TORTS

Assumption of Risk

The plaintiff was injured riding on an amusement device called the "Bug" operated by the defendant company. The device consists, broadly, of a train of six cars operated on a circular, undulating track, so constructed as to provide its patrons with a jerky, jolting ride. The plaintiff had ridden on the contrivance before, but testified that the jerk resulting in her injury, was more violent than she had previously experienced. In deciding the validity of a motion for directed verdict by the defendant, the Supreme Court of Ohio held that the evidence was sufficient to go to the jury. *Durbin* v. *The Humphrey Co.*, 133 Ohio St. 367 (1938).

The majority of the court in rendering its opinion relied upon *Hamden Lodge* v. *Ohio Fuel Gas Co.*, 127 Ohio St. 469, 189 N.E. 246 (1934), wherein the "scintilla rule" of evidence was abrogated and the rule adhered to in the principal case, approved. The dissent concurred on this ground, but raised the question of liability because of the doctrine of the assumption of risk.

In order to determine whether or not there has been an assumption of risk, it is necessary to consider the duty owed by the defendant. It can be laid down as a general rule, that an owner or proprietor of an amusement device is not the insurer of his patrons' safety. *Carlin* v. *Smith*, 148 Md. 524, 130 Atl. 340, 44 A.L.R. 193 (1925); *Shellack* v. *Biers*, 109 N.J.L. 61, 160 Atl. 404 (1932). Yet some few courts have gone to the full length of holding him to the same degree of care required of a common carrier. *Brown* v. *Winnwood Amusement Co.*, 225 Mo. App. 1180, 34 S.W. (2d) 149 (1931); *Bibeau* v. *Fred W. Pearce Corp.*, 173 Minn. 331, 271 N.W. 374, 61 A.L.R. 1299 (1928); *Tenn. St. Fair Ass'n.* v. *Hattie Hartman*, 134 Tenn. 159, 183 S.W. 735 (1915). In *Lausterer* v. *Dorney Park Coaster Co.*, 100 Pa. Sup. Ct. 33 (1930), it was said, "owners of an amusement appliance are not deemed common carriers, although under some circumstances the degree of care required may be just as high." But the great weight of authority supports the view that he is bound to exercise only the degree of care that would be expected of an ordinarily careful and prudent man under the circumstances. *G. A. Boeckling Co.* v. *Slattery*, 26 Ohio App. 261, 160 N.E. 99 (1927); *Godfrey* v. *Conn. Co.*, 98 Conn. 63, 118 Atl. 446 (1922); *Shellack* v. *Biers*, *supra*.

The courts, in dealing with cases involving amusement devices, have

not infrequently ignored the question of voluntary assumption of risk, either because recovery was barred on the ground that there was no negligence, *Denver Park Amusement Co.* v. *Pflug*, 2 Fed. (2d) 961 (C.C.A. 8th, 1924); *Fenner* v. *Atlantic Amusement Co.*, 84 N.J.L. 691, 87 Atl. 344 (1913), or because of a failure to appreciate the doctrine as applicable to a situation of this sort. *Eldred* v. *United Amusement Co.*, 137 Ore. 452, 2 Pac. (2d) 114 (1931).

Where the doctrine has been considered, certain limitations have been established as affecting its use. It appears well established that there is no assumption of risk of dangers which, although inherent in the sport, are obscure and unobserved. *Dahna* v. *Fun House Co.*, 204 Iowa 922, 216 N.W. 262 (1927); *Tantillo* v. *Goldstien Bros. Amusement Co.*, 248 N.Y. 286, 162 N.E. 82 (1928).

In a like manner, the cases are in accord in refusing to allow the defense of assumption of risk where the injury resulted from the negligence of the operator or attendant. *Connolly* v. *Palisades Realty Amusement Co.*, 11 N.J. Misc. 841, 168 Atl. 419 (1933); *Shankland* v. *Morris & Castle Shows, Inc.*, 4 La. App. 326 (1925); *Hays* v. *Eldora Amusement Co.*, 51 Pa. Sup. Ct. 426 (1912). But aside from these exceptions, there is a line of cases wherein the plaintiff has been deprived of recovery because he assumed the risk which resulted in his injury. Leading case in the field, and that relied upon by the minority in the principal case, is *Murphy* v. *Steeplechase Amusement Co.*, 250 N.Y. 479, 166 N.E. 173 (1929), wherein Judge Cardozo expresses the opinion that "one who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist, or a spectator at a ball game, the chance of contact with the ball." The view, thus expressed, that the patron assumes the risk of those dangers which are inherent, obvious and necessary, is well supported. *Myers* v. *Park Play, Inc.*, 35 Ohio App. 336, 172 N.E. 394 (1929); *Gardner* v. *G. Howard Mitchell, Inc.*, 107 N.J.L. 311, 153 Atl. 607 (1931); *Torian* v. *Parkview Amusement Co.*, 331 Mo. 700, 56 S.W. (2d) 134 (1932); *Sullivan* v. *Ridgeway Constr. Co.*, 236 Mass. 75, 127 N.E. 543 (1920); *Pointer* v. *Mountain Ry. Constr. Co.*, 269 Mo. 104, 189 S.W. 805 (1916).

It is interesting to note that in the case of *Lumsden* v. *Thompson Scenic Ry. Co.*, 130 App. Div. (N.Y.) 209 (1909), the plaintiff, a passenger on a roller coaster, was held to have assumed the risk of being thrown from the car by its usual operation, whereas it has since been held on similar fact situation, that the plaintiff could recover under the doctrine of res ipsa loquitur. *Bibeau* v. *Fred W. Pearce Corp.*, *supra*;

Brown v. *Winnwood Amusement Co., supra; Ponticorvo* v. *Clark,* 95 Cal. App. 162, 272 Pac. 591 (1928). The divergence of these views is indicative of the attitude of the courts in different jurisdictions. Few courts have gone as far as did the court in the *Lumsden* case, yet some of the language in *Murphy* v. *Steeplechase Amusement Co., supra,* indicates that the same view exists in New York today.

The contention of the minority in the principal case finds support in *Myers* v. *Park Play, Inc., supra,* which is the only Ohio case directly in point. The court in that case, applied the doctrine of assumption of risk with respect to an amusement device known as the "Dodgem," a machine operated to some extent by the patron himself. That the doctrine could be applied to the use of the "Dodgem" and not to the use of the "Bug," is entirely conceivable. In fact, a parallel situation exists in New Jersey where the court approved the doctrine as applicable in a case involving a "Dodgem," *Gardner* v. *G. Howard Mitchell, Inc., supra,* but refused to recognize it in a case involving the "Virginia Reel," a device similar to the one in the principal case. *Schnoor* v. *Palisades Realty & Amusement Co.,* 112 N.J.L. 506, 172 Atl. 43 (1934). Reasoning thus, it may be that the majority opinion in the principal case can be reconciled with the *Myers* case.

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TORTS

GUEST STATUTE — WHO IS A GUEST?

The deceased was fatally injured while riding in a car owned and operated by the defendant. He was invited to get into the car for the sole purpose of pointing out to the driver the location of a house a short distance away. In an action for negligence brought by the plaintiff, as administrator of the estate of the deceased, the common pleas court submitted to the jury the question of whether the deceased was a guest. The court of appeals reversed the resulting judgment for the plaintiff on the ground that it was manifestly against the weight of the evidence, but refused to enter final judgment for the defendant. The Supreme Court affirmed this ruling and remanded the cause for a new trial, holding that the deceased was not a guest within the meaning of Ohio G. C. sec 6308-6, which reads as follows: "The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest