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Section B Story

Amusement Park Litigation on the Rise

By Christa Zevitas

Zipora Jacob was having a blast celebrating her nephew's Disneyland bar mitzvah until she climbed off the Indiana Jones Adventure ride.

Feeling like her head was going to explode, she projectile vomited. Less than three hours later, the 42-year-old genetic scientist fell into a coma.

That was on July 17, 1995. Since that day, Jacob has undergone three brain surgeries to treat a hemorrhage caused by extreme shaking. Her doctor concluded that she essentially suffered "shaken baby syndrome" caused by the lurching movements of the ride which tore the brain tissue near the base of her skull.

Today, Jacob is bedridden, surrounded by prescription bottles and dependent on a tube that runs under her skin from the right side of her skull to her stomach so that fluid will drain from the damaged brain tissue.

Her confidential settlement with Disneyland shortly before trial is just one example of an increasing number of successful lawsuits against amusement parks.

Statistics suggest that attorneys today are much more likely to have an amusement park case land on their desks. Injuries resulting from fixed rides (those at stationary parks such as Disneyland) nearly doubled in four years – from 2,400 in 1994 to 4,500 in 1998, according to the Consumer Product Safety Commission, which estimates total injuries based on emergency room records. The number of injuries from mobile rides (such as those in traveling carnivals and fairs) held steady during the same period, with 2,000 in 1994 and 2,100 in 1998.

And many lawyers say this is a conservative estimate, placing the actual

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number of injuries at 9,200 in 1998.

Either way, the number of reported injuries is clearly on the rise.

"It's not surprising – with rides getting more dangerous and with the general population getting older and more susceptible to injuries – that we're seeing more and more of these types of lawsuits," says Howard Spiva, a plaintiffs' lawyer in Savannah, Ga., whose three-lawyer firm handles ride-related injury cases.

The dramatic increase in amusement park injuries is largely due to the increased violence of the rides, according to Barry Novack, the Beverly Hills solo who represented Jacobs.

"This is due to increases in G forces and jerk rates," he says. "You can develop stresses sufficient enough to tear tissues and blood vessels [in the brain], which causes bleeds."

Spiva echoes Novack's point.

"Many new rides present a transition of forces that some people can't handle," he says. "Some of the newer roller coasters can hit levels as high as four or five G's, and physicians and ride consultants say people can experience blackouts at forces of 6 G's and above.

"What makes a new ride design lucrative is its appeal to lure patrons in to experience new sensations through gravitational forces in a different way," he adds. "These changes mean bugs sometimes must be worked out during commercial operations. Our clients and their children are literally being used as guinea pigs."

It may be no coincidence that 1999 was a record year for amusement park deaths, which totaled six. The last four of these deaths occurred during a single week last August, which U.S. News & World Report called "one of the most calamitous weeks in the history of America's amusement."

* One woman drowned and nine people were injured when a raft capsized on the Roaring Rapids ride at Six Flags Over Texas in Arlington, Texas.

* A teenager died of internal bleeding after being thrown from the Himalaya ride at Coney Island in New York.

* A 12-year-old boy died after falling 200 feet from the Drop Zone Stunt Tower at Paramount's Great American park in Santa Clara, Calif.

* A 20-year-old man died after partially removing himself from an overhead harness at the end of the 50-mph Shockwave roller coaster at Paramount's Kings Dominion near Richmond, Va.



* A 39-year-old mother and her 8-year-old daughter died when their car slid backwards and crashed on the Wild Wonder roller coaster at Gillian's Wonderland Pier in Ocean City, N.J.

However, fatal injuries are clearly the exception. The vast majority of these cases involve injuries that are neither life-threatening nor life altering, according to Tom Brophy, a defense lawyer in Morristown, Pa.

Morris says he has defended about 150 amusement park cases in his 18 years of practice and that 125 of them involved relatively minor injuries. He says routine cases typically settle for less than \$10,000.

According to Jack Robinson, a defense attorney in a three-partner firm in Denver, the most common suits involve whiplash, back strain and trip and falls.

Cases that involve more serious injuries often settle for "high six to seven figures," says Spiva, the Savannah plaintiffs' lawyer.

According to U.S. News and World Report, the median award for compensatory damages since 1993 is \$61,653, with a high of \$2.7 million for a broken thumb in a waterslide accident. These figures are based on a study conducted by Jury Verdict Research of Pennsylvania.

Although the potential exists for large verdicts, plaintiffs' attorneys offer a warning: If you take a case against any of the larger parks, you better be prepared for battle against a corporate giant and all that entails – stonewalling during discovery and a host of other pretrial tactics that drive up the cost on litigation in terms of both money and manpower.

