

2006

Rider Beware: Relying on the Courts and a Nationalized Rating System to Address the Duty of Care Owed to Amusement Park Attraction Guests

Tobias Butler

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/jetlaw>



Part of the [Torts Commons](#)

Recommended Citation

Tobias Butler, Rider Beware: Relying on the Courts and a Nationalized Rating System to Address the Duty of Care Owed to Amusement Park Attraction Guests, 9 *Vanderbilt Journal of Entertainment and Technology Law* 369 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol9/iss2/4>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Entertainment & Technology Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Rider Beware: Relying on the Courts and a Nationalized Rating System to Address the Duty of Care Owed to Amusement Park Attraction Guests

I.	DESIGNING THRILLS	372
II.	THE SAFETY OF FORCES INVOLVED	374
III.	DEFINING EXPECTATIONS.....	377
	A. <i>Legislative Action</i>	377
	B. <i>Defining Liability in the Courts</i>	379
	1. The Duty of Ordinary Care	380
	2. The Duty of the Utmost Care (Common Carrier)	381
III.	ANALYZING THE STANDARDS	383
	A. <i>The Benefits of a Common Carrier Standard</i>	383
	1. The Language of the Law	384
	2. The Point of Using the Transportation	385
	3. Consistency of Enforcement	387
	4. Promoting Rider Behavior	388
	B. <i>The Assumption of the Risk Defense</i>	391
IV.	SOLVING THE PROBLEM	394
	A. <i>Imposing a Common Carrier Standard</i>	394
	1. Issue of Tort Law as a Regulatory Method	396
	B. <i>Creating a Federal Ratings System</i>	398
	1. Issue of Commerce Clause Authority	399
	2. Issue of Complacency	400
V.	CONCLUSION.....	401

The sun is shining bright in the sky on a beautiful Monday morning. A boy leaves his mother's side and excitedly trots down the cement path. With a bright red sign to the left, he lines up behind other children and gets ready to board the large yellow vehicle. As soon as they are seated, ready to go, the operator releases the brake. The boy waves to his mom, as he always does, and she waves back. She is a bit anxious, but this trip has been made many times by her child and others. The vehicle starts to move, and the passengers begin their journey. The bus is not traveling to a school or camp, however.

It is instead 3,486 feet of twisted metal that will take them over 200 feet in the air, sending them upside down, through tunnels, and over hills at speeds over 60 mph. It is a wild, sense-heightening experience meant to shock and stress the body and mind, a “thrill ride.”

Even though this yellow vehicle is a roller coaster train not operated by a bus driver, the fundamental concern in this situation is still safety. People have high expectations of safety regarding public transportation. However, amusement parks do not always invoke the same fears that automobile or airplane travel might. People often turn a blind eye to the massive machinery and look solely to the scenery and fun. After all, these are places of fun and merriment; they are “where magic lives” and “a vacation from the ordinary.”¹ But, such an unconcerned view can result in unseen dangers.

The theme park industry has become a major player in entertainment-related business, with estimated annual revenues of over \$9.3 billion.² With individual parks bringing in as many as 16.2 million guests per year,³ operational safety is a central focus. “While the amusement park and attractions industry is in the business of fun, it takes all aspects of this business very seriously, especially ride safety. . . . Thus, operators and manufacturers work continuously to provide a safe and enjoyable visit for every guest.”⁴ As with any large piece of machinery, maintenance is integral to proper operation, and parks go to great lengths to ensure proper maintenance.

1. See Wayne Friedman, *Attendance Down: Theme Parks Face Tough Summer*, ADVERTISING AGE, Apr. 23, 2003, at 14, available at LEXIS. “Where Magic Lives” was the central slogan of the Walt Disney World Resort’s advertising campaign for 2003. *Id.* “A vacation from the ordinary” was the central slogan of Universal Orlando Resort for 2003. *Id.*

2. U.S. CENSUS BUREAU, 2004 SERVICE ANNUAL SURVEY, TBL. 9.9 (Selected Arts, Entertainment, and Recreation Industries (NAICS 71) – Estimated Sources of Revenue for Employer Firms: 2003 Through 2004), available at http://www.census.gov/svsd/www/services/sas/sas_data/71/sas71_99_2004.pdf.

3. See Juliana Koranteng, *Worldwide Top 50: Parks Persist in the Face of Calamity*, AMUSEMENT BUS. MAG., Dec. 27, 2005, available at http://www.amusementbusiness.com/amusementbusiness/industrynews/article_display.jsp?vnu_content_id=1001738098 (explaining that Disney’s Magic Kingdom park at the Walt Disney World Resort in Lake Buena Vista, FL, is the top attended park in North America and the world based on annual attendance estimates). As a whole, the 28 largest parks in North America saw a 4.1% increase in attendance from 2004 to 2005. *Id.* This translates to approximately 175,970,000 guests. *Id.*

4. International Association of Amusement Parks and Attractions, *Safety in the Amusement Industry: Serious Business in the United States*, <http://www.iaapa.org/modules/News/index.cfm?fuseaction=Details&mtid=3&iid=1046> (last visited Dec. 20, 2006) [hereinafter *Safety in the Amusement Industry*]; see also Press Release, Int’ Ass’n of Amusement Parks and Attractions, *Safety First in Attractions Industry* (Jan. 24, 2006), <http://www.iaapa.org/modules/News/index.cfm?fuseaction=Details&mtid=1&iid=115> 1 [hereinafter *Safety First in Attractions Industry*].

Unfortunately, safety measures taken by operators are not infallible. When something goes wrong, a guest is often hurt or even killed. It is then the role of the law to determine if the operator met his obligation to his guests.

Currently, the federal government specifically exempts fixed-site amusement park attractions from federal regulation.⁵ Scholars, lobbyists, legislators, and industry members have debated whether these regulations are better suited to the states or to federal regulation under its Commerce Clause authority.⁶ The debate has not looked as closely at the judicial treatment of roller coasts, more specifically the state court split over whether roller coasters and other transportation-based attractions fit within the definition of "common carrier."⁷ This classification carries with it a higher expectation of due care. Some courts have been hesitant to apply this heightened standard to entertainment-based transportation. Applying the lower standard, however, leaves a grey area regarding the safety measures expected of amusement park owners.

Also, because this sits in tort law, the threat of major litigation could itself exhibit regulatory ability. Courts have required extensive information in applying the assumption of the risk defense. This is the strongest defense an operator can raise, but determining what an individual rider understood or should have understood before boarding is difficult. Many injuries on amusement attractions stem directly from riders ignoring safety warnings and acting inappropriately. Again, people often let down their guard when it comes to a day at the amusement park, even though that day of fun is actually a day of riding on heavy machinery.

This note explores the history of amusement park attraction regulation, including both the legislative and judicial treatment, and highlights the deficiencies in court approaches in light of "common carrier" law. First, is a brief history of thrill attractions in America as well as regulation of these attractions by both the legislature and judiciary. Specifically it will discuss the major approaches courts have taken in applying or refusing to apply the "common carrier" definition

5. See 15 U.S.C. 2052(a)(1)(I) (2000).

6. Compare Chad D. Emerson, *The Continuing Showdown Over Who Should Regulate Amusement Attraction Safety: A Critical Analysis of Why Fixed-Site Amusement Attraction Safety Should Remain State-Governed*, 28 SETON HALL LEGIS. J. 1 (2003), with Patricia E. Ziminski, *Are We Being Taken for a Ride? The Need for Uniform Federal Regulation in the Recreation Industry*, 51 SYRACUSE L. REV. 883 (2001).

7. Compare *Lamb v. B&B Amusements Corp.*, 869 P.2d 926, 930-31 (Utah 1993) (applying a "reasonably prudent person" standard of care to an amusement ride operator), with *Gomez v. Superior Court*, 113 P.3d 41, 47-48 (Cal. 2005) (holding amusement ride operators to the higher standard of care applied to common carriers).

to these attractions. Second, it will analyze why any standard less than “utmost care” does not provide sufficient power for the courts to create a consistent standard that can regulate operator behavior and expectations. It will also explore the inadequacies of warnings and information about the ride that is provided to guests prior to boarding. Finally, it will suggest that the courts adopt a heightened standard that is balanced by a more liberal application of the contributory negligence defense. In order to improve rider information and decisions, it suggests creating a nationalized ratings system with more accurate descriptions of the forces and health risks associated with all attractions to create more informed riders.

I. DESIGNING THRILLS

America has developed a strong love for roller coasters, “thrill rides,” and other transportation-based attractions. Today, over 620 roller coasters alone are operating in the United States, and thrill rides like this are among the most popular offerings at amusement parks.⁸ The history of how today’s modern thrill ride evolved is somewhat debated, but the quest for thrills likely began with Russian ice slides.⁹ These large wooden structures were covered in a sheet of water and “ridden” by boarding a hollowed and lined block of ice.¹⁰ Other contraptions were built across Europe that took small cars up tracks and allowed them to roll gently down the course.¹¹ Most used manpower to get the cars back up the inclines or a very crude cable system.¹²

The modern roller coaster got its American start as a modification to a mining railway.¹³ In 1827, Josiah White and Erskine Hazard built a stretch of track from their coal mine on Summit Hill to the Lehigh Canal in Mauch Chunk, Pennsylvania, eighteen miles away.¹⁴ Because the trek was entirely downhill, dropping approximately 96 feet every mile, the trains needed very little force to start.¹⁵ Although new railways made the tracks obsolete for mining, tourists began requesting rides because of the beautiful mountain

8. Roller Coaster Census Report: World: North America: USA, <http://www.rcdb.com/census.htm?location=59> (last visited Dec. 20, 2006).

9. DAVID BENNETT, ROLLER COASTER 9 (1998).

10. *Id.*

11. *Id.* at 11.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

scenery.¹⁶ Eventually, two steam engines were employed with a “barney”¹⁷ to return the cars to the summit, making the entire round trip an attraction.¹⁸ The eighty minute ride, named the Switchback Railway, cost \$1 and became a huge tourist destination.¹⁹ The mechanical roller coaster was born.

The roller coaster separated from the confines of natural terrain when La Marcus Adna Thompson built his first switchback railway in 1884.²⁰ As one of Coney Island’s attractions, this simple structure was a fifty foot tall structure with an undulating track that used attendants to push the cars back up the track.²¹ As its popularity grew, new creative attractions that featured larger hills, loops, and dramatic scenery started appearing along both American coasts.²² Other attractions, like Ferris’ mechanical wheel, soon joined roller coasters.²³ Names like Coney Island went from evoking calm stretches of shoreline to major tourist destinations – “the amusement mecca of the U.S.”²⁴ In fact, parks like Chutes Park in Chicago opened and offered attractions as the sole source of amusement.²⁵ It is estimated that over 2,000 rides were operating in America before the stock market crash of 1929.²⁶ This was a golden age for amusement rides and their design.²⁷

With the Great Depression in the 1930’s and the need for materials during the Second World War, amusement parks fell on hard times. Even with their popularity suffering, though, the engineering of new roller coaster designs and technology continued.

16. *Id.* at 12.

17. A “barney” is a small car attached to an engine by a cable that was used to pull the cars back up the incline. It was originally designed and installed for efficiency in loading and unloading coal, but it was kept on since it allowed use of the entirety of the track. *Id.*

18. *Id.* at 11-12.

19. *Id.* at 12-13.

20. *Id.* at 15.

21. *Id.*

22. *Id.* at 14-15, 17.

23. In fact, the Ferris Wheel served as an inspiration to George Tilyou, one of the major purveyors of Coney Island’s Steeplechase Park. *Id.* at 19.

24. *Id.* at 18.

25. Chutes Park opened in 1894 and was “the first park to be enclosed and charge an admission.” National Amusement Park Historical Association, Industry History, <http://napha.org/nnn/Default.aspx?tabid=69> (last visited Dec. 20, 2006). Chutes Park is considered by many to be the first “amusement park” in the modern sense of the term. *See id.*; Encyclopedia of Chicago, Amusement Parks, <http://www.encyclopedia.chicagohistory.org/pages/48.html> (last visited Jan. 3, 2007).

26. BENNETT, *supra* note 9, at 27.

27. *See id.*

Wood was the sole material for roller coasters until a cartoonist paired with Karl Bacon, Edgar Morgan, and Walter Schulze of Arrow Dynamics to develop a bobsled-type adventure. Disneyland's "Matterhorn Bobsled," which debuted in 1959, was the first roller coaster to use tubular steel track.²⁸ Its new design literally redefined the physics of roller coaster design,²⁹ leading to the development of loops, tight turns, and other such maneuvers that simply were not employable on a traditional wooden track. The popularity of the roller coaster truly resurfaced in the late 1970's and early 1980's.³⁰ With this newly restored popularity, the insights of designers such as Arrow Dynamics, Bollinger & Mabillard, Anton Schwarzkopf, and others laid the foundation (sometimes literally) for the steel megacoasters that populate amusement parks and theme parks across the world today.³¹

The quest for thrills has not been limited to roller coasters, though. Popular attractions like free-fall towers, tethered "sky" coasters, and spinning rides are some of the new, popular offerings at these parks. Creators such as S&S Power use pneumatic air to launch riders up and down towers.³² Others, such as Environmental Tectonics Corporation (ETC) created the Multiple Arm Centrifuge (MAC) which uses a large centrifuge to expose riders to high, sustained gravitational forces along with visual displays to simulate an environment.³³ Attractions today run the gamut to create immersive and exciting experiences.

II. THE SAFETY OF FORCES INVOLVED

The physics behind today's thrill rides often means subjecting people to much greater forces than before. For example, a day at Cedar Point in Sandusky, Ohio, *Amusement Today Magazine's* top

28. *Id.* at 52.

29. National Amusement Park Historical Association, *supra* note 25.

30. *Id.*

31. BENNETT, *supra* note 9, at 26-28, 52, 78.

32. S&S Power, Inc., About S&S Power, Inc., <http://www.s-spower.com/history.html> (last visited Dec. 20, 2006).

33. Entertainment Technology Force, Space Launch and Flight Sim: Sustained G-Force Anchor Attraction, <http://www.therideworks.com/casestudies/spacelaunch/> (last visited Dec. 20, 2006). ETC first developed this technology with Walt Disney Imagineering for "Mission: Space" at Disney's Epcot Theme Park. See Saferparks.org, Mission: Self Protection, http://www.saferparks.org/saferparks_agenda/editorials/mission_selfprotection.php (last visited Dec. 20, 2006). See generally Press Release, Environmental Tectonics Corporation, Environmental Tectonics Corporation Signs Major Entertainment Ride Contract; Company Backlog Hits Record Level (Feb. 2, 2000), http://www.therideworks.com/pressrel/PR_2000_02_00.htm.

rated amusement park for nine years in a row,³⁴ offers access to incredibly intense experiences. Just some of their more popular rides include: Millennium Force, a 310 feet tall steel coaster with a near-vertical drop and top speed over 90 miles per hour;³⁵ Top-Thrill Dragster, a 420 feet tall launched steel coaster with a vertical incline and vertical drop that reaches launched speeds of 120 miles per hour in four seconds;³⁶ Mean Streak, a 161 feet tall wooden coaster, which are historically known for rough rides, that travels over 60 miles per hour;³⁷ Mantis, a steel coaster on which riders stand up that features 4 different types of inversions;³⁸ and Power Tower, a set of towers which use pressurized air to either blast riders up or pull riders down over 200 feet along the sides of the towers.³⁹

These experiences represent a small sampling of the 68 mechanical rides this one park offers.⁴⁰ Additionally, other parks, particularly those owned by major film distributors such as Disney and Universal Studios, have incorporated theatrical-oriented design elements rather than rely solely on the pure physical thrill.⁴¹ In fact,

34. Press Release, Amusement Today Magazine, Annual Awards for Amusement, Theme, and Waterparks Announced for 2004 (Aug. 27, 2004), <http://www.amusementtoday.com/2004gta82704.html> (last visited Dec. 20, 2006) (citing Cedar Point in 2004 as a seven-time winner); Press Release, Amusement Today Magazine, The "Best of the Best" in the Amusement Industry Honored at Golden Ticket Awards (Aug. 27, 2006), <http://www.amusementtoday.com/2006gta82706.html> (last visited Dec. 20, 2006) (announcing the 2006 winners); Amusement Today, 2005 Golden Ticket Award Winners, <http://www.amusementtoday.com/2005gtaParkAndRide.html> (last visited Dec. 20, 2006) (listing the 2005 winners).

35. Roller Coaster Database, Millennium Force, <http://www.rcdb.com/id594.htm> (last visited Dec. 20, 2006).

36. Roller Coaster Database, Top Thrill Dragster, <http://www.rcdb.com/id1896.htm> (last visited Dec. 20, 2006).

37. Roller Coaster Database, Mean Streak, <http://www.rcdb.com/id16.htm> (last visited Dec. 20, 2006).

38. Roller Coaster Database, Mantis, <http://www.rcdb.com/id7.htm> (last visited Dec. 20, 2006).

39. See High Capacity Thrills, Multi-Tower Complex, <http://www.s-spower.com/download/multi.pdf> (last visited Jan. 3, 2007); Theme Parks Online, Power Tower, <http://www.themeparksonline.com/tpoRides.asp?ID=1903&ParkID=18> (last visited Dec. 20, 2006).

40. See CedarPoint.com, Rides & Ride Policies, <http://www.cedarpoint.com/public/news/faq.cfm> (last visited Dec. 20, 2006).

41. See generally Brenda J. Brown, *Landscapes of Theme Park Rides: Media, Modes, Messages*, in *THEME PARK LANDSCAPES: ANTECEDENTS AND VARIATIONS* 235 (Terence Young & Robert Riley, eds. 2002), available at <http://www.doaks.org/TParks/TPch10.pdf>.

the use of stage effects such as strobe lights, smoke effects, and pyrotechnics can be common.⁴²

While this may seem unsettling to the ordinary reader, it does not translate into a disregard for the safety of riders. In fact, the modern roller coaster is much safer than many of its predecessors. The coasters of the 1920's were known for extremely sharp drops, unbanked curves, and other treacherous features. One coaster, "Lightning" at Revere Beach in Massachusetts, had a fatality on its first day of operation.⁴³ In 1926, "a girl fell to her death and the ride had to be stopped for 20 minutes so that her body could be removed."⁴⁴ In fact, Harry Traver's Crystal Beach Cyclone at Crystal Beach Park, Ontario, employed a full-time nurse at the unloading station.⁴⁵

Safety is the first concern of any park operator.⁴⁶ In addition to strict standards imposed by park operators, forty-two states have enacted requirements for ride safety.⁴⁷ In 2003, the International Association of Amusement Parks and Attractions (IAAPA), working with the National Safety Counsel, found approximately 2,486 guest injuries occurred during the 2001-2002 season while approximately 300 million people visited facilities with transportation-based attractions.⁴⁸ Therefore, these major machines are not untamed beasts.

42. For example, Universal's Revenge of the Mummy roller coaster alone features strobe lights, large robotic figures, and an igniting ceiling, among other elements. See John Calhoun, *Mummy Dearest*, ENT. DESIGN, Aug. 2004, at 8, available at LEXIS.

43. BENNETT, *supra* note 9, at 40.

44. *Id.*

45. *Id.* It should be noted that the Crystal Beach Cyclone is the only coaster that has ever reported having such measures, but this does show the level of danger guests were exposed to on these attractions. *Id.*

46. See Safety in the Amusement Industry, *supra* note 4; Safety First in Attractions Industry, *supra* note 4.

47. *How Safe are Roller Coasters?*, CBS NEWS, June 25, 2002, <http://www.cbsnews.com/stories/2002/06/25/earlyshow/living/parenting/main513414.shtml> (transcribing an interview by the CBS Early Show with Bill Powers, representative of the International Association of Amusement Parks and Attractions, on June 25, 2002). Most of these standards have come from the ASTM. Robert E. Ammons & Vuk Stevan Vujasinovic, *Is the All-American Amusement Park Safe?*, 40 TRIAL 30, 33 (June 2004) ("In 1978, ASTM created a technical committee on amusement-ride safety standards . . . called ASTM F-24, [which] developed 15 standards addressing ride design, operations, maintenance, quality control, and testing. The most recent of these, F2291-03a--issued late last year and known as the 'world standard' for amusement-ride design--details specific criteria, including g-force limits.").

48. Press Release, International Association of Amusement Parks and Attractions, IAAPA and National Safety Counsel Publish Ride Safety Material, Including Initial Results of IAAPA's Incident Reporting System (June 20, 2003), <http://www.iaapa.org/modules/News/index.cfm?fuseaction=Details&mtid=1&iid=1065> [hereinafter Counsels Publish Ride Safety Material].

III. DEFINING EXPECTATIONS

A. Legislative Action⁴⁹

Legislation has established high expectations for ride operators regarding operation and maintenance standards. Keeping a low injury record requires constant attention and near-flawless maintenance. Historically, regulation of the safety and maintenance of amusement park attractions has been largely left to the states, which “traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.”⁵⁰

In 1972, the Consumer Product Safety Commission (CPSC) was authorized to determine mandatory product safety standards and to initiate product recalls.⁵¹ The CPSC began intruding into amusement park regulation in *CPSC v. Chance Manufacturing*,⁵² in which the court held that the Zipper, an attraction with cars that travel vertically along a rotating column-like track, was a product for “personal use.”⁵³ “Because one rides the Zipper machine for its own sake and for the pleasure and thrill resulting therefrom, and not for any other purpose, it is used ‘in recreation.’”⁵⁴ The court found the CPSC’s jurisdiction over this specific attraction as a “consumer product” was proper.⁵⁵ After *Chance Manufacturing*, the CPSC

49. Although this article does not address whether a state or federal orientation of the law is a better approach, it is necessary to set forth the general progression of legislative treatment, especially since this language helps define both the party acting on behalf of operator negligence and the appropriate standard in analyzing these cases.

