

## Criminal Prosecutions in the Amusement Industry – Is There a Trend?

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Patrons of amusement attractions are sometimes hurt or killed, as in any situation in which people and machines interact. In recent years, prosecutors have more often charged owners, operators, and inspectors with crimes stemming from those incidents.

Commentators suggest that this is evidence of a “growing threat” of criminal liability in the industry.<sup>1</sup> In this Paper, I provide basic information about these criminal prosecutions and several reasons to doubt whether the industry faces such a trend.

I first provide a brief history of each of the domestic criminal prosecutions in roughly the past two decades. Most of these incidents, if not all, will be familiar to those active in the industry. Second, I discuss various potential confounding factors that may cut against concluding that there is a significant trend. Perhaps most notably, I describe a number of amusement-related incidents that led to criminal *investigations* but not *charges*. As I discuss, if we consider the investigated-but-not-charged incidents (and I argue that we should), it becomes less clear that there is a significant trend in the amusement industry. Nonetheless, of course, operators, inspectors, and counsel must consider the possibility, even if slight, of criminal prosecution.

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<sup>1</sup> See, e.g., Chad D. Emerson, *The Growing Threat of Criminal Liability for Amusement Operators*, TOURIST ATTRACTIONS & PARKS (April/May 2005) 48. David Daly suggests that the trend is caused by “inexperienced regulators...promulgating regulations which may criminalize negligence” and by political pressure on elected prosecutors. See *id.*

## I. The Prosecutions

### A. May 11, 1984 – Great Adventure Haunted House Fire

The earliest modern criminal prosecution I know of involving amusement attractions arose out of “the notorious fire of May 11, 1984 which took the lives of eight young people in the ‘Haunted House’ of Great Adventure Amusement Park.”<sup>2</sup> Because of the prominence of the case, and how it arguably laid the groundwork for future prosecutions, a relatively detailed look may be of value.

The attraction, called the “Haunted Castle,” consisted of seventeen metal trailers (placed behind a “castle” façade) connected together, with standard haunted house stunts and costumed employees throughout it; given the nature of the attraction, it’s not surprising that it was dimly lit.<sup>3</sup> Indeed, a patron described it as “very disorienting” and “[s]ometimes...totally black.”<sup>4</sup> The Castle opened as a temporary Halloween attraction in 1979, and because of its popularity and capacity, the park lengthened its lease and “mirrored” the original attraction to permit even greater capacity.<sup>5</sup>

Early that May evening, a fire broke out, likely caused by a patron’s cigarette lighter igniting highly flammable foam rubber used in the walk-through.<sup>6</sup> At the time, four employees and sixteen visitors were inside the attraction. Eight of the visitors died, all found in a single trailer adjacent to where the fire started.<sup>7</sup> The fire resulted in temperatures of up to 2,000 degrees and burned the victims’ bodies beyond recognition.

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<sup>2</sup> *Caiazza v. Bally Mfg., Inc.*, 509 A.2d 187, 188 (N.J. Super. 1986).

<sup>3</sup> Joe Costal, *Fire at Haunted Castle*, HAUNTED ATTRACTION, available at <<http://www.hauntedattraction.com/33/industry.html#ind2>>.

<sup>4</sup> *Id.*

<sup>5</sup> *See id.*

<sup>6</sup> *See* Tom Torok, *Fire Victim’s Family Gets \$2.5 Million*, PHILADELPHIA INQUIRER (Dec. 21, 1985) A1. Nobody ever definitively determined the source of the fire, and the patron who may have started it was never identified. *See* Costal, *supra* note 3. At the criminal trial and afterward, defense experts and attorneys suggested that the fire may have been intentionally set, with gasoline or another accelerant involved. *See* Marc Duvoisin, *Jury Acquits Great Adventure*, PHILADELPHIA INQUIRER (July 21, 1985) A1.

<sup>7</sup> Reports indicate that at least some of the victims may have been attempting to themselves hide among the decorations and scare other patrons. *See* Costal, *supra* note 3.

The attraction had been inspected by township officials at the start of the season and met the building code's requirements, which, because the attraction was a "temporary structure," did not require, for instance, smoke detectors or a sprinkler system.<sup>8</sup> While many allegations (of chained doors and the like) were never substantiated, reports indicate "deteriorating conditions" at the Castle, with an employee writing "forget it, too numerous to mention" on a safety report the year prior, and employees evidently staging a walkout based on safety concerns (among other things).<sup>9</sup> Civil lawsuits alleged insufficient emergency exits, lighting, and warnings regarding hazards of the attraction.<sup>10</sup>

Prosecutors charged two corporate defendants (Great Adventure, Inc., and Six Flags Corporation) with aggravated manslaughter and two individuals, Larry Cochran (the park's former general manager) and David Paltzik (Cochran's successor), with manslaughter.<sup>11</sup> Of particular note to the subject of this Paper, the case was purportedly "the first in New Jersey and one of the first in the country" in which companies *in any industry* had been charged criminally with homicide.<sup>12</sup> Additionally, the grand jury considered charges against, but

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<sup>8</sup> *Id.*

<sup>9</sup> *See id.* According to testimony at trial, employees had warned superiors that "customers routinely smoked in the dimly lit castle, used cigarette lighters to help them walk through its winding corridors and occasionally threw lit matches at the costumed actors stationed inside." *See* Marc Duvoisin, *Jury Acquits Great Adventure*, PHILADELPHIA INQUIRER (July 21, 1985) A1. The defendants vigorously contested those witnesses' credibility. *See id.* Other testimony indicated that an insurance inspector had suggested a sprinkler system but had also acknowledged that such a system might have been economically unfeasible due to the temporary nature of the construction. *See id.*

<sup>10</sup> *See Caiazza, supra* note 2. Later code changes required "disorienting attractions" to, among other things, shut down their effects in emergencies and have lights and audible guidance to help patrons get to exits. *See* Kirk Moore, *Tragedy's Legacy: Greater Safety*, ASBURY PARK PRESS (May 10, 2004) A1. The civil cases settled for various amounts; six of the eight settled for \$2.5 million in long-term structured payouts, while a seventh settled for \$750,000. *See Family Settles for \$750,000 in Great Adventure Fire*, PHILADELPHIA INQUIRER (February 7, 1987) B3.

<sup>11</sup> *See id.* at 189. Mr. Cochran went on, of course, to become, among other things, the Chairman of Six Flags. He is now with Palace Entertainment and on IAAPA's Board of Directors. Internet searches reveal that a David Paltzik worked for a casino company in the late '90s, but I have no idea if it's the same David Paltzik.

<sup>12</sup> *See* Donald Janson, *Closing Statements to Jurors are Made in Park Fire Trial*, NEW YORK TIMES (July 19, 1985) B4.

ultimately did not indict, officials of Jackson Township, issuing a presentment criticizing the township for being “slipshod and ineffective” in enforcing the state’s code.<sup>13</sup>

The criminal trial of the corporate defendants lasted for two months, including 83 witnesses and over 200 exhibits.<sup>14</sup> In the jury charge, the judge permitted the jury to consider both aggravated manslaughter and the lesser included offense of simple manslaughter.<sup>15</sup> In closings, the prosecutor described the park’s management as “indifferent, reckless, greedy and callous” in their decisions not to install sprinklers or smoke alarms.<sup>16</sup> The defense, on the other hand, conceded that the park was wrong in believing that their efforts had been sufficient to prevent a fatal fire, but focused on the state’s failure to meet its burden of proving conscious disregard of the known risk.<sup>17</sup> In particular, the defense noted that the company had adopted some safety recommendations (human surveillance, for example, in place of smoke detectors after detectors had been vandalized). The jury acquitted the corporate defendants in July 1985.<sup>18</sup>

The individual defendants entered a pretrial intervention program; after completing that program, the indictments were dismissed.<sup>19</sup> Neither individual admitted any wrongdoing in pursuing that program and performing community service.<sup>20</sup>

*B. March 19, 1998 – Austin-Travis County Livestock Show & Rodeo in Texas – Reverchon Himalaya*

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<sup>13</sup> See Donald Janson, *Great Adventure Juror Absolves Township in Fire*, NEW YORK TIMES (July 28, 1985) 129.

<sup>14</sup> See Marc Duvoisin, *Jury Acquits Great Adventure*, PHILADELPHIA INQUIRER (July 21, 1985) A1.

