

Recreation and Risk

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Author's Note

“Do you know what that means, to be in the amusement business?”

“No, sir, not exactly.”

His eyes were solemn, but there was a ghost of a grin on his mouth. “It means the rubes have to leave with smiles on their faces.... [T]he place turns 'em into rubes with their mouths hung open. If it doesn't, it's not doing its job.... [They] have to leave happy, or this place dries up and blows away. I've seen it happen, and when it does, it happens fast.”

Stephen King, *Joyland* (2013)

Most rides and attractions are designed to make you feel like you're in danger—that's why you get that adrenaline rush—without, you usually assume, actually endangering you. Get on a roller coaster, go into a haunted house, or board a drop ride: Do any of these, and you probably expect to get through the experience with a thrill and nothing else more unpleasant than maybe a bump or a mild bruise.

This book is about the case law, statutory provisions, and regulatory structures related to that core idea and what



A sign with this text hung for years at the coasters at Mount Olympus at Wisconsin Dells.

happens when those expectations are not met in various recreational contexts.

Amusement parks and carnivals, which are central to the book, sit at intersections that make them particularly interesting legally. Fixed-site parks' rides aren't regulated by the federal government, leaving them to a patchwork of state regulations; carnivals are—kind of—federally regulated, but also fall under some state rules. Questions of assumption of risk and comparative fault are complicated when the idea of the attraction is to make you feel simultaneously in danger but also in a bubble of assumed safety. The contractual questions raised by waivers purporting to limit liability are complex. And so on.

This book grew out of a course I created. That course was originally framed by New Jersey's Action Park, and Action Park will appear throughout the book. Action Park upended or defied most of the assumptions about amusement parks. It generated thousands of stories (many of them true), countless injuries, a number of deaths—and at least 100 lawsuits. At its peak in the 1980s and 1990s, it was wildly popular with kids on the East Coast for many of the reasons it was also far more dangerous than more conventional parks—the guests had a great deal of control over their experiences, and, thus, their risks. The risks that were illusions in most other places were, at Action Park, the genuinely dangerous, and, by most accounts, very fun, reality.

My premise is that we can sometimes learn the most about the development of various areas of law by exploring situations in which someone pushes those areas' boundaries. Accordingly, the book spends a lot of time on tort law, but also touches on administrative law, criminal law, the interplay of federal and state law and regulations, and insurance law.

The goal here is for you to better understand the various ways that tort and other doctrinal law evaluates (and affects?) the conduct of actors—both plaintiffs and defendants—and to be better prepared to make arguments related to such topics, recognizing that conduct often falls within more than one doctrinal approach.

Given the topic, the book includes some upsetting fact patterns. They are included not for shock value, but because they represent an opportunity to explore important issues. Keep in mind—as I do—that these are real people and real injuries with real consequences. That

said, I hope you find the course as much fun to take as I have found it to teach. I *love* amusement parks (my roller coaster count is around 200) and I *love* thinking about these issues.

In focusing primarily on one broadly defined industry rather than a doctrinal area, this book is unusual. In doing so, it seeks to help you think about the range of legal issues that affect people and businesses. In practice, lawsuits don't come in your door labeled with just one doctrine ("Hello, my name is Products Liability—Warnings Defect"), and so we're spending a course thinking about an area of life rather than an area of law. Whether you're advising or defending a business or suing it, it's necessary to recognize those cross-doctrine questions. (It also, I understand from students, is a pretty good way to review material you've heard before.)

Notwithstanding the somewhat uncommon subject matter, the book is broadly conventional in structure. However, because of the range of issues addressed, the chapters necessarily often touch on more than one topic, notwithstanding their relatively narrow titles—so a chapter about waivers of negligence claims might meander into intentional tort stuff for a while. I have attempted to keep the notes focused and less voluminous than in some books. I've also included a chapter with extensive (largely primary) materials from one (real and tragic) incident from the fall of 2021, to provide the opportunity for you to do an in-depth case study.

