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Amusement Parks - Liability of Owner for Injury on Concessionaire's Device - Kuhn v. Carlin

AMUSEMENT PARKS — LIABILITY OF OWNER FOR INJURY ON CONCESSIONAIRE'S DEVICE

Kuhn v. Carlin[1]

Suit was entered in the Court of Common Pleas by the Plaintiff, Kuhn, to recover from the Defendant, Carlin, owner and operator of an amusement park, for personal injuries when a fitting on an amusement device broke. The

[1] 196 Md. 318, 76 A. 2d 345 (1950).

machine was owned and operated by a concessionaire to whom the defendant leased space and over whom the defendant exercised no direction or control. The defendant received from the plaintiff no admission fee for entry into the park, nor did he receive any money for the operation of the device other than rent for the land upon which it was located. From a judgment N.O.V. for the defendant, after a jury verdict for the plaintiff, the plaintiff appeals. *Held. Affirmed.*

The owner or operator of a place of amusement is liable to the public for personal injuries sustained from defective equipment maintained by a concessionaire or independent contractor thereon, if a reasonable inspection of such equipment would have disclosed its defective character. The owner or proprietor is under a positive obligation to know that the place is safe and his lack of knowledge of defective conditions which he could have discovered by a reasonable inspection will not excuse him.[2] However, in the present case, the court affirmed the judgment N.O.V. in favor of the Defendant, Carlin, on the grounds that there was no evidence that a reasonably attentive inspection would have disclosed that the machine was being improperly maintained.

The general rule is established by the great weight of authority[3] and by the *Restatement of Torts*,[4] on the theory that the operator of a place of amusement extends an invitation to the public to attend the place of amusement, and as the author of the invitation, the patrons are his invitees and as such he owes them a non-delegable duty to see that the premises are in a reasonably safe condition.

Since the duty of the amusement park proprietor is based solely on his invitation to the public, the proprietor's

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[2] Rubin & Cherry Shows, Inc. v. Dinsmore, 88 Ind. App. 616, 164 N. E. 304 (1928).

[3] For a collection of cases, see 145 A. L. R. 962.

[4] RESTATEMENT OF TORTS (1934), Vol. II, Sec. 415.

"A possessor of land who in the course of his business holds it open to members of the public, is subject to liability for bodily harm caused to them, on a part of the land retained in his possession or upon a part thereof leased to a concessionaire, by his failure to exercise reasonable care to secure the use of reasonably safe equipment and methods by an . . . (b) independent contractor or concessionaire employed or permitted to carry on upon the land an activity in furtherance of the possessor's business use thereof."

Illustration 4. "A, the proprietor of an amusement park lets out to B, a concessionaire, the privilege of operating a roller coaster. The roller coaster is improperly maintained, as a reasonably attentive inspection would have disclosed to A. Due to the improper maintenance, the roller coaster collapses, causing harm to C who is riding in one of the cars. A is liable to C."

liability has been extended by the courts to all cases where such an invitation, express or implied, is found to have existed, regardless of the fact that the proprietor may not have had a direct hand in the construction or maintenance of the amusement device.[5] The fact that the proprietor receives no direct pecuniary benefit from the operation of the devices or that he receives no admission fee for entrance to the park does not act to relieve him from the duty to inspect the devices erected by independent contractors or concessionaires.[6] Formerly some courts made a distinction between concessionaires and independent contractors, thus relieving the amusement park proprietor from liability if the faulty equipment was erected on land leased to the concessionaire, but holding him liable if the injury resulted from equipment of an independent contractor. The distinction is thought to be due to an erroneous application of the rule that a landlord is not responsible for tortious acts committed by the tenant upon the leased grounds without the landlord's consent. In holding that there is no reason for a distinction between a case where the defective equipment was erected on land leased to a concessionaire and where the equipment was run by an independent contractor for a percentage of the gross receipts, the Maine court, in *Thornton v. Maine State Agricultural Society*,[7] said:

> "Some of the cases cited are those where the injuries resulted from the negligence of independent contractors, and not lessees. But we can perceive no tenable distinction in a case like this. In either case the offending thing is where it is by the license and permission of the owners of the premises, and upon ground which the owners, by virtue of their invitation to the public, hold out as safe. This is the ground of their liability. By inviting patrons to their fair, they make themselves bound to use reasonable care to see that the fair in all its parts is safe, and is conducted safely, whether the various parts of the fair are conducted and managed by the owners themselves, or, with their permission, by licensees, independent contractors, or lessees."

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[5] Texas State Fair v. Brittain, 118 F. 713 (5th Cir., 1902).

[6] Demarest v. Palisades Realty & Amusement Co., 101 N. J. L. 66, 127 A. 536 (1925); Blakeley v. White Star Line, 154 Mich. 635, 118 N. W. 482 (1908).

[7] 97 Me. 108, 53 A. 979, 982 (1902).

Furthermore, no distinction should be drawn on the basis of the charging of an admission fee for entry into the park; the touchstone is the invitation of the park operator.

> "It makes no difference whether admission was charged to the grounds or not. The amusement park was conducted as an attraction to its patrons by the railway company, in order to hold and increase its traffic. The plaintiff was there by the invitation of the defendant. One who invites others to come upon his premises for business or pleasure must exercise reasonable care to have and keep the premises reasonably safe for such visitors."[8]

This rule should not be confused with the formula[9] imposing liability on a lessor of land who knowingly leases it for purposes involving the admission of the public and upon which there is a defect *existing* when the lessee takes possession. There, the liability is not, under the better view as expressed by Cardozo, J., in *Junkermann v. Tilyou Realty Co.*,[10] based on the lessor's invitation to the general public but, rather, is based on the idea that the lessor of land has a duty to the public so great, that when he knowingly leases land which will be used for the admission of the general public and upon which, at the time of the leasing, there is in actual existence a defect in the land that could have been found by reasonable inspection before transferring possession, he will not be permitted thereby to shift this duty to the tenant who may be in a worse pecuniary position than the lessor. Thus, under this latter rule, the liability is extended only to the lessor who transfers possession to a lessee of land upon which a defect exists at the time it is transferred to the lessee's possession.

However, in the cases under the rule presently discussed, since the basis of liability is the amusement park owner's invitation, liability for injuries sustained by defects extends to anyone in general control of the place of amusement as a whole. This liability exists not only if he owns the land himself and in turn leases portions of it to concessionaires, but also if the proprietor of the amusement park, himself, leases the grounds from the owner and in turn, leases portions of it to concessionaires or to independent contractors. Here, the proprietor's liability is also

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[8] Turgeon v. Connecticut Co., 84 Conn. 538, 80 A. 714, 715 (1911).

[9] RESTATEMENT OF TORTS, *supra*, n. 4, Vol. II, Sec. 359; Albert v. State, 66 Md. 325, 7 A. 697 (1887).

[10] 213 N. Y. 404, 108 N. E. 190 (1915).

extended beyond defective conditions existing on the land at the time the concessionaire takes possession, and is held to include defective conditions that arise both on the land and in the apparatus that has been erected upon the land after the concessionaire or independent contractor has taken possession.

In *Frear v. Manchester Traction, Light & Power Co.*,[11] the New Hampshire Court extended the invitation concept to its logical conclusion. In this case, the owner of the amusement park grounds leased out the premises as a whole to the defendant, a railway company, who advertised the premises as an amusement park. The owner thereafter leased out a small portion of the same premises to Williams, with permission to erect and operate a ferris wheel thereon. Thus, the only relationship existing between Williams and the defendant was that they were both lessees of the owner of the amusement park premises. Plaintiff, a patron of the amusement park, was injured due to a defect in the ferris wheel, and the defendant was held liable for such injuries sustained. Here, there was no basis of liability to the defendant other than the invitation the defendant extended to the public through his advertisement of the amusement park. The court found this sufficient and held defendant liable solely on the invitation doctrine. In its opinion, the court said:

> "Surrender of control of the premises to Williams did not free the railway from responsibility. The issue is not one of a landlord's liability to his tenants' guests, but of his duty to his own invitees. The doctrine of nonliability for the negligence of an independent contractor, or a lessee, does not control the rights and duties of these parties. A duty was imposed, not because the railway was liable generally for faulty construction or negligent operation, but because its acts made it a sponsor for the enterprise. The invitation was such an adoption of the place invited to that the duty to use care arose. The same duty would exist as

[11] 83 N. H. 64, 139 A. 86, 89 (1927). In Babicz v. Riverview Sharpshooters Park Co., 256 Ill. 24, 99 N. E. 860 (1921), concessionaires of an amusement park needed more land for their exhibits. Defendant, the owner of the park, arranged for them to lease directly from the owner of an adjoining tract the necessary land, and extended the fence surrounding the park to include the additional land. The Court held for the plaintiff, who was injured by the collapse of the grandstand built by a concessionaire on this additional land, stating that since the plot was enclosed by the defendant park owner within the park grounds, and since he used this plot in the same manner as his own grounds, the defendant's invitation to the public extended to that portion of the adjoining land fenced in with his own.

> to premises owned and controlled by an entire stranger, if the defendant had in like manner invited the public thereto as to its own property. Ownership or control of property is often of importance as tending to show what the invitation was. But, when the fact of invitation is otherwise shown, this feature of the situation is not controlling."
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> ". . . If the invitation includes a representation of ownership or control, justice and reason require that the invitor may be taken at his word. . . . If he wished to avoid such responsibility, he should not extend such an invitation."

The Court of Appeals in the present case specifically distinguished the following cases which were cited by the plaintiff, on the ground that they were not factually similar. In *Agricultural and Mechanical Association v. Gray*,[12] the proprietor was held liable for an injury caused by the faulty construction of a grandstand. However, here, the defendant had itself erected the grandstand which had broken. In *Lawson v. Clawson*[13] and *Carlin v. Smith*,[14] the parties held were found to be proprietors of the defective apparatus, thus liability rested upon that fact. In the instant case, Carlin, the defendant, had neither erected the machine nor had any hand in maintaining or operating it.

Carlin v. Krout[15] and *Smith v. Benick*[16] cited by the court were also found to be distinguishable. In the *Krout* case, the device (known as the "Ocean Wave") was not only owned and operated by the defendant, but in addition the injuries were due to "visible conditions presenting known hazards which were voluntarily assumed" and were not received from a defect in the apparatus, so recovery was denied. In the *Benick* case, the injuries of the spectator were not derived from a defect in the apparatus, but rather from the personal negligence of an independent contractor conducting an enterprise not likely in itself to cause injury to the spectator.

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[12] 118 Md. 600, 85 A. 291 (1912).
[13] 177 Md. 333, 9 A. 2d 755 (1939).
[14] 148 Md. 524, 130 A. 340 (1925).
[15] 142 Md. 140, 143, 120 A. 232 (1923).
[16] 87 Md. 610, 41 A. 56 (1898). This case is cited in 145 A. L. R. at 972-3 as standing for the proposition that:

> ". . . where the operator of a place of amusement has exercised ordinary care in making the premises reasonably safe for his patrons, he cannot be held liable for personal acts of negligence on the part of a concessionaire or the latter's employees in the operation of devices used in connection with the concession."

There is a conflict in authority in the United States on this question.

The Court of Appeals, thus finding an absence of prior Maryland authority determinative of the specific question, pointed out that plaintiff relied on the rule set forth in the Restatement of Torts,[17] but that the condition for recovery under that rule had not been met because the plaintiff failed to show any defect in the apparatus that could have been discovered by a reasonable inspection. From the standpoint of predicting for the future, the opinion does not indicate whether the court would have permitted the plaintiff to recover had such evidence of a discoverable defect been shown. The Restatement rule would seem to place an affirmative duty upon an amusement park proprietor to inspect amusement devices, even though they are in the complete control of independent contractors and concessionaires, but the result of the instant case did not require flat approval of the rule. The door may be open for its acceptance in some future case as the test of liability of the proprietor, but a more firm pronouncement than exists here would be required before potential plaintiffs can accept it with assurance as being established law in Maryland.

[17] *Op. cit., supra*, n. 4.