<sup>15</sup> See *id.*

<sup>16</sup> See Janson, *supra* note 12.

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* Jurors, in post-trial interviews, disagreed about the proper party to blame (some stated that they blamed the Township for lax enforcement) but agreed that the corporate defendants were blameless because they had relied on inspectors’ statements. See Janson, *supra* note 13.

<sup>19</sup> See *id.*

<sup>20</sup> See *Charges Dropped in Six Flags Case*, NEW YORK TIMES (March 8, 1986) 130.

Fifteen-year-old Leslie Lane was ejected from a Himalaya ride manufactured by Reverchon and flew into a wall, suffering fatal injuries. Bob Gill & Associates had inspected the ride, which was owned and operated by B&B Amusements, ten days earlier.<sup>21</sup>

A grand jury initially returned murder indictments against nine individuals associated with B&B. Those charges were later dropped.<sup>22</sup> Eight months later, a grand jury indicted five people,<sup>23</sup> including Robert Merten, B&B's vice president, and two corporations<sup>24</sup> for manslaughter. The indictments alleged that the restraining lap bar was held in place by a too-small pin (possibly made of an inadequate material), and that the lap bar's latch was insufficient.<sup>25</sup> Prosecutors alleged (and Merten admitted at his guilty plea) that Merten was aware of a California report ordering modifications to the Himalaya's lap bar cotter pins and that the modifications were not made on the Texas ride.<sup>26</sup>

In November of 2000, Merten pleaded guilty to manslaughter and was sentenced to thirty days in jail and six years of probation.<sup>27</sup> He publicly insisted that his decision was only based on the financial costs of proceeding: "[W]e know we are not guilty," said his brother, co-owner of B&B.<sup>28</sup> At the end of his probationary period, Merten's plea agreement provides that

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<sup>21</sup> See *Carnival Ride In Fatal Accident Had Passed All Safety Checks*, FT. WORTH STAR-TELEGRAM (Mar. 21, 1998) 10.

<sup>22</sup> See Don Muret, *Murder Indictments Dropped in Austin Case*, AMUSEMENT BUSINESS (May 10, 1999) 48. At the same time, the prosecutor's office released a statement that offended many in the industry: "The carnival industry is in large part, a complete unknown to law enforcement. This is an industry that operates outside of the mainstream of society and is transient in nature. Carnivals routinely move from place to place and employ workers with unstable backgrounds who are not easily located." *Id.*

<sup>23</sup> B&B's vice president Robert Merten Sr.; employee Philip Parenti; ride operator Joshua Johnson; Johnson's supervisor, Jeff Campbell; and Bob Gill.

<sup>24</sup> B&B itself and Bob G. Gill and Associates.

<sup>25</sup> See Tom Powell, *Indictments in Austin, Texas, Murder Case Reduce Charges to Manslaughter*, AMUSEMENT BUSINESS (December 27, 1999). Stories are unclear, but the original indictment evidently included an allegation that the ride was operated too fast, an allegation that may have been dropped in the manslaughter indictments. See *Carnival Ride Workers Face Charges in Death*, LAS VEGAS REVIEW-JOURNAL (October 1, 1998) 8A. Additionally, at least one witness stated that the ride operator asked patrons if they wished to go faster during the victim's ride cycle. See *id.* The recommended speed maximum is ten revolutions per minute, while the ride was capable of at least fifteen. See *id.*

<sup>26</sup> See David Hafetz, *Guilty Plea in Death at Carnival*, AUSTIN AMERICAN-STATESMAN (November 21, 2000) A1.

<sup>27</sup> See Tom Powell, *Merten Pleads Guilty to End Case; Charges Remain Against Bob Gill*, AMUSEMENT BUSINESS (November 27, 2000) 30.