50. *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 756 (1985) (internal quotations marks omitted).

51. Consumer Product Safety Act, Pub. L. No. 92-573 §7, 86 Stat. 1208, 2056 (1972). The CPSC was created by Congress in 1972 to serve as an overarching agency that centralized areas of regulatory authority formerly included in segmented agencies. Specifically, the CPSC combined certain products formerly controlled by agencies such as the Food and Drug Administration, Center for Disease Control, Department of Commerce, Federal Trade Commission, Department of Agriculture, and Department of Health, Education, and Welfare. See S. Rep. No. 92-749 (1972), reprinted in 1972 U.S.C.C.A.N. 4573-4574; see also Consumer Product Safety Act, Pub. L. No. 92-573 §2, 86 Stat. 1208, 2051 (1972).

52. *Emerson*, *supra* note 6, at 25-28 (citing *Consumer Prod. Safety Comm’n. v. Chance Mfg.*, 441 F. Supp. 228 (D.D.C. 1977)).

53. *Chance*, 441 F.Supp. at 233.

54. *Id.* at 233-34; see also 15 U.S.C. §2052(a)(1) (2000).

55. *Emerson*, *supra* note 6, at 26-27.

continued to expand its reach, and courts carved out exceptions regarding just what type of attraction the CPSC could regulate.⁵⁶

Congress next addressed this issue in 1981 by amending the Consumer Product Safety Act (CPSA).⁵⁷ The amendment limited the CPSC's reach by defining "consumer product" as:

includ[ing] any mechanical device which carries or conveys passengers along, around, or over a fixed or restricted route or course or within a defined area for the purpose of giving its passengers amusement, which is customarily controlled or directed by an individual who is employed for that purpose and who is not a consumer with respect to that device, and *which is not permanently fixed to a site*.⁵⁸ Such term does not include such a device which is permanently fixed to a site.⁵⁸

The purported goal of amending the CPSA was to encourage state involvement in amusement ride safety,⁵⁹ but some argue that extensive lobbying by industry leaders led to specifically removing fixed-site amusement attractions from the definition of "consumer product."⁶⁰

In 2003, Representative Edward Markey from Massachusetts introduced the National Amusement Park Ride Safety Act.⁶¹ This act serves to strike the final statement from the 1981 Amendment to the CPSA.⁶² Currently, states are addressing the issue individually. Approximately six states have not taken any steps toward regulation.⁶³ Some states have created advisory boards that oversee, counsel, and inspect rider operations.⁶⁴ Others, like Florida, take into

56. See, e.g., *Tex. State Fair v. Consumer Prod. Safety Comm'n*, 481 F. Supp. 1070 (N.D. Tex. 1979) (fining an aerial tramway to be within the jurisdiction of the Consumer Product Safety Commission). *Contra Walt Disney Prod. v. Consumer Prod. Safety Comm'n*, No. 79-0170-LEW-(Px), 1979 U.S. Dist. LEXIS 12996 (C.D. Cal. 1979) (same). See also *Robert K. Bell v. Consumer Prod. Safety Comm'n*, 645 F.2d 26 (10th Cir. 1981) (overruling a district court determination that an aerial tramway is a "consumer product").

57. See Emerson, *supra* note 6, at 37.

58. 15 U.S.C. 2052(a)(1)(I) (2000) (emphasis added).

59. See Emerson, *supra* note 6, at 39 ("The goal of this reform was to encourage states to 'assume greater responsibility for the safety of amusement rides located at permanent cites.'") (quoting H.R. Rep. No. 98-114, at 27 (1983)).

60. See Ammons & Vujasinovic, *supra* note 47, at 33. These commentators suggest that this somewhat blatant

61. National Amusement Park Ride Safety Act Introduced to Congress, <http://www.rideaccidents.com/2003.html#may22> (last visited Dec. 20, 2006); see also H.R. 2207, 108th Cong. (1st Sess. 2003) available at <http://thomas.loc.gov/cgi-bin/query/z?c108:H.R.2207.IH>.

62. See H.R. 2207.

63. Saferparks.org, State Regulation, States Without Laws Governing Safe Operation of Thrill Rides, <http://saferparks.org/regulation/state/> (last visited Dec. 20, 2006). Arizona, Mississippi, Montana, Nevada, Utah, and Wyoming are examples of states without any direct regulation for safe operation of "thrill rides." *Id.*

64. E.g. CAL. LAB. CODE §7920 (West 2005); OHIO REV. CODE ANN. § 1711.52-55 (West 2005).

account the size of the operator's company.⁶⁵ In addition to regulating operators, some states are enacting laws focused toward rider behavior by requiring minimum compliance with all posted warnings.⁶⁶ Parks and industry associations are also addressing concerns by increasing and improving warning systems.⁶⁷ Altogether, the legislative treatment is varied and inconsistent.⁶⁸

B. Defining Liability in the Courts

Protection has not solely been left to the legislatures, however. The courts also have a place in the debate on an amusement park operator's duty of care. Through a combination of statutory clauses and common law decisions, the state courts have sharply divided in answering what an amusement park operator owes to his guests.

One of the challenges in harmonizing judicial regulations is the breadth of statutory language affecting amusement park attraction operations. A "common carrier" is usually defined as "any person, firm, or corporation that undertakes for hire, as a regular business, the transportation of persons or commodities from place to place, offering its services to all who choose to employ it and pay its charges."⁶⁹ Whether that definition includes amusement park attractions, however, is unclear. Some states include express and relevant definitional language, but even this language does not explain precisely what duty is owed if it is not that of a "traditional" common carrier.⁷⁰ Others go so far as to cite specific operations that are not considered common carriers outside of a general amusement or entertainment exception.⁷¹ Offering perhaps the most expansive definition, under California law "[e]very one who offers to the public to

65. See FLA. STAT. ANN. § 616.242 (West 2005).

66. See, e.g., NEV. REV. STAT. ANN. § 455B.040 (West 2005); N.J. STAT. ANN. § 5:3-36.1 (West 2005); OHIO REV. CODE ANN. § 4169.07 (West 2005).

67. Jennifer Kingsley, *High Tech Hunks of Steel: Fixed-Site Amusement Rides and Safety Under State Regulation*, 5 U. PITT. J. TECH. L. & POL'Y 1 (2003), available at www.pitt.edu/~sorc/techjournal/articles/Vol5,1Kingsley.pdf.

68. Betsy Wade, *How Safe are Thrill Rides?*, N.Y. TIMES, Sept. 26, 1999, at E4.

69. E.g., FLA. STAT. ANN. §561.01(19) (West 2005).

70. See OR. REV. STAT. ANN. § 460.355(2) (West 2005) (stating that "[t]he owner or operator shall be deemed not a common carrier; however, such owner or operator shall exercise the highest degree of care for the safety of users") (emphasis added).

71. ALASKA STAT. § 05.20.010. "An owner or operator of a device . . . shall construct, furnish, maintain, and provide safe and adequate facilities and equipment with which to safely and properly receive and carry all persons offered to and received by the owner or operator of the device, and to promote the safety of the patrons, employees, and the public. *The owner or operator of ski equipment and devices is not considered a common carrier.*" *Id.* (emphasis added).

carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry.”⁷²

Despite some potentially confusing language, the courts are clear about the relationship at issue regarding amusement parks and their common carrier duty. General common law precedent clearly states that the operator of an amusement park is not a general insurer of his guests’ safety.⁷³ When dealing with a common carrier, the relationship terminates once one has a reasonable opportunity to safely exit the vehicle.⁷⁴ Therefore, an amusement park operator cannot be a common carrier “with respect to all who pay admission to enter” the park.⁷⁵ In California,

[T]he burdens imposed by the Civil Code on common carriers do not apply before a passenger has been accepted for carriage, after a passenger has safely gotten off the carrier’s vehicle, or to the carrier’s other activities on its property not directly related to carriage. . . . When a guest purchases an admission ticket and enters the park, no carrier-passenger relationship exists at that moment. . . . [T]he carrier-passenger relationship would not exist unless the guest enters the boarding area for a particular ride and is accepted by the ride operator as a passenger.⁷⁶

Similarly, a duty beyond general, reasonable care does not attach when a guest merely enters the park through its main turnstiles.

1. The Duty of Ordinary Care

In defining the duty of care, some courts have refused to recognize transportation-based attractions as common carriers. Generally, these courts take two avenues. Some affirmatively state that amusement park operators are not considered common carriers because of the circumstances surrounding their relationship with riders.⁷⁷ The most prevalent distinction is the purpose of the

72. CAL. CIV. CODE § 2168 (West 2006).

73. 27A AM. JUR. 2D *Entertainment and Sports Law* § 90 (2005).

74. See, e.g., *Simon v. Walt Disney World*, 8 Cal. Rptr. 3d 459, 462-63 (Cal. App. 2004) (holding that discounts offered to residents of certain states did not violate any concerns regarding equal charges because a theme park cannot be considered a common carrier in and of itself); see also *Pharr v. Chi. Transit Authority*, 462 N.E.2d 753, 755 (Ill. App. Ct. 1984) (“[T]he passenger-[common] carrier relationship does not terminate until the passenger has had a reasonable opportunity to reach a place of safety.”); *Mount Pleasant Indep. Sch. Dist. v. Lindburg*, 766 S.W.2d 208, 214 (Tex. 1989) (“[I]n Texas, the higher duty of care for a common carrier terminates at the point when the passenger safely exits the common carrier vehicle.”).

75. *Id.* at 460.

76. *Id.* at 466 (referencing *Orr v. Pac. Sw. Airlines*, 257 Cal. Rptr. 18 (Cal. Ct. App. 1989)).

77. See *Bregel v. Busch Entm’t Corp.*, 444 S.E.2d 718, 720 (Va. 1994); *Lamb v. B&B Amusements Corp.*, 869 P.2d 926, 930-31 (Utah 1993); *Harlan v. Six Flags Over Georgia*,

transportation.⁷⁸ Common carriers provide their services for no other reason than the transportation itself; amusement park operators, however, provide transportation for entertainment. Courts taking this approach find that such rides are “for entertainment purposes, and the transportation function is incidental to the entertainment function.”⁷⁹ Furthermore, amusement rides feature certain thrills, including “high speeds, steep drops, and tight turns.”⁸⁰ As the *Lamb* court noted, “Amusement rides are not designed to provide comfortable, uneventful transportation, even when the equipment operates without incident and as intended.”⁸¹ Because the focus of amusement park rides is different from traditional common carriers, the owners are not held to the high standards of a common carrier.