Cases that involve serious injuries are also expert-intensive, which further adds to the up-front expense.

"We have a bio-mechanical engineer, an engineer, an amusement park expert, a life care planner, an orthopedic surgeon, a neurosurgeon and other medical providers giving expert witness testimony," says Randall Hood, who has a case slated for trial this summer against Paramount Carowinds, a fixed-site park in South Carolina. The case involves a woman who received neck injuries when her bumper car was slammed by a reckless driver.

But there's a payoff for those who are up for the challenge – plaintiffs' attorneys say they often have enormous leverage in settlement negotiations.

"The parks don't want the public to know how dangerous they are," says Spiva. "Because the industry relies solely on tourism, cases see larger recoveries than auto accident suits. And in Georgia, even small parks, including the fly-by-night ones like those in the K-Mart parking lots, are required to have at least one million dollars in [accident insurance] coverage."

Lax Regulation

Defense attorneys say that since the financial success of amusement parks depends on safety, the industry is scrupulous about designing, testing and inspecting rides. They contend that riding on a scream-inducing roller coaster is, in fact, safer than going for a Sunday drive.

But plaintiffs' attorneys argue that a patchwork of regulations across the country has resulted in lax safety measures at some parks.

Although the federal government regulates the inspection of mobile carnivals and fairs, it does not have authority over fixed-site amusement parks. As a result, enforcing safety standards for fixed-site parks is done on a state-by-state basis by a hodgepodge of various agencies.

"In Texas, the department of insurance regulates amusement parks, because in Texas we don't like to regulate businesses so we just require that they have insurance coverage and then they can go out and kill people," says Joe Crews, partner in a five-lawyer firm in Austin, Texas.

Worse yet, the District of Columbia and nine states – Alabama, Arizona, Kansas, Mississippi, Missouri, Montana, North Dakota, South Dakota and Utah – don't require any inspections of these parks. And some states let the largest parks conduct their own inspections. This is true in Florida for any park that has more than 1,100 employees.

Plaintiffs' attorneys also note that the rides used at traveling carnivals are repeatedly dismantled and put back together – which they believe increases the chances for mechanical error.

"Fixed location parks have faster, bigger, newer rides that are pushing the envelope on speed, height and forces exerted on the human body," says Cecil Clay Davis, an associate in Spiva's firm. "But at smaller parks, you may see older rides, and if they're getting to be decades old, they're not as safe as they should be."

According to Crews, this is a serious problem in Texas, which doesn't require owners of mobile rides to report accidents that occurred in other states.

"It's a great system if you're the owner of the ride," he says.

Case Assessment

Amusement park cases typically hinge on one or more of three defenses – a preexisting condition, assumption of risk or comparative negligence.

* Pre-existing condition.

One of the strongest defenses is that the patron suffered from the ailment before they even arrived at the park.

"Ultimately, we look at the plaintiff's pre-existing medical conditions and many times argue that the person was predisposed to a herniated disc and that it didn't or may not have happened on the ride," says Brophy, who defends several amusement parks including Busch Entertainment and Six Flags Great Adventure. "Juries are receptive to that argument because, for example, most major roller coasters in the country have been [designed] by sophisticated engineering companies and tested substantially before they're put into operation."

If there isn't strong causation, the case probably isn't worth taking, plaintiffs' lawyers say.

Obviously, the defense is much stronger if the patron knew about the condition – such as a person who gets on a roller coaster in spite of recent heart surgery or a person with back problems who goes on a waterslide.

As in any personal injury case, the existence of a previous injury often comes down to a battle of the experts. But when the issue is cloudy, the decision on whether to take the case often comes down to something more subjective.

"You can take these cases as long as it's a serious injury and you have a very nice plaintiff," says David Glickman, partner in a four-attorney firm in Beverly Hills. "They'll blow out anyone that's not nice."

* Assumed risk.

Another standard defense is that the patron knew there was a risk of injury before getting on the ride. Of course, this isn't likely to work when someone is killed or permanently incapacitated, but it is a standard defense for whiplash, sprains and even minor fractures.

Plaintiffs often try to undermine this defense by focusing on the visibility and clarity of the warnings. Sometimes the warning consists of a small sign that can't be seen in a crowded waiting line. Other times, plaintiffs will argue that the warning wasn't explicit enough.

According to Novack, the solo who represented Jacob in the Indiana Jones ride case, this defense is much more effective when patrons can see the entire ride from the waiting line. In those cases, the defense can argue that patrons knew exactly what they were in for.

But when most of the ride is indoors or out of view, as with many theme park rides, the plaintiffs may have an advantage.

"Oftentimes you can't see ride as you approach so you don't know what's going to happen," says Novack. "The signs say the ride will be very exciting,

but you don't knowingly assume the risk that you're going to get an injury to the neck or back or brain."



Novack also points out that the less controlled the ride is, the stronger the assumption of risk defense will be.

"A ride where the actual movement is controlled by the defendant is different from going on a river raft where the assumption of risk has been implied," he says.

One strategy that Novack has used in his cases is that the patron's assumption of risk is eliminated by the park's failure to publicize the accident statistics for various rides.

"So we argue that there's no way for patrons to know what they're getting into," he says. "They take a chance because they've been lulled into a false sense of security."

Another way to disarm the assumption of risk defense is to raise the standard of care.

"If you're a smart enough lawyer you can get a common carrier instruction and then they owe the passenger the highest duty of care," says Glickman.

The common carrier liability standard is one typically applied to airlines based on the fact that they carry large numbers of people for hire. It states that the company is responsible for the client's safety almost regardless of fault, explains Novack. So if a patron put his hands outside the ride, it doesn't matter that the injury is partly his fault because the park is responsible for creating a ride that is safe in spite of minor transgressions by its patrons.

* Comparative negligence.

Defense attorneys contend that the vast majority of amusement park injuries occur because patrons break the safety rules – maybe they put their hands in the air while riding a roller coaster, loosened their seat belts or stood up on rides when they are warned to remain seated.

"Most of the cases I've defended deal with people not following park rules," says Denver attorney Jack Robinson, who has represented Six Flags' Elych Gardens for the past six years. "And comparative negligence is a common defense."

Brophy describes a typical comparative negligence case in which a woman tripped over a balance beam, broke her hip and sued. Unlike most cases Brophy defends, this one went to trial. The park argued that the woman should have been paying attention; the woman claimed the park should have shielded the beam so no one could trip over it.

The jury agreed with both sides, awarding the woman \$75,000 but reducing that substantially for her own comparative negligence.

In one of Spiva's cases, a 7-year-old girl was thrown from a junior roller coaster and fractured her skull at a small fixed park near Savannah, Ga. The park argued that the girl stood up before she was ejected.

Spiva countered that the girl was thrown into a standing position and that the restraining device should have been designed so that this was impossible.

"A valid question is, 'How was this person able to stand up in the first place?'" he says.

This is a standard response to comparative negligence – that the park has a duty to protect patrons from actions that, although unwise, are predictable.

Glickman describes one such case.

In 1995 an 11-year-old boy was thrown out of the Tea Cups ride at Disneyland. The boy broke his back and suffered a concussion and minor brain damage.

The park argued that the boy put his hands over his head and outside the ride even though patrons were specifically warned before boarding that they must keep their hands inside at all times. So Glickman set out to prove that (1) the boy had his hands straight up inside the ride and (2) in spite of the warnings, patrons did this all the time.

He hired a private investigator to videotape the Tea Cups. He says the tapes showed large numbers of patrons doing exactly what the boy had done. Furthermore, he obtained a Disneyland brochure that showed gleeful patrons on the Tea Cups with their hands over their heads.

Glickman lost the case, but the judge has granted a retrial.

Battling the Hometown Hero

Glickman says his loss in the Tea Cups case says more about the difficulty of battling Disney than it does about the merits of his case.

He notes that on the back of every admissions ticket there is language stating that any suit filed against Disneyland will be tried in Orange County, Calif. Since Disney is the region's largest employer and has a sterling reputation for patron service, suing the park in its hometown is clearly an uphill battle, says Glickman.

"They do this in an attempt to maintain control over where litigation is being handled and to get the benefit of hometown jurors," says Novack.

He suggests that lawyers explore the possibility of moving the case based on the location of the ride manufacturer or designer.

"Try to sue where the ride developer is located rather than where the accident occurred," he says. Of course, this is possible only when the case involves a designer or manufacturer that contributed to the injury.

Litigating Successfully

Plaintiffs' attorneys recommend several steps lawyers should take in developing amusement park cases.

First, they should visit the accident scene immediately to take photos and videos. Parks have come under increasing criticism in recent years for cleaning up accident scenes before the authorities arrive. This criticism has been raised in the editorial pages of the Los Angeles Times and in Congress by Rep. Edward Markey, D-Mass.