<sup>28</sup> *Id.*

his conviction can be removed from his record.<sup>29</sup> B&B was fined \$50,000.<sup>30</sup> It appears that prosecutors told the other B&B employees that their charges would be dropped if they cooperated with the case against Gill.<sup>31</sup> Gill eventually also pleaded guilty to a misdemeanor and fined \$100, and his company pleaded guilty to manslaughter and was fined \$30,000.<sup>32</sup> As with Mr. Merten, Mr. Gill insisted that he was not responsible for Ms. Lane's death and that he pleaded guilty out of pragmatism.<sup>33</sup>

A civil suit against most of the same parties but adding in Reverchon, the fair itself, and Travis County, brought in the spring of 1999, was apparently settled for an undisclosed amount.<sup>34</sup>

C. *March 14, 2004 – Pigeon Forge Hawk (Zamperla)*

Early in the afternoon of March 14, June Carol Alexander, with her son and sister, boarded the Hawk (Zamperla Hawk 24 – a prototype) at Rockin' Raceway in Pigeon Forge, Tennessee.<sup>35</sup> When at the top of the ride's cycle, her restraint failed and she fell sixty to sixty-five feet to her death.<sup>36</sup> Inspections revealed "jumper cables" in the ride's control box that, according to an independent inspector and prosecutors, permitted the ride to operate without all of the restraints in place and latched.<sup>37</sup> According to testimony at trial, another similar incident occurred a year prior, but the patron held himself in place when his restraint failed.<sup>38</sup>

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<sup>29</sup> See *id.*

<sup>30</sup> See *Man Sentenced for Girl's Death on Carnival Ride*, HOUSTON CHRONICLE (December 8, 2000) A40.

<sup>31</sup> See *id.*

<sup>32</sup> See Tom Powell, *Gill Pleads to Misdemeanor*, AMUSEMENT BUSINESS (May 21, 2001) 32.

<sup>33</sup> See *id.*

<sup>34</sup> See Tom Powell, *Mertens Hoping Civil Suit Is Settled Soon*, AMUSEMENT BUSINESS (July 26, 1999) 66.

<sup>35</sup> See CPSC Epidemiologic Investigation Report, available in the downloads section of my website, <http://masstort.org>. A search on my site for "Hawk" will bring back a number of relevant entries.

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*; see also Emmanuella Grinberg, *Amusement Park Manager Found Guilty of Reckless Homicide*, CNN.com (May 17, 2005).

<sup>38</sup> See Lola Alapo, *Ride Manager Takes the Stand*, KNOXVILLE NEWS-SENTINEL (May 15, 2005) B9.

The manager of the park, Charles Stan Martin, was charged with second-degree murder and reckless homicide.<sup>39</sup> Prosecutors contended that Martin at least knew of the jumpers or placed them there himself. Martin denied having placed the jumpers in the control box and suggested that the manufacturer (Zamperla) and its representative had done so.<sup>40</sup> In particular, he testified that the ride was problematic from the start and was delivered without a manual, while admitting that he never read the full manual (once delivered) nor kept a maintenance log.<sup>41</sup>

The trial lasted four days and included twenty-six witnesses and a video showing how the ride could be operated without the restraints in place.<sup>42</sup> After an hour of deliberations, the jury found Martin guilty of reckless homicide but acquitted him of second-degree murder.<sup>43</sup> He was sentenced to four years of probation and 200 hours of community service.<sup>44</sup> Civil cases remain pending.<sup>45</sup>

*D. August 13, 2003 – Lake County “Scooters”*

Eight-year-old Greyson Yoe was electrocuted while waiting to get on the “Scooters” bumper car ride at the Lake County Fair in northeastern Ohio.<sup>46</sup> The failure to ground the ride structure and damage to a light fixture on the ride caused his death directly, but many factors led to his death. The fair board had not obtained a permit for connecting the ride to a utility pole and thus a licensed electrician did not inspect the connection. The electrician who connected the ride (an eighty-year-old former lineman for the Ohio electrical company) left the

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<sup>39</sup> See J.J. Stambaugh, *Murder Charged in Ride Death*, KNOXVILLE NEWS-SENTINEL (Sept. 30, 2004) A1.

<sup>40</sup> See Alapo, *supra* note 38.

<sup>41</sup> See *id.*

<sup>42</sup> See Grinberg, *supra* note 37.

<sup>43</sup> See *id.*

<sup>44</sup> See Lola Alapo, *Tennessee Amusement Park Manager Sentenced to Probation*, KNOXVILLE NEWS-SENTINEL (July 27, 2005).