Other courts that do not include these attractions under the common carrier definition take a more lenient approach. These courts narrowly rule that the duty owed by attraction operators is the traditional “reasonable” care, while implicitly retaining the ability to raise the level of care in the future.⁸² Some courts rule against a heightened duty because the statutory definition of “common carrier” is not as loose as that in California.⁸³ Still other courts decline to extend the duty of care more by language than by effect.⁸⁴ Such courts clearly state that the operators of amusement park rides are not common carriers but nonetheless have a heightened duty of care.⁸⁵ These cases, however, focus more on the labeling of the carriers and take a weaker stance regarding the duty of care owed to riders.

2. The Duty of the Utmost Care (Common Carrier)

Courts that apply the duty of care owed by common carriers to amusement park rides use one of two general approaches. California

297 S.E.2d 468, 469 (Ga. 1982); *Brennan v. Ocean View Amusement Co.*, 194 N.E. 911, 912 (Mass. 1935); *Beavers v. Fed. Ins. Co.*, 437 S.E.2d 881, 884 (N.C. Ct. App. 1994).

78. See *Bregel*, 444 S.E.2d at 719; *Lamb*, 869 P.2d at 930-31; *Harlan*, 297 S.E.2d at 469; see also *Firszt v. Capitol Park Realty Co.*, 120 A. 300 (Conn. 1923); *Gates v. Astroworld*, No. 01-98-00246-CV, 1999 WL 417311, at *1 (Tex. App. June 24, 1999).

79. *Bregel*, 444 S.E.2d at 719.

80. *Lamb*, 869 P.2d at 930.

81. *Id.*

82. See *Spath v. Fed. Ins. Co.*, 101 F. Supp. 2d 49, 53 (D. Mass. 2000); *Sergermeister v. Recreation Corp. of Am.*, 314 So. 2d 626 (Fla. Dist. Ct. App. 1975); *Jackson v. Kings Island*, No. 199, 1978 WL 216108, at *2 (Ohio App. June 21, 1978).

83. See *Spath*, 101 F. Supp. 2d at 53.

84. See *Sergermeister*, 314 So.2d at 629, 631 (finding that other statutory language specifically describes the duty of an amusement park operator as “reasonable care”).

85. This may make more sense in certain contexts where outside factors make the “common carrier” label important, such as insurability. See *id.* at 630.

expands the reach of its common carrier duty through its statutory language. Again, California's statute is markedly broader in scope, and the California courts have maintained that reach.⁸⁶ The California courts apply common carrier status to several activities that are related to amusement park attractions.⁸⁷ *Neubauer v. Disneyland* was the first case to specifically address the breadth of California's common carrier statute in light of amusement park attractions.⁸⁸ The court held that "[T]he California statutory common carrier definition is very broad. Any narrowing of that definition must be for the legislature and not the court."⁸⁹ The court went one step further in *Gomez v. Superior Ct.*,⁹⁰ when it rejected the argument of different purpose and declared: "Certainly there is no justification for imposing a lesser duty of care on the operators of roller coasters simply because the primary purpose of the transportation provided is entertainment."⁹¹ The court decided that an amusement park is a "carrier of persons for reward" and subject to all liability the common carrier statutes applied.⁹² *Gomez* is also notable because the attraction in question, the Indiana Jones Adventure, was operating according to its design.⁹³ In California, therefore, operators are liable for any injury caused even with properly functioning attractions.

California is not the only state to extend the duties of a common carrier to amusement park attractions. Other courts find that the underlying element of transportation deserves of the same standard as a traditional common carrier.⁹⁴ Such courts, however, are cognizant of the difference in purpose between common carriers and

86. See, e.g., *Spath*, 101 F. Supp. 2d at 53 (citing *Neubauer v. Disneyland*, 875 F. Supp. 672 (C.D. Cal. 1995)).

87. See *Neubauer*, 875 F. Supp. at 673 (citing *Squaw Valley Ski Corp. v. Superior Ct.*, 3 Cal Rptr. 2d 897 (Cal. Ct. App. 1992); *McIntyre v. Smoke Tree Ranch Stables*, 23 Cal. Rptr. 339 (Cal. Dist. Ct. App. 1962)).

88. *Id.* at 673.

89. *Id.*

90. See *Gomez v. Superior Ct.*, 35 Cal. 4th 1125 (Cal. 2005).

91. *Id.* at 1136.

92. *Id.* at 1141.

93. In *Neubauer*, a couple was riding the Pirates of the Caribbean attraction, a slow-moving boat ride with two short flumes, when a second boat struck their boat from behind after navigating a flume and injured both. 875 F. Supp. at 673. In *Gomez*, a young woman was riding the Indiana Jones Adventure attraction, an attraction that simulated a jeep journey on a track with computerized motions that simulate negotiating rugged terrain, and allegedly suffered brain injury due to the "shaking" of the attraction. 35 Cal. 4th at 1127.

94. See, e.g., *Best Park & Amusement Co. v. Rollins*, 68 So. 417, 417 (Ala. 1915); *Coaster Amusement Co. v. Smith*, 194 So. 336, 339-40 (Fla. 1940); *O'Callaghan v. Dellwood Park Co.*, 89 N.E. 1005, 1007 (Ill. 1909); *Friedli v. Kerr*, No. M1999-02810-COA-R9-CV, 2001 WL 177184, at *7 (Tenn. Ct. App. Feb. 23, 2001).

amusement park attractions,⁹⁵ and refer to a varying level of care. Some courts apply the *res ipsa loquitur* doctrine,⁹⁶ while others lessen the traditional common carrier standard. As the court in *Rollins* notes, “[The amusement park] can be properly designated as a common carrier of passengers. But obviously the measure of care to be observed in their operation must depend upon the perils to which passengers thereon are ordinarily exposed, and this will, in turn, depend on the character of the track and cars and their mode of operation.”⁹⁷

III. ANALYZING THE STANDARDS

Differing treatment of amusement park attraction liability raises the question: which standard is more appropriate? It also exposes an underlying issue of rider behavior and how fault on the rider’s behalf can contribute to injuries.

A. The Benefits of a Common Carrier Standard

The common carrier standard of care is easier to apply than other, more lenient standards. The duty of care a business provider owes establishes the baseline expectations for operating that business. The traditional reasonable person standard of “due care” has a lower threshold, focusing on whether the party failed to recognize risks involved in his behavior.⁹⁸ This allows courts greater discretion in determining liability. Raising the standard to “utmost care” under the common carrier standard provides more consistent application of the standard because it offers less discretion in determining reasonableness. More consistent enforcement across courts in turn provides operators with more consistent expectations (at least regarding the minimum level of care) and increases general safety for the public. Both standards provide a valid approach from precedent,⁹⁹ but only a common carrier standard sufficiently creates regulation through judicial action and expectation.

95. See *Rollins*, 68 So. at 417-18; see generally *Castle v. Riverview Park Co.*, 11 N.E.2d 135, 135 (Ill. App. Ct. 1937); *O’Callaghan*, 89 N.E. at 1007; *Friedli*, 2001 WL 177184, at *7.

96. See, e.g., *Coaster Amusement*, 194 So. at 340; *Castle*, 11 N.E.2d. at 135.

97. *Rollins*, 68 So. at 417.

98. 57A AM. JUR. 2D *Negligence* §139 (2006).

99. Compare *Lamb v. B&B Amusements Corp.*, 869 P.2d 926, 930-31 (Utah 1993) (applying a “reasonably prudent person” standard of care to an amusement ride operator), with *Gomez v. Superior Court*, 35 Cal. 4th 1125, 1136 (2005) (holding amusement ride operators to the higher standard of care applied to common carriers).

1. The Language of the Law

In applying state statutes, amusement park attractions almost invariably satisfy the definition of "common carrier." Assuming that "common carrier" accords with Black's basic definition,¹⁰⁰ the term suggests two questions: 1) what service is being provided? and 2) what benefit is the provider receiving?¹⁰¹

In addressing the first question, the physical action(s) performed is of central concern. The language of Florida's common carrier statute, for example, requires "any person, firm, or corporation that undertakes for hire, as a regular business, the transportation of persons or commodities from place to place."¹⁰² At a basic level, an amusement park attraction provides the same services as a more traditional common carrier. Whether it is a bus, a train, a boat in a canal, or a car attached to a tubular track, the physical experience facially meets the standard. In other words, there is no real difference between a railway train and a roller coaster. In fact, many attractions mimic public transportation through their design. A trolley car or railway car in Disney's Magic Kingdom is really no different than one in San Francisco or along the southern shore of Lake Michigan. The rider's intent for the journey may differ, but the statutory language itself requires nothing more than transporting "from place to place."¹⁰³ Even if the attraction is on a closed circuit that picks up and drops off at one location, the guests are still transported across terrain. The statutory language does not require that the transportation result in a net change of location, but instead looks to the idea of movement more generally. In other words, when one boards a large piece of machinery to be moved around, there is a certain level of safety demanded of the operator.

Intent is a more relevant issue with the second question. It seems common knowledge that people purchase tickets to amusement

100. See BLACK'S LAW DICTIONARY 226 (8th ed. 2004) (defining "common carrier" as "a commercial enterprise that holds itself out to the public as offering to transport freight or passengers for a fee").

101. That may not be the case, however, so there are certain instances where these questions may not accurately represent a proper "test" for an alleged common carrier. This is especially true for those states with specific roller coaster exception clauses. See, e.g., ALASKA STAT. § 05.20.010 (2006) (specifically exempting ski equipment from common carrier status but not amusement rides and roller coasters). However, the majority of states would be able to analyze these questions to fit within their language or at least to adapt the tone of their language to similar themes so that the analysis, taken in general form, would still apply as discussed *infra* in Part IV.A.1, especially when a specific standard outside of "common carrier" is provided.

102. FLA. STAT. ANN. § 561.01 (West 2005).

103. *Id.*

parks in order to experience the attractions inside the park.¹⁰⁴ In other words, a patron purchases a ticket and expects the opportunity to utilize at least one, and most likely many, "rides." In fact, historically, tickets were sold to each individual attraction or group of attractions.¹⁰⁵ It was not until the latter part of the twentieth century that parks offered general admission tickets that included access to all attractions.¹⁰⁶ Therefore, the relationship created by purchasing a ticket was and continues to be one of providing payment for the service of transportation, at least during the time the rider is actually on board the attraction. This relationship is fundamentally the same as buying a bus ticket and then riding the bus (or train, airplane, or any other traditional "common carrier").

2. The Point of Using the Transportation

Courts look beyond the statutory language, however, to find the rider's intent as the primary distinguishing characteristic. Very few park patrons ride these machines solely for the transportation element itself.¹⁰⁷ Again, amusement park attractions pick up and drop off passengers at the same place. Also, the loading platforms are often far from the main park pathways, so any time saved by utilizing such "transportation" is lost walking to get on in the first place. Clearly, these rides are used solely for entertainment purposes.¹⁰⁸ Some rides are minimally intense transportation vehicles used for a

104. There is an argument that not all attendees purchase tickets in expectation to utilize the attractions. See *Simon v. Walt Disney World*, 8 Cal. Rptr. 3d 459, 466 (Cal. App. 2004). For example, a parent may purchase tickets to take her children to the amusement park but does not anticipate riding all the attractions with her children. However, this assumption would require that these patrons ride no attractions. Considering the cost of tickets, this seems highly unlikely that the patron would merely walk around. Therefore, what tiny percentage of guests may fall into this odd category do not seem significant enough to disclaim this "intent to ride" for the vast majority of patrons.

105. *E.g.*, 1970's Walt Disney World Ticket History, <http://allearsnet.com/tix/tixpix70.htm> (last visited Dec. 24, 2006).

106. *E.g.*, 1980's Walt Disney World Ticket History, <http://allearsnet.com/tix/tixpix80.htm> (last visited Dec. 24, 2006).

107. This excludes certain amusement park attractions which are, in fact, used for transportation from place to place in a park including miniature trains, chairlifts, monorail train systems, and other such attractions. However, these would fit within the common carrier standard even more directly. *Contra* *Wright v. Midwest Old Settlers and Threshers Ass'n*, 556 N.W.2d 808, 811-12 (Iowa 1996).

108. See, *e.g.*, *Gomez v. Superior Court*, 35 Cal.4th 1125, 1136 (2005). There may be an argument that certain attractions, such as sky gondolas, miniature railways, etc., are used solely for transportation purposes, but the scenic nature of their trips and the relatively short distances covered by these attractions suggests there is at least a joint entertainment-transportation element to riding these.

scenic tour; others use the transportation itself to create a thrilling ride (and, of course, some are a combination thereof). However, despite the intention, the safety expectations are the same. As a California court noted:

Certainly there is no justification for imposing a lesser duty of care on the operators of roller coasters simply because the primary purpose of the transportation provided is entertainment. As one federal court noted, "amusement rides have inherent dangers owing to speed or mechanical complexities. They are operated for profit and are held out to the public to be safe. They are operated in the expectation that thousands of patrons, many of them children, will occupy their seats." Riders of roller coasters and other "thrill" rides seek the illusion of danger while being assured of their actual safety.¹⁰⁹

A person does not expect to walk off of the Coney Island Cyclone with a broken arm any more than she would walking off the city bus that took her to the park gate.

I am not suggesting, though, that a similar expectation for safety in a roller coaster and a bus ride should suggest similar expectations for all aspects of the experience. The physical forces in particular are dramatically different; traditional forms of transportation do not provide the desired "thrill" to turn a "trip" into an "attraction." For example, compare the experience on Disney's Test Track with a traditional bus ride. Test Track simulates auto testing and provides a road-course ride where riders can "rush on to 50-degree banked curves at 60 miles an hour."¹¹⁰ In a traditional motor vehicle, this would not be an exceptionally thrilling experience. When a ride vehicle with a low windshield, no control by the riders, and a banked roadway operates at that same speed, however, it creates a much more thrilling experience.¹¹¹ Ironically, these changes often make the ride both more thrilling¹¹² and safer. By creating the perception of speed or danger, it heightens the rider's physical response without dramatically increasing the forces involved.¹¹³ It does not seem that one method of inducing a heightened sensory response is more dangerous than another *per se*, but merely that the precautions and designs incorporated in that method must be well maintained. This suggests that a standard of utmost care is as appropriate for attractions as for buses.

109. *Id.* (quoting U.S. Fid. & Guar. Co. v. Brian, 337 F.2d 881, 883 (5th Cir. 1964)).

110. Epcot, Test Track, <http://disneyworld.disney.go.com/wdw/parks/attractionDetail?id=TestTrackAttractionPage> (last visited Dec. 24, 2006).

111. See video link *id.* (showing the design of the car, the passengers' lack of control, and the ride "experience").

112. Eric Minton, *Thrills & Chills: Designers of Amusement Park Attractions Exploit Fear*, PSYCHOL. TODAY, May 1999, at 60.

113. *Id.* at 63.

3. Consistency of Enforcement

While state courts are free to interpret their respective statutes and laws, there is a desire for some level of consistency between similarly situated parties within a state. When you have a general class that can easily be divided into smaller classes, such as amusement park operators, this can make the “reasonable person” difficult to define. For example, one could find that a manager for Six Flags Parks, a national corporation owning dozens of properties, and an operator of a small, local park are in the same general class. However, the budget for maintenance would clearly be higher at Six Flags than the other due solely to volume of business. Also, the attractions at Six Flags are likely to be much larger and, to an extent, more dangerous in the event of failure than would smaller attractions.¹¹⁴ Therefore, what is reasonable for the Six Flags manager may seem excessive for the small amusement park operator. This disparity in financial ability suggests the expectations of one may differ from the other.

However, the need to protect a patron’s safety should not change with the size of the business’ operation. Because the “utmost care” standard has less flexibility in its interpretation, it imposes more uniform expectations regardless of the operator’s ability or financial constraints. A lesser standard, such as “reasonableness,” leaves greater ambiguity and the potential for disparity in the expectations of amusement park attraction operators.

There also might be a problem of free riding. In light of amusement parks, major companies will likely meet the highest standards of safety in operation simply because of market pressures. Major park chains have outside pressures pushing for higher safety standards. The threat of public disclosure is a concern for large, national corporations.¹¹⁵ Reputation-related damages that come from negative publicity, especially regarding safety, can trigger declines in sales, profitability, and stock market value for both the attraction and company.¹¹⁶ Large companies will often take large measures to avoid these situations.¹¹⁷ “Corporations fear the sting of adverse publicity

114. It should be noted that larger amusement parks contain these smaller attractions as well. Therefore, a larger park may likely include the same attractions as the local park, as well as other usually much larger attractions.

115. Andrea A. Curcio, *Painful Publicity: An Alternative Punitive Damage Sanction*, 45 DEPAUL L. REV. 341, 370 (1996).

116. *Id.*

117. *Id.*

attacks on their reputations more than they fear the law itself.”¹¹⁸ Smaller companies, on the other hand, may not feel these pressures. This could reduce the level of care these parks impose internally. However, it may still meet a reasonableness standard. Therefore, the flexibility in defining this lower standard may lead to an increased chance of public harm that would not be present with the higher standard of care.

This flexibility also reduces the strength judicial enforcement might carry. If judicial enforcement is to be sufficient with the current system absent legislative action,¹¹⁹ it must have clear precedent so expectations are high and uniform even without external pressures.

4. Promoting Rider Behavior

Common carrier law should not be seen as synonymous with a strict liability approach, however. Although some courts have done so,¹²⁰ this creates a dangerous game. Generally, strict liability and negligence “differ in three major respects.”¹²¹ First, the costs of administering the rule differ for each.¹²² Negligence increases the amount of litigation needed to determine the expectations under “due care.”¹²³ Strict liability, on the other hand, increases general costs because it increases the number of claims filed as a whole due to the heightened standard of care negligence.¹²⁴ In other words, this creates a balancing act of sorts between the number and content of cases. Second, insurance coverage needs are broader because the defendant is constructively insuring against all claims whether or not he acted with due care.¹²⁵ Third, and most importantly, strict liability creates a stronger “incentive to avoid accidents by reducing the level of an activity rather than simply increasing the care with which the activity

118. *Id.*

119. The issue of whether judicial enforcement through tort law is possible and proper will be discussed later. *See infra* Part IV.A.1.

120. *E.g.*, *Eljizi v. Dorney Park Coaster Co.*, No. 92-C-2322, 1996 WL 1038823, at *4 (Pa. Com. Pl. June 19, 2006).

121. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 65 (1987).

122. *Id.*

123. *Id.* This is particularly due to the amount of information costs necessary since the requisite level of “due care” is fact-specific and must, therefore, be determined by evidence. Therefore, the discovery costs increase. *Id.*

124. *Id.*

125. *Id.* at 66.

is conducted.”¹²⁶ Courts generally narrow the scope of potential alternatives when addressing negligence, focusing solely on improved ways of performing the activity.¹²⁷ Under strict liability, however, courts broaden their view and address whether the amount of activity itself contributed to the injury.¹²⁸ In short, applying a strict liability standard to amusement park attractions would create incentives for operators to reduce the number of rides operating, reduce the intensity level, and look to alternative ride systems instead of simply being more careful.¹²⁹

Using this analysis, however, could lead to certain problems in the long run. First, it could create extensive restrictions on riders, an increased need for waiving rights through extensive contracts, or even limitations on intensity and creativity in attraction design. For example, Disney's Mission: Space attraction, a space flight simulator using centrifuge technology, subjects riders to over 2.5 g-forces for sustained periods and keeps them in an enclosed space for the duration of the experience.¹³⁰ In the summer of 2005, a young boy passed out on the attraction and was not revived.¹³¹ The incident questioned both the sufficiency of warnings, height requirements, and response by park staff, as well as the intensity of the attraction itself.¹³² Similar incidents have happened on attractions of much less intensity. For example, just a couple miles away at Disney's Disney-MGM Studios Park, the Twilight Zone Tower of Terror, another Disney “thrill” attraction, subjects its riders to much lower forces.¹³³ In that same summer, another young woman sustained serious brain

126. *Id.*

127. *Id.* For example, under a traditional negligence standard, “a court in an automobile accident case will consider whether the defendant was driving carefully when the accident occurred but will not consider whether the trip was really necessary.” *Id.*

128. *Id.*

129. *See id.* at 66-67.

130. *See* Mission Space Ride System, 9 December 2002: Ride System Specs, http://www.wdwmagic.com/space_pavilion_ridesystem.htm (last visited Dec. 24, 2006). “G-force” as used in this context refers to the equivalent of one gravitational force. One “g” equals the force of the pull of gravity under normal circumstances on Earth.

131. *See* Scott Powers, *Family Sues Disney Over Boys Death After Ride: The Suit Accuses the Resort of Not Taking Steps to Modify Mission: Space or Adequately Warn the Public of Danger*, ORLANDO SENTINEL, June 14, 2006, at A1, available at LEXIS.

132. *See id.*

133. The Tower of Terror features an elevator shaft-like ride system which raises and drops riders seated in the shaft multiple times, pulling them down faster than the speed of free fall. WDWMagic.com, Twilight Zone Tower of Terror News & Info, http://www.wdwmagic.com/tower_info.htm (last visited Jan. 3, 2007). It drops riders up to thirteen stories in a series of drops and climbs. *Id.* This is compared with similar rides like Power Tower at Cedar Point, which features a maximum drop height of 260 feet. Theme Parks Online, Power Tower, *supra* note 39.

complications after riding the ride and subsequently went into cardiac arrest.¹³⁴ The ride operation was determined to be normal, and the girl had experienced the attraction many times before.¹³⁵ After each deadly incident, Disney faced the publicity of potential liability as well as potential lawsuits.¹³⁶ If liability could attach in these situations, this would be unnecessarily costly to the parks, and would exceed the point of the common carrier standard. It could also create an incentive to avoid larger thrill rides which are a huge financial benefit to the parks. Because thrill rides operate with such strong safety records,¹³⁷ however, these also offer strong entertainment benefits to the public.