More than many other books you've used, you'll see a lot of primary source materials (like investigation reports) and pleadings (as opposed to opinions). In the same way cases don't come in the door labeled with a doctrine, they also don't come in with all of the issues identified, and a lot of being a litigator in particular involves getting good at analyzing things like investigation reports. You'll get some practice doing so.

Some of the book will feel like a refresher from other classes you've taken. From time to time, it may feel like it's at odds with some of those classes. As you have no doubt already figured out, there's more than one way to approach some key issues in the law, and certain subjects here are, I think, easier to understand with a particular approach. For example, I think primary assumption of risk is best thought of as a no-duty rule (as opposed to the more mundane defense some treat it as). Each approach has support in various cases and I won't fuss about

which approach is “right”—but for our purposes, the no-duty rule makes the most sense. Because not every Torts professor uses that approach, the book takes a bit of time to establish it.

Thank yous, academic division: Professor Erin Buzuvis (for taking my idle “I could make this a class” as an offer to create and teach it at Western New England University School of Law); my former colleague Eric Gouvin (also at Western New England) for always being interested in what I’m up to; all the nice folks at Mitchell Hamline School of Law for making me feel welcome as an adjunct; South Carolina’s Professor emeritus David Owen (for pointing out that this would make a good book); Professor David Anderson and the late Professor David Robertson, both of the University of Texas School of Law (for helping me as a baby professor and for co-authoring my favorite Torts casebook). I am also grateful to Christopher Churilla and Greg Van Gompel from the National Amusement Park Historical Association for their patience as we scrolled through hundreds of wonderful amusement park photos for the cover. On that note, I should add that the pictured coaster, the Lakeside Cyclone, has not had any significant accidents of which I am aware, and is on the cover because it’s beautiful, not because it’s risky. Thanks also to Ana Marie Cox for her assistance in the editing process and helpful comments on the text. Thanks to all the great folks who have visited my class, sharing their wisdom and ideas, including Prof. Serena King; Judge Colette Routel; Zamperla Rides’ Adam Sandy; Ride Training International’s Erik Beard; Prof. Kathryn Woodcock; author Andy Mulvihill; activist Kathy Fackler; and attorney Elijah Watkins. And thanks, as always, to my students (especially Maggie Solis and Jasmine Campbell), both recent and in the distant past, for enjoying, or at least putting up with, my ramblings about this stuff, and for asking great questions.

Thank yous, personal division: My family—my wife Dena and our kids, Joss and Liam—for riding the rides with me and putting up with my ramblings about this stuff. Joss, despite being a scholar of early Christianity, is also obsessed with the National Transportation Safety Board Go Team and loves lengthy conversations about the appropriate model for regulations and investigations. Liam goes to enough hardcore shows that he can get me up to date on the unwritten rules of the mosh pit, since I’m a few years out from my time up

front at shows. Thanks also to my mom and late dad—Holly and Ves—for encouraging deep dives into obscure topics, even if they never really liked riding the rides, as far as I know.

Thank yous, other division: Andy Mulvihill, co-author of a book about his dad's Action Park, and Seth Porges, director of the documentary film about the same place. Both sources were useful and both people generous with their time, and both kindly visited my class multiple times.

Dedication: To the memory of Mount Holyoke College Professor Jon Western, who kept gently nudging me back towards teaching.

As I reference from time to time in the book, many materials related to this subject are available at RecreationAndRisk.com. I will try to post there from time to time as events warrant.

I hope you enjoy the book, and the course. Get in touch with any ideas. One of the weird delights of my specialty is former students reaching out every time something goes awry in an amusement park, and I'd be glad to add readers of this book to that list of correspondents. If you find yourself in Minnesota, get in touch and we'll go ride some rides at Valleyfair or, if the time is right, the greatest state fair in the country.

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P.S. I should note that none of this is legal advice and none of this is necessarily representative of the view of any of my various employers.

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