<sup>45</sup> See *id.*

<sup>46</sup> I have written extensively about this incident in a forthcoming law review article, and specific citations for the material in the main text can be found there and are not replicated here. See William G. Childs, *When Criminal and Tort Law Incentives Run Into Tight Budgets and Regulatory Discretion*, 34 CAP. U. L. REV. \_\_ (2005). The current draft is available upon request. Additionally, many documents from the litigation and inspections are available at my website's download section.

grounding wire dangling at the pole, later stating that he assumed it was grounded elsewhere and that he didn't know what the green wire was for.<sup>47</sup> The ride owner knew of the damaged light fixture but made no effort to repair it; nor did he inform the state inspectors (noted below) of the damage. Ride operators and supervisors ignored and dismissed complaints of patrons regarding shocks, and bypassed various electrical systems – including, for example, bypassing fuses with aluminum foil.

On the day before the electrocution, two inspectors from the Ohio Department of Agriculture (the “ODA”) inspected the ride and passed it as safe to operate. Later investigation revealed that inspection to be superficial and inadequate, and the completed inspection form had misrepresentations. In particular, the inspectors later admitted that they never reviewed the key electrical items that they checked off on the inspection form – including the “Equipment properly grounded” item. The post-electrocution review also showed that the electrical system had gross safety problems and that the ride's management and operators knew of and ignored these problems.

On the criminal side, the electrician, ride owner, and inspectors were all prosecuted. A jury convicted the electrician of reckless homicide and involuntary manslaughter and a judge sentenced him to thirty days in jail. The ride owner pleaded guilty to attempted involuntary manslaughter and sentenced to six months in jail. Prosecutors charged the inspectors with various forms of homicide and they eventually pleaded no contest to dereliction of duty.<sup>48</sup> The various defendants did not contest most of the key facts alleged by the prosecution but focused instead on whether those facts supported criminal liability. The inspectors, for their

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<sup>47</sup> Most rides were powered off of generators and grounded via grounding rods. The bumper cars were connected directly to a utility pole.

<sup>48</sup> This charge criminalizes the failure to perform a duty imposed by law – in this case, the failure to perform the inspection as required. The homicide charges were tied to that underlying statutory violation based on the idea of a statutory violation resulting in death being a form of homicide. After these guilty pleas, the state agency (the Department of Agriculture) removed the grounding section from the inspection form. Since then, the Ohio legislature has adopted legislation returning grounding to the items to be checked by state inspectors. This series of events is the main subject of my forthcoming article.



part, argued that they were insufficiently trained to test the grounding and that the form was flawed by including the items in the first place, but conceded that they had not attempted to test the grounding of the ride.

Greyson Yoe's parents sued the county fair's board and the ride owner; together, those defendants settled for insurance limits of almost \$2 million. They have said that suits against the state and inspectors are coming, but I have not yet seen reports of those suits.

*E. September 19, 2004 – Sizzler (Wisdom) – Shrewsbury, Massachusetts*

Andrew Fohlin, a resident of a group home in Massachusetts, was thrown from a Wisdom Sizzler ride and killed at a festival at St. Mary's Parish in Shrewsbury, Massachusetts.<sup>49</sup> He and another rider were thrown from the ride when the end of the seat structure gave way.<sup>50</sup> Wisdom, in cooperation with the CPSC, issued a bulletin the next month requiring operators to inspect, grade and torque certain frame bolts, to inspect foot tub hinge bolts for proper grade and locknuts, and to inspect internal frame welds.<sup>51</sup> State officials concluded that "an improperly replaced lap bar nut loosened, a bolt with its head removed gave way, and an undersized bolt sheared off."<sup>52</sup>

On October 6, 2004, the CPSC concluded (in a letter to Wisdom Industries) that Wisdom had not provided "voluntary cooperation" and opened an investigational case.<sup>53</sup> It appears that this letter was followed by cooperation from Wisdom as I have seen no similar statements since then.<sup>54</sup>

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<sup>49</sup> See Shaun Sutner, *Ride Operator Arraigned in Sizzler Death*, WORCESTER TELEGRAM & GAZETTE (July 15, 2005) A1. I have a number of documents produced by the CPSC in response to my FOIA request posted at my website.

<sup>50</sup> See CPSC FOIA response.

<sup>51</sup> See *id.*

<sup>52</sup> Sutner, *supra* note 49.