This supportive analysis of strict liability also ignores the heightened duty of care applied in common carrier negligence cases. Looking at the three differences outlined by Landes and Posner, it seems that increasing the duty element alone lessens the three differences noted above – litigation costs, insurance costs, and activity avoidance. First, while strict liability has lower litigation and information costs, establishing breach of its heightened standard of care is likely easier to establish than with a lower standard. The comparison of insurance costs already tips in favor of negligence, and is further supported by the fact that running parks with this insurance could become cost prohibitive, thereby forcing ticket prices to become excessively high.¹³⁸ Furthermore, common law shows that promoting insurance is not the intent of the heightened standard of care for common carriers.¹³⁹ In addition, the risk of activity avoidance must also be adjusted because, as discussed above, reduction in behavior is not a valid option for this industry. Profits are made by newer, larger attractions, and, assuming proper maintenance and operation, the forces come solely from design and not from the number of cars on the track.

134. Willoughby Mariano, *Teen Went on Ride Many Times: The British Girl Enjoyed Tower of Terror Repeatedly Before Suffering Cardiac Arrest*, ORLANDO SENTINEL, July 14, 2005, at B1, available at LEXIS.

135. *Id.*

136. See generally sources cited *supra* notes 131 & 134.

137. See Counsels Publish Ride Safety Material, *supra* note 48.

138. Ticket prices are already costly. For example, all major Central Florida theme parks instated a ticket price increase in 2006. See Donna Balancia, *SeaWorld, Busch Raise Ticket Prices*, FL. TODAY, Dec. 2, 2006, at 8B, available at LEXIS. Busch Gardens raised a single-day adult ticket to \$61.95 (plus tax). *Id.* Sea World, another Busch park, raised its single-day tickets to \$64.95 (plus tax). *Id.* Both Disney and Universal raised their single-day tickets to \$67.00 (plus tax). *Id.*

139. 27A AM. JUR. 2D *Entertainment and Sports Law* § 90 (2006).

Finally, this analysis of strict liability ignores the behavior of the injured party.¹⁴⁰ Strict liability creates no incentive for a potential victim to take care of his actions because he will be fully compensated for his injury.¹⁴¹ A negligence standard, however, creates incentives to be more careful on the part of the rider because he will not recover unless it “could have been avoided by the injurer’s being more careful rather than by the injurer’s reducing his activity.”¹⁴² As Landes and Posner note:

Thus the relative effects of strict liability and negligence on activity provide a reason for preferring strict liability only when an adjustment in the defendant’s activity, but not in the plaintiff’s would be an efficient method of accident avoidance. Strict liability will reduce the defendant’s activity level, but it will increase the plaintiff’s, and the number of accidents may be greater, fewer, or the same as under a negligence standard.¹⁴³

The physical nature of amusement park attractions demands intelligent choice by the rider simply not present in traditional modes of common carrier transportation. The issue is improper maintenance and operation. If the courts were to drift into the strict liability realm, however, there could be a danger of finding liability when the attractions are operating exactly as they are supposed to. Finally, a German tourist collapsed after riding Mission: Space in April 2005.¹⁴⁴ A preexisting medical condition was again blamed for her death.¹⁴⁵ Under a strict liability standard, however, the mere fact that the ride triggered or worsened the injury could be sufficient to find liability. If the actions of the designers and operators were appropriate, namely at a high level of operating safety, liability for an unforeseen event should not attach when rider decision and behavior can suffice to avoid the harm.

B. The Assumption of the Risk Defense

Beyond factoring into the full analysis of strict liability, rider behavior is a central concern in determining liability. Assumption of the risk is a defense afforded in negligence cases where the injured party either directly or constructively realized the dangers inherent in

140. LANDES & POSNER, *supra* note 121, at 69.

141. *Id.* at 63.

142. *Id.* at 69.

143. *Id.* at 70.

144. Henry Pierson Curtis & Beth Kassab, *Stroke Killed Disney Visitor: The German Woman Had ‘Severe’ High Blood Pressure, an Autopsy Finds*, ORLANDO SENTINEL, Apr. 15, 2006, at A1, available at LEXIS.

145. *Id.*

the activity.¹⁴⁶ Courts have applied primary implied assumption of the risk to roller coasters and similar attractions.¹⁴⁷ This type of assumption of the risk is applied to inherent risks only.¹⁴⁸ Therefore, the assumed risks do not relate to negligence by the defendant but rather to the nature of the activity itself.¹⁴⁹ Generally, riders understand there is some risk involved in these machines.¹⁵⁰ However, this defense requires both knowledge by the plaintiff of the injury-causing defect and an appreciation of the resultant risk.¹⁵¹ Therefore, a person cannot assume the risk for concealed risks or for those of which plaintiff was unaware; the risks must be known risks.¹⁵² As a standard, the risk must be "fully comprehended" by or "perfectly obvious" to the plaintiff.¹⁵³

An area of contention in assuming the risk for amusement park attractions comes from the posted warning signs. Any visitor will quickly become aware of warnings provided by the park. Almost every attraction has warnings, including both audio and visual statements and diagrams. These warnings, along with prior experience with an attraction, provide the foundation for most assumption of the risk defense claims.¹⁵⁴ The sufficiency of these warnings, however, is not handled equally by the courts.

146. *E.g.* *Ritchie-Gamester v. City of Berkley*, 597 N.W.2d 517, 531 (Mich. 1999) (citing PROSSER & KEETON, TORTS § 68, 481 (5th ed.): "[W]here the plaintiff voluntarily enters into some relation with the defendant, with knowledge that the defendant will not protect him against one or more future risks that may arise from the relation . . . [h]e may then be regarded as tacitly or *impliedly* consenting to the negligence, and agreeing to take his own chances.").

147. *See id.*; *see also* *Darling v. Fairfield Med. Ctr.*, 756 N.E.2d 754, 759 (Ohio Ct. App. 2001); *Vorum v. Joy Outdoor Educ. Ctr.*, No. CA98-06-072, 1998 WL 883806, at *2 (Ohio Ct. App. Dec. 21, 1998).

148. *E.g.* *Duffy v. Midlothian Country Club*, 481 N.E.2d 1037, 1041 (Ill. App. Ct. 1985) (citing Edward Kionka, *Implied Assumption of the Risk: Does It Survive Comparative Fault?*, 1982 S. ILL. L.J. 371).

149. *Id.*

150. *Id.*; *see also* *Murphy v. Steeplechase Amusement Co., Inc.*, 166 N.E. 173, 174 (N.Y. 1929).

151. *See, e.g.*, *Morgan v. State*, 685 N.E.2d 202, 207 (N.Y. 1997); *see also* *Maddox v. City of New York*, 487 N.E.2d 553, 556-67 (N.Y. 1985).

152. *See, e.g.*, *Maddox*, 685 N.E.2d at 207; *see also* *Telega v. Security Bureau, Inc.*, 719 A.2d 372, 375-76 (Pa. 1998).

153. *Morgan*, 685 N.E.2d at 207 (quoting *Turcotte v. Fell*, 68 N.Y.2d 432, 439 (1986)).

154. *E.g.* *Woolbright v. Six Flags Over Georgia*, 321 S.E.2d 787, 788 (Ga. Ct. App. 1984); *Beroutsos v. Six Flags Theme Park, Inc.*, 713 N.Y.S.2d 640, 641-42 (App. Div. 2000). For examples of cases dealing with assumption of the risk generally, *see* *Ritchie-Gamester v. City of Berkley*, 597 N.W.2d 517, 531 (Mich. 1999) (Brickley, J., concurring); *Darling v. Fairfield Med. Ctr.*, 756 N.E.2d 754, 759 (Ohio Ct. App. 2001); *Vorum v. Joy Outdoor Education Center*, No. CA98-06-072, 1998 WL 883806, *2 (Ohio Ct. App. Dec. 21, 1998).

Whether or not the sign warns patrons with no history of neck or back problems of the risk of resulting neck and back injury, [sic] is an issue for determination by the jury. Defendant replies that the amusement park's souvenir manual's description of the roller coaster, "brace yourself for one of the tallest, fastest looping coasters in the world!" sufficiently warned patrons to brace themselves. There is no evidence submitted that plaintiff read the manual, and even assuming that he did, it cannot be established as a matter of law that the aforementioned description made known the risk of ensuing back and neck injuries in healthy individuals. The usual risks of roller coaster rides assumed by ordinary people can include dizziness, nausea, vomiting, and, for some, regret.¹⁵⁵

Some states have enacted statutory requirements for signage.¹⁵⁶ However, having statutory requirements for signage is not uniform among the states, and where there are requirements they are general requirements instead of explanations of specific forces and dangers.¹⁵⁷ Therefore, they may not aid much in determining a guest's individual understanding of the dangers posed.

Assumption of the risk is not the sole defense available in these circumstances. Certain courts which have maintained the common law contributory negligence defense have applied it to amusement park-related cases.¹⁵⁸ The test employed also differs: "The assumption-of-risk doctrine requires that a defendant use a primarily subjective test, rather than the objective reasonable person test applicable to contributory negligence . . ."¹⁵⁹ In applying this standard to attractions, the courts have relied upon riders' actions that disobey posted warnings.¹⁶⁰ Therefore, although contributory negligence tends toward an objective viewpoint, the outcome in these cases seems to be the same because both defenses stem from a failure to comprehend and understand posted warnings.

In invoking these defenses, however, exculpation clauses have been frowned upon. Although courts have been sympathetic to assumption of the risk defense claims, exculpation clauses on tickets will likely be seen as adhesion contracts and, therefore, insufficient.¹⁶¹

155. *Beroutsos*, 713 N.Y.S.2d at 642.

156. See, e.g., N.J. ADMIN. CODE §§ 5:14A-9.33, -9.34 (2006); OKLA. STAT. ANN. tit. 40 § 460.3 (West 2005); S.C. CODE ANN. § 41-18-350 (2005).

157. Compare OKLA. STAT. ANN. tit. 40 § 460.3 (West 2005) with N.J. ADMIN. CODE §§ 5:14A-9.33, -9.34 (2006).

158. *First Arlington Inv. Corp. v. McGuire*, 311 So.2d 146, 151 (Fl. 1975) (concerning a hotel's failure to warn guests against diving off its pier because of shallow water); *Bregel v. Busch Entm't Corp.*, 444 S.E.2d 718, 720 (Va. 1994) (concerning the contributory negligence of a passenger in a monorail who failed to heed the stated warning to keep arms inside the car).

