves prior to trial and theme park accident cases are no different.''

Some cases might be subject to dismissal on the basis of a release or indemnification agreement.

Sometimes the parties have to ask the judge to decide if the waiver or release applies. ''That is true in many states,'' LeVangie said.

Kagan says he doesn't generally see outright dismissals in park ride injury cases because most plaintiffs' attorneys are diligent in conducting their own investigations before proceeding with a suit.

But LeVangie said there is a ''greater likelihood of a defense verdict in amusement and recreation liability matters'' than in other types of civil litigation.

''Defenses based upon express waivers and assumption of risk greatly enhance the potential of a defense judgment or dismissal in these cases when compared to traditional injury litigation,'' he said.

Robinette, the law professor who follows amusement park ride cases, says that as with ''medical malpractice cases, defendants appear to win the vast majority of those that go to trial.''

Kozlowski agreed, saying that in recreational injury cases, liability is the exception, rather than the rule.

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