<sup>53</sup> See CPSC FOIA, *supra* note 49.

<sup>54</sup> I reach this conclusion based strictly on the absence of other adversarial letters in the documents produced by the CPSC.

Prosecutors charged the supervisor of the ride, Brian McCullough (at the time employed by Jaro Amusements, who had the carnival contract), with manslaughter.<sup>55</sup> He has pleaded not guilty. The case remains pending.<sup>56</sup> To date, there have been no indictments of any other party such as the company that owned the piece or ride inspectors. Civil suits are expected in the matter.

## II. Is There A Trend?

A cursory review of the cases outlined above makes it clear that there have been more prosecutions in the last seven years than at any time prior to that period. This could be a trend of prosecuting people involved in amusement park accidents where prosecutions would not have ensued previously, but it could be attributable (at least in part) to several other factors, alone or in combination:

- More people riding more rides, more injuries, and more deaths
- Increased press relating to amusement injuries
- A general trend towards expanded criminal liability, in particular relating to the prosecution of corporate defendants
- A coincidence where cases that previously would have been *investigated* criminally happened to result in charges being filed

Below, I briefly address each possibility.

### A. Attendance Trends

According to IAAPA's website, fixed-site park attendance has grown from 253 million visitors in 1990 to 328 million in 2004, a thirty percent increase. OABA indicates that 350 million people visit carnivals every year, without indicating the rate of growth, but presumably

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<sup>55</sup> See Sutner, *supra* note 49.

<sup>56</sup> See *id.*

that attendance is also growing.<sup>57</sup> Of the prosecutions outlined above, two were at fixed-site parks and three were at carnivals.

From 1993 to 2000 (a period in which fixed-site attendance grew by 15 percent), the CPSC reports a 57 percent increase in emergency room visits relating to injuries at fixed-site amusement parks, growing from 4,195 to 6,594.<sup>58</sup> The same period shows a 33 percent increase in those same visits relating to injuries at mobile amusements, growing from 2,990 to 3,985. Of note, statistical analysis indicated that the increase was statistically significant for fixed-site injuries but not for mobile amusement injuries. The overall trend was modest but statistically significant upward, even when adjusted for attendance.<sup>59</sup>

From 1997 to 2004, the CPSC reported no statistically significant increase in mobile amusement injuries and in fact estimated a modest decrease in injuries, from 3,000 to 2,500. Over that same time period, the CPSC estimated that injuries at fixed-site parks grew from 2,700 to 3,400.<sup>60</sup> The CPSC did not evaluate the significance or lack of significance statistically of that growth.<sup>61</sup>

In short, while it is clear that the absolute numbers of attendees and, unsurprisingly, injuries are growing, it is unclear whether there is even a small increase in the rates of injuries. That said, the combination of an increase in attendance and even a marginal increase in the rate of injuries (or just an increase in attendance) would, one would expect, cause an increase

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<sup>57</sup> See OABA Carnival Facts, <http://www.oaba.org/facts2.htm>. Elsewhere on the site (<http://www.oaba.org/safety2.htm>), the safety page indicates that 500 million people attend carnivals, fairs, or festivals.

<sup>58</sup> I recognize the difficulties of relying on the CPSC's numbers, but they seem as good as anything else that is available.

<sup>59</sup> See CPSC, *Amusement Ride-Related Injuries & Deaths in the United States: 1987-2000*, available at <http://www.cpsc.gov>.

<sup>60</sup> The CPSC changed its calculation approach in 2000 and so the numbers from the 1987-2000 report are not directly comparable to the post-2000 report. In the post-2000 report, the CPSC adjusted the 1997-2000 numbers to provide for some basis for comparison.

<sup>61</sup> See CPSC, *Amusement Ride-Related Injuries & Deaths in the United States: 2005 Update*, available at <http://www.cpsc.gov>.

in prosecutions. It is not a factor that appears to fully explain the increase in prosecution, but it may be part of the explanation.