159. 57B AM. JUR. 2D *Negligence* § 770 (2005).

160. See *Bregel*, 444 S.E.2d at 720.

161. *Evans v. Pikeway*, 793 N.Y.S.2d 861, 863 (2004) (applying both jurisprudence and New York statutory law that specifically addresses this point).

States such as New York have interpreted limiting statutory language to specifically prevent such exculpation on amusement park tickets.¹⁶² The modern practice of selling single admission tickets supports this interpretation because each patron may choose vastly different experiences. A blanket exculpation clause would not be sufficiently tailored and certainly would provide no means of bargaining.

While intent may not factor as heavily in the common carrier debate, it factors strongly into rider understanding which is an important element regarding assumption of the risk. Because people are not boarding these machines merely to get safely from point A to point B, additional factors apply. Visual and physical cues indicate these attractions are different. Many attractions are visible to bystanders, so the course can be seen as well as any screams induced by elements of the ride. Before the ride begins, restraints are usually placed on the rider. Roller coasters, for example, have sophisticated harnessing systems, and riders are not allowed to board if those systems cannot operate properly.¹⁶³ Generally, the restraint system on a traditional common carrier involves minimal restraints if any at all, and those are often deemed unnecessary.¹⁶⁴ These factors warn the average rider that additional forces and concerns go along with this experience. Specifically on thrill rides, people are intentionally seeking elevated physical forces.¹⁶⁵ This imparts understanding to some degree that this is not simply a normal train ride, and each rider intentionally undertook the transportation for that reason.

IV. SOLVING THE PROBLEM

A. Imposing a Common Carrier Standard

In order for court authority to garner enough power to address this issue, the standard by which an action will be measured must be high and clear. Adopting the common carrier standard would create a

162. *Id.*; see also *Lemoine v. Cornell Univ.*, 769 N.Y.S.2d 313, 316 (2003).

163. Saferparks.org, Safer Ride Restraints, http://www.saferparks.org/are_rides_safe/risk_factors/safer_restraints.php#top (last visited Jan. 17, 2007) (showcasing some developments in restraint technology following both potential and actual problems with rider safety).

164. For example, city buses have no seatbelts, lapbars, or other restraints. Even carriers with such restraints, such as airplanes, often do not require their use for the entire duration (i.e. the "fasten seat belts" light).

165. Minton, *supra* note 112 at 63 ("Most coasters travel below 70 miles an hour, slower than many people drive, but designers heighten the sense of speed and danger with close flybys of terrain, buildings, people, even other trains.").

heightened duty that satisfies both strength and clarity. While this broadens the current reading of the definition in each state's code, this limited, intentional expansion is justified by the need for a clarified standard and increased safety. If this is impossible in certain states due to specific exceptions contained within their common carrier language, these states should adopt new language increasing their standard, even if it is outside of the common carrier standard itself. By finding that transporters of any type owe this duty of "utmost care" to their passengers, regardless of intent, the courts can send a clear message that the expectations placed on these operators are not simple and do not change in response to the size, type, or location of the attraction.

Several considerations should be taken into account in adopting this reading of the common carrier definition for amusement park rides. First, the established limitations for the common carrier relationship in light of amusement and theme parks should be preserved. The mere sale of a ticket does not start a relationship of this type.¹⁶⁶ While an admission ticket may grant access to the attractions that are transportation based, that does not create a blanket heightened duty of care for operators if these patrons choose not to participate in such attractions. As the *Simon* court found, "[I]t is undisputed that the payment of the admission price into Disneyland permits a guest to enjoy access to dozens of attractions and entertainment activities that are not amusement rides, such as parades and shows, character appearances, themed restaurants and shops, fireworks displays, stage shows, live music and arcades."¹⁶⁷ In light of this, the standard set forth by that court is correct:

[T]he burdens imposed . . . on common carriers do not apply before a passenger has been accepted for carriage, after a passenger has safely gotten off the carrier's vehicle, or to the carrier's other activities on its property not directly related to carriage . . . When a guest purchases an admission ticket and enters the park, no carrier-passenger relationship exists at that moment . . . [T]he carrier-passenger relationship would not exist unless the guest enters the boarding area for a particular ride and is accepted by the ride operator as a passenger.¹⁶⁸

Second, this heightened standard must be limited to the duty element alone. If an attraction is functioning properly, there should not be a standard that would find fault. Finally, and most importantly, the standard must include a better understanding of assumption of the risk. Considering the extreme importance of rider

166. See *Simon v. Walt Disney World*, 8 Cal. Rptr. 3d 459, 462-63 (Cal. Ct. App. 2004) (citing *Orr v. Pac. Sw. Airlines*, 257 Cal. Rptr. 18, 21 (Cal. Ct. App. 1989)).

167. *Id.* at 466.

168. *Id.*

behavior, courts should be sure to recognize the ability of both operator and rider to understand the exact nature of an attraction and the potential dangers associated with it. Generally, risks are low with traditional common carrier vehicles. Because those risks change with different attraction vehicles, especially as the attractions get larger, faster, and taller, this dictates a change in the general understanding of risk assumption an amusement park patron takes on.

One potential problem is that common carrier statutes are not consistent in their language. Applying the broad language of California law is easier than looking to more narrowly tailored statutes. This becomes more difficult because certain statutes specifically exempt roller coasters and similar attractions.¹⁶⁹ Aside from lobbying the legislature to amend their statutes, courts should be willing to expand their reach. Although a given statute may not be as broad as that of California, the tone and general language is similar. It need not be read in an overly expansive way to include attractions, as discussed above.¹⁷⁰ Even with roller coasters exempted, amusement parks have many attractions that could still fit within the statutory language. Small attractions, especially those that mimic public transportation such as miniature railways, clearly fall within the language. While this does leave parks with a bifurcated standard that depends on which attraction caused an injury, it lends consistency to the law. Furthermore, this double application might prompt the legislature of an affected state to address the standard in favor of removing the exception.

1. Issue of Tort Law as a Regulatory Method

There is an underlying issue of whether court enforcement through tort law would be able to accomplish this form of regulation at all. Certainly a threat of litigation exists when potential injury or even death is present. Whether this approach is appropriate, however, is a deeper issue. Professor Goldberg argues, "[Tort law] is also not well equipped to provide public safety regulation because of, among other things, judges' and jurors' lack of agenda control, their limited access to information, and their relative lack of expertise and accountability."¹⁷¹ As Professor Shavell argues, however, those areas that lend themselves to control via regulation rather than liability,

169. *E.g.* OR. REV. STAT. § 460.310-380 (West 2005).

170. See discussion on applying the statutory language *infra* Part III.A.1.

171. John C. P. Goldberg, *Tort Law for Federalists (and the Rest of Us): Private Law in Disguise*, 28 HARV. J.L. & PUB. POL'Y 3, 4 (2004).

specifically tort liability, are those "justified by common knowledge or something close to it."¹⁷² Liability, on the other hand, serves better when private parties with relatively equal information are on both sides because they would possess better information about the risks and how to reduce them.¹⁷³ Because each individual's tolerance varies and each attraction's elements and forces do as well, a liability standard seems more appropriate than regulation.

This is not to assert that tort liability alone is the best method of achieving proper attraction regulation. Instead, this is a means that can be used in the interim and can provide a foundation before any action by the legislature is, if at all, taken. The threat of liability can serve to give parties the incentive not to stop merely at the regulation's standard since liability could still attach despite meeting the bare minimum language in court.¹⁷⁴ There are elements that can and should be regulated, and "[a] complete solution to the problem of the control of risk evidently should involve the joint use of [both liability and regulation], with the balance between them reflecting the importance of the determinants."¹⁷⁵ This is not meant to supplant legislative power at all. The legislature would still have free reign to clarify the standards, add additional law, and even clarify the duty owed itself. Furthermore, this judicial capability would provide a strong foundation upon which legislation can be built. If a better understanding of a court's power is granted because of a more consistent standard, the provisions of the statutes can provide more accurate wording. Even with a common carrier standard, it is up to the legislature of each state to define just who meets this standard and what duty is owed. This is not legislation from the bench; it is a full use of judicial power with which the legislature can do what it chooses.

Assuming this liability form of regulation is possible and appropriate, it would further push the law toward a common carrier standard from a power perspective. Looking again to the difficulty of defining "reasonable" person and the potential for creating classes of parks, a regulation could involve a different standard for different levels of operation. However, this ignores the point. Regulating safety must be done to protect the public riding any attraction. The level of sales should not shift the baseline of safety. Certainly, Disney,

172. Steven Shavell, *Liability for Harm Versus Regulation of Safety*, in ECONOMIC FOUNDATIONS OF PRIVATE LAW 357, 369 (Richard A. Posner & Francesco Parisi, eds., 2002).

173. *Id.* at 366.

174. *Id.* at 365.

175. *Id.*

Six Flags, Cedar Fair, and other operators could theoretically have more “riding” on better operation records, but any differences in incentives would come merely from the marketplace itself and should not stem from differences in standards or expectations. The standard must be consistent, and the heightened standard of a common carrier accomplishes this to a much greater extent than does the “reasonable person” standard.

B. Creating a Federal Ratings System

Congress should amend the 1981 amendment to the CPSA to grant the CPSC the authority for a national ratings system for amusement park attractions. While park operators currently list warnings, they are not as effective as they could be and are slightly redundant. Current displays are all-inclusive, often including a laundry list of potential dangers and effects. The risks are legitimate, but these long-winded statements may be much better in protecting the parks from liability than in informing the rider about safety risks. For example, a comparison of Space Mountain to Millennium Force shows a vastly different experience but a very similar warning slate.¹⁷⁶ Taking the content for what the average rider would understand, the

176. Space Mountain at Walt Disney World's Magic Kingdom Park has a maximum speed of 27 mph and an overall height of 90 feet. Roller Coaster Database, Space Mountain, <http://www.rcdb.com/id267.htm> (last visited Dec. 24, 2006). Millennium Force at Cedar Point has a maximum speed of 94 mph and a maximum height of 310 feet. Roller Coaster Database, Millennium Force, *supra* note 35. However, the warnings posted at the entrance to both attractions are very similar. According to Disney's official website, “For safety, you should be in good health and free from high blood pressure, heart, back or neck problems, motion sickness, or other conditions that could be aggravated by this adventure. Expectant mothers should not ride.” Space Mountain, <http://disneyworld.disney.go.com/wdw/parks/attractionDetail?id=SpaceMountainAttractionPage> (last visited Dec. 24, 2006). According to Cedar Point's official website, which gives a blanket warning for all of its thrill-based attractions:

Many rides at Cedar Point are dynamic and thrilling. There are inherent risks in riding any amusement ride. For your protection, each ride is rated for its special features, such as high speed, steep drops, sharp turns or other dynamic forces. If you choose to ride, you accept all of these risks. Restrictions for guests of extreme size (height or weight) are posted at certain rides. Guests with disabilities should refer to our Ride Admission Policy available at the Park Operations Office or Town Hall. Participate responsibly. You should be in good health to ride safely. You know your physical conditions and limitations, Cedar Point does not. If you suspect your health could be at risk for any reason, or you could aggravate a pre-existing condition of any kind, DO NOT RIDE!