For example, in 1996 a 17-year-old boy lost a finger after his ring caught on a screw on Disneyland's Splash Mountain ride, and court records and testimony show that a maintenance worker tightened the screw and someone cleaned up the blood before photos of the accident site were taken.

Lawyers should also obtain witness statements as soon as possible, since customers who may have witnessed the accident are likely to return home and employees are often transient, especially in the case of traveling carnivals.

Furthermore, it's important to conduct a thorough background check on the ride operator to make sure he or she has been properly trained in safety, operation and maintenance of the ride as well as in first aid. Spiva notes that you'll rarely find anyone at a small park with these qualifications.

Hood agrees, saying poor training was the direct cause of one client's injuries. She was riding on the bumper cars at Paramount Carowinds in South Carolina when another car slammed into her, causing serious neck injuries. She has since amassed more than \$50,000 in medical bills and has had a morphine pump implanted near her diaphragm.

Hood claims the ride was operated by two young, inexperienced operators who failed to take action when another patron began driving fast in the wrong direction. The ride has an emergency switch to cut the power to cars in situations like this.

"But these two high-school-aged operators weren't worried about stopping the kid who was flying around – they were worried about socializing," says Hood. "And that's just part of the problem. Training sessions only last a day or two, which is woefully inadequate. So essentially you have a ride that [requires] millions of dollars in technology to build, yet you're using a six-dollar-an-hour

worker to run it.

"It's a nightmare that they've got these kids running these damn machines that can kill somebody."

Spiva also suggests using open records laws to obtain safety records.

"Subpoena the park, the State Department of Revenue and OSHA's records," he says. "This research could disclose prior knowledge of injuries as well as subsequent and remedial repairs. And the Department of Revenue frequently obtains statements from the employees and witnesses."

Crews did this during his suit, which involved a 15-year-old girl who died in 1998 when she was flung out of a Himalaya ride and into a metal pole at a mobile fair in Texas. Crews argued that the girl was killed because the lap bar broke off the ride.

"What we found through that process was a pretty ugly history of accidents and of safety problems concerning our particular ride," says Crews. "In 1991 in California, for example, a young girl was sitting in the same spot [as the victim in my case] and she was thrown in precisely the same manner. That girl is alive today, but she has a permanent paralysis in her right arm."

Crews adds that this information bolstered his case against the ride's owner, B&B Amusements, which settled for a confidential amount. While Crews can't reveal the amount of the settlement, he notes that "it was for a lot of money. I can tell you that fortunately for us there was \$10 million in insurance coverage."

When it comes to experts, Spiva says plaintiffs' lawyers should have at least two – an amusement industry operational safety consultant and an engineer – on any case that involves serious injury.

"An expert should have practical experience and background in the industry," says Spiva. "Law Engineering and Environmental Services in Jacksonville, Florida, is an excellent source for experts, including engineers who are experienced in carnival and rollercoaster claims."

Hood suggests going to www.lawyerpages.com and clicking on "amusement parks" to locate additional amusement park consultants. "There are only 10 to 20 well-known ones in the country," Hood adds.

Plaintiffs' attorneys should also interview state inspectors.

"In Georgia, the Department of Labor, which is the same department that inspects elevators, is charged with inspecting amusement parks," says Spiva. "While the state has significant protections, such as official immunity, for state employees who conduct state-mandated inspections, the inspectors are usually cooperative. And often the inspectors have assistants who may prove

valuable in your investigation – they are frequently more transient and therefore more likely to talk to you."

If inspectors don't answer your questions, Spiva suggests locating former inspectors who "will generally be very cooperative in providing information about the park."

Experience

For cases that involve serious injuries, Hood recommends that attorneys have experience in either complex products liability or med-mal cases.

"You just need to have some complex litigation background," he says. "Essentially what you have in the majority of cases is a very large corporate entity with deep pockets, and also a design defect case against the manufacturer."

"Lawyers who do products liability or medical device cases are going to be able to incorporate these into their practices without too much effort because they have experience with biochemical engineering and products liability experts."

Spiva agrees.

"Any personal injury lawyer could handle a case involving a broken bone from one of these rides," he says. "But it takes specific knowledge to handle closed head or traumatic brain injuries. And knowing and understanding the types of injuries involved in these cases is essential."

Spiva adds that he's a member of ATLA's traumatic brain injury litigation group and attends "at least 20 hours per year in continuing legal education dealing with traumatic brain injuries."

For example, in the case of the girl who fractured her skull after falling off the roller coaster, Spiva needed detailed knowledge of the connection between head injuries and cognitive defects. He says his "concentration in claims involving brain injuries" helped him obtain a "favorable settlement."

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