CedarPoint.com, Inside the Park, Ride Policy, http://www.cedarpoint.com/public/park/rides/ride_policy.cfm (last visited Dec. 24, 2006).

only major difference is a height requirement. While that can be an important factor, it is far from an all-telling distinction.

There are many factors going into just what makes the labeling slate in the private sector. As Saferparks.org, a California-based not-for-profit organization dedicated to creating safer theme park attractions, points out:

When it comes to safety instruction, ride owners are caught between conflicting priorities. Their primary corporate goal is to increase sales, which requires suppressing any negative information about their products and services. Yet, in order to be effective, safety warnings have to create a "stop and think" response. In factories, for example, pinch points and other machinery hazards are painted bold colors and labeled clearly as "hazards". In amusement parks, such labeling might scare customers, so machinery hazards are not painted or labeled. Euphemisms are employed to soft-sell the safety message.¹⁷⁷

Establishing a standardized rating system would also help to close the gap between the better lawyering of the large operators and the small operators.

1. Issue of Commerce Clause Authority

A ratings system like this must come from some authority. Since these parks attract people the world over, they have at least an aggregate effect on interstate commerce.¹⁷⁸ The strongest authority would be under the Commerce Clause of the Constitution.

Setting federal standards raises the problem of classes of park operators, however, especially because the operators who most directly effect commerce tend to be major contributors like Disney and Busch.¹⁷⁹ Smaller parks are likely reserved to local patrons. Therefore, they might not be directly involved in interstate commerce. However, because attractions come from a fairly limited number of sources,¹⁸⁰ it could be argued that operation and expansion requires interstate commerce. Combined with the cumulative effect argument

177. Saferparks.org, Risk Factors: Risk #7, Operational Issues, http://www.saferparks.org/are_rides_safe/risk_factors/operational_issues.php (last visited Dec. 24, 2006).

178. Kingsley, *supra* note 67. Even under a *Lopez* analysis, some believe a court would likely uphold such regulations under the commerce clause, especially in light of an aggregation theory. *Id.*; see generally *United States v. Lopez*, 514 U.S. 549 (1995) (holding that Congress only had the power to regulate channels of commerce, instrumentalities of commerce, and intrastate actions that had a substantial effect on interstate commerce).

179. Kingsley, *supra* note 67.

180. While there are hundreds of manufacturers involved in aspects of amusement park operation, those represented as major contributors that make transportation-based attractions are much more limited. See IAAPA Expo, Welcome to the IAAPA Expo, <http://www.iaapaexpo.com> (last visited Dec. 24, 2006). The IAAPA Expo is the major American exposition for the amusement park industry. *Id.*

– that others who are similarly situated can suffice to establish an effect on interstate commerce – this should be sufficient to establish a link to interstate commerce and to grant authority to a federal agency like the CPSC.

There is an argument that the parks, or at least the states, are better suited to such regulation. They have been doing so in the past and are more intimately aware of their attractions and local laws. Furthermore, if this type of regulation is suited for the federal government, it could result in a general return of power to Congress over the regulation of these attractions entirely under the CPSA.¹⁸¹ In response, this change should be narrowly tailored to address solely the issue of an educational rating system regarding attraction design. There are two separate issues addressed here: the issue of operation expectations in light of the negligence duty and the issue of educating riders in light of risk assumption. Any amendment to the CPSA should be written with an eye solely to the latter. Because it should focus on providing a consistent, understandable presentation of attraction forces, intensity, content, etc., any regulation would be better reserved for one entity. The most practical option is to bestow this responsibility on the federal government much like the FDA has authority to label food under the Food, Drug, and Cosmetics Act.¹⁸² Federal regulation would allow travelers from various states to understand just what they are riding and allows courts from various states to have at least some foundation about what information was provided to riders prior to the commencement of the common carrier relationship. While states and parks are capable of producing these warnings, there could easily be a lack of consistency. The parks also might import a marketing or economic strategy associated with how information is provided. The parks have legal interests involved as well, especially in avoiding liability. These factors make both states and parks less fit for this type of educational dissemination.

2. Issue of Complacency

There is a risk that a standard warning system will create a false sense of ease in riders for certain attractions. In other words, consumers will assume that low intensity numbers equate to safety for any rider. However, this risk of false-ease should apply to the development of the information system itself and not land on the

181. Again, the issue of whether regulations regarding maintenance and operation expectations should be granted to Congress or left to the states is not addressed here.

182. 21 U.S.C. §§ 341, 343-1 (2000).

shoulder of amusement parks in liability actions. As with other national information systems, an effective, easily understood system allows the consumer to be ultimately responsible for his own, informed decisions. While a system offering "recommended daily risk" is unrealistic given the differences in individual health and preferences, such a system would still help to develop a basic understanding of how the ratings work and what factors are considered in assigning ratings to particular rides. For example, a ride that has a certain rating could be an intense experience for one person and boring for another. A unified rating system would assist both individuals, however, in evaluating the likely intensity of their own ride experience. This is not necessarily a novel concept, as many parks already have similar systems. A uniform system across all parks, however, would be easier and therefore more effective for riders. Currently, posted warnings are practically the same for all rides regardless of the intensity level,¹⁸³ so riders likely pay them little heed. Any improvement in understanding, therefore, would help both the safety of riders and the park's position in arguing assumption of the risk.

Complacency is not an escape for negligence. As Ammons and Vujasinovic state, "Amusement companies almost always attempt to blame the patron for his or her injuries."¹⁸⁴ Because the standard of care is still high, this system of education must be limited to times when the attraction is functioning properly. Ammons and Vujasinovic also note that when children are involved, the company will often be barred from introducing contributory negligence information.¹⁸⁵ Having a system that is standardized would also provide parents, whether they ride the attraction or not, with additional information and allow them to be educated on just what the numbers posted mean.

V. CONCLUSION

By increasing rider awareness and understanding, court application of a negligence standard can sufficiently establish when an amusement attraction operator is truly failing to provide the safe ride her patrons expect. While the debate will likely continue in the

183. See comparison of posted warnings, *supra* note 176.

184. Ammons & Vujasinovic, *supra* note 47, at 34.

185. *Id.* (citing *Nguyen v. Six Flags Theme Parks*, No. 2001-54868 (Tex. Harris County Dist. Ct. 2002)). In *Nguyen*, a 13-year-old boy was thrown from the front car of the Mayan Mindbender roller coaster, an indoor attraction, when the lapbar malfunctioned. *Id.* The boy stood up after the lapbar released, and Six Flags argued this action added to his injuries under a theory of contributory negligence. *Id.*

legislature,¹⁸⁶ a blind eye should not be turned to the power of regulation from the court system. Courts have disagreed about an appropriate standard of care for amusement park rides as “common carriers,” but there can be no doubt that the safety of riders must be the main concern in adopting any such standard.

Those courts that have refused to include fixed site amusement attractions have done so because of either narrow exceptions in the definitional language or statutes, or because the transportation provided is for a different purpose. This ignores the express language of the statutes. Under the basic definition,¹⁸⁷ however, the language makes no exception for purpose. People are riding these machines to be moved around or transported. While that transportation may be solely to experience the effects of the movement itself (as with a roller coaster) or to travel past an entertaining scene (as with a skyride or miniature train ride) instead of getting from point A to point B more expediently, that motive is not included in the definitions of common carrier provided to the courts.

There is a concern that the design and operation of these types of machines brings about new, or at least different, challenges than traditional transportation common carriers including height, safety restraints in light of open-air cars, increased speeds, etc. The expectation of operation should not be lowered because of this concern, however, as there is an obligation of safety which does not change regardless of the risk. Increased risks do, however, create a greater responsibility for the rider. Amusement parks offer a unique product. Not only do they provide transportation, but a large part of their success comes from doing so in an environment that creates a sense of freedom and fun. Unlike a bus or trolley car, which is merely a vehicle, the carefree attitude of a day at Disneyland adds another element to making these locations safe.

Offering a “fun day at the park,” however, should not excuse riders from understanding the risks involved. As an official of the

186. Congressman Markey still maintains a significant portion of his Congressional website to this issue, and he has continued to call on this topic as a necessary move by Congress. See Congressman Ed Markey, Amusement Park Ride Safety, http://markey.house.gov/index.php?option=com_content&task=blogcategory&id=218&Itemid=50 (last visited Jan. 3, 2007); see also Saferparks.org, Markey Reintroduces Theme Park Safety Bill, <http://www.saferparks.org/#top> (last visited Dec. 24, 2006). Congressman Markey reintroduced his National Amusement Park Ride Safety Act again on May 19, 2005. *Id.*

187. A common carrier is “any person, firm, or corporation that undertakes for hire, as a regular business, the transportation of persons or commodities from place to place, offering its services to all who choose to employ it and pay its charges.” See, e.g., FLA. STAT. ANN. §561.01(19) (West 2005); see also BLACK’S LAW DICTIONARY 226 (8th ed. 2004).

IAAPA has said, 65-85% of accidents involving transportation-based amusement parks stems from riders breaking posted rules, either intentionally or inadvertently.¹⁸⁸ While the industry is trying to increase warnings,¹⁸⁹ because of inconsistency, over-warning, and a simple lack of content, current systems created by the parks are inadequate. Additionally, because of the difficulty in determining what riders knew, the courts hesitate before applying contributory negligence to riders. If operators are to be held to a high standard, they are also entitled to the expectation that liability attaches only to situations where they have not taken steps to prevent injury.

By requiring more of operator and rider, the system can operate more safely even before any steps by Congress. Whether the ride is on a city street on the way to school or twisted metal performing acrobatics hundreds of feet in the air, differences in safety expectations should not be at issue. The concerns raised differ only because both experiences have unique elements for safe use. Combining a heightened standard of care for amusement park ride operators with a nationalized rating system for amusement park patrons can ensure a safe and entertaining experience, which in the end is the goal for patrons and operators alike.

*Tobias Butler**

188. Gene Sloan & Anthony DeBarros, *Park Safety Rules Lax*, USA TODAY, Apr. 7, 2000, at 1A, available at 2000 WLNR 3508355.

189. Kingsley, *supra* note 67.

* J.D. Candidate, Vanderbilt University Law School, 2007. The author wishes to thank the following people: his friends, for providing support and encouragement through the entire writing process; my family, for helping ease the stress of publication; the editorial staff of the Journal for their infinite help and talents; and the webmasters of the various theme park-oriented fan sites that, through diligent efforts, have allowed me to keep up with the happenings in the theme park world.