*B. Additional Press*

Readers are undoubtedly familiar with the efforts of Representative Markey to federalize the regulation of fixed-site amusement parks. It is presumably unnecessary to cite to all of the statements Rep. Markey has issued after the various injuries and their publicity.<sup>62</sup>

Chad Emerson has suggested that publicity arising from Rep. Markey and others involved in regulatory issues may have affected prosecutors' interest in bringing criminal charges.<sup>63</sup> I am somewhat less inclined to attribute the prosecutors' charging decisions to this publicity, but it may well be a factor (particularly in the Sizzler prosecution, in Markey's home state).

*C. General Trends in Criminal Prosecutions*

Following the collapse of Enron and WorldCom, and various other scandals in the business world, prosecutors have become more aware of the possibility of criminal prosecution of business entities.<sup>64</sup> While a substantial amount of that attention has been paid to prosecution relating to financial misdeeds, perhaps the additional press provided to non-injury prosecutions has caused prosecutors to consider the options of criminal charges against corporate defendants more quickly than they might have twenty years ago. Recall that the Great Adventure prosecution was reported to be the first New Jersey case to bring homicide charges against a corporation in *any* industry, and as one of the first in the country to do so.<sup>65</sup>

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<sup>62</sup> His relevant press releases can be seen at <http://www.house.gov/markey/amusement.htm>.

<sup>63</sup> Cf. Shaun Sutner, *Sizzler Death Indictment Part of Trend*, WORCESTER TELEGRAM & GAZETTE (June 19, 2005) A1 (Emerson: "This is just another example of a dangerous growing trend in which prosecutors are trying to criminalize actions which previously would likely have been dealt with through lawsuits between individuals. . . . It's because the amusement industry is a high-profile business and it gathers attention. Prosecutors are prone to bring charges in instances that are higher-profile. You don't see prosecutors bringing charges if an elevator inspector misses something in his checklist.").

<sup>64</sup> See, e.g., [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm).

<sup>65</sup> See *supra* note 12 and accompanying text.

Thus, the increase in prosecutions may be an instance of a generic trend, not specific to the amusement industry.

*D. Investigation Versus Charging – A Broader Examination of Prosecutors’ Conduct and Decisions*

One category of incidents that receives relatively little attention is made up of those situations where police or prosecutors consider bringing criminal charges but choose not to do so. One would expect that the publicity factor noted above would have more influence on the decision to start an investigation than on the decision to bring charges at the end of the investigation, though it certainly could have an impact on both decisions.

While this is by no means a complete catalog of such incidents (time constraints preclude such research at this point), I include below a sampling of incidents in which press reports indicate that police or prosecutors took a serious look at bringing criminal charges. While it is not conclusive, I suggest that these incidents may indicate that the trend – if there is one at all – may be a trend in charging decisions rather than in investigation decisions.<sup>66</sup>

1. 1988 Broward County Fair Monster (Eyerly) – In November of 1988, an arm of a Monster ride (operated by Strates Shows) snapped off and crashed into the ground. Seventeen-year-old Christie Schafale was riding in one of the cars on that arm. Another arm, still in motion, smashed into and killed her. Inspectors found a crack in the failed arm that had been painted over and believed that it may have corroded if stored improperly. A week later, the Broward State Attorney’s office entered the investigation after reports indicated that the Strates insurance carrier would test the ride, a step that concerned public officials.<sup>67</sup> The

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<sup>66</sup> While it is difficult to be certain, it does appear to be the case that there were very few criminal investigations at all prior to the 1984 Great Adventure deaths. Limitations on electronic research and on time make it difficult to explore the cases before that for this Paper.

<sup>67</sup> See Christopher Wellisz & Sallie Hughes, *State Attorney’s Office to Probe Fatal Collapse of Amusement Ride*, MIAMI HERALD (December 2, 1988) 3C. The owner of Strates denied any prior knowledge of problems with the ride, noting that he had purchased the ride from a now-defunct park and that bulletins may have gone to that

following April, a grand jury examined the accident, hearing testimony from at least nine witnesses.<sup>68</sup> Though the grand jury stopped short of issuing indictments, it did issue what was universally described as a “scathing” report criticizing the Florida ride safety system, concluding that a state regulator “went out of his way to absolve” the ride owner in his investigation of the death. It also alleged substantial conflicts of interest in the department conducting inspections (including that the chief ride inspector was a coinvestor in property with ride owners, among other things).<sup>69</sup> A criminal inquiry proceeded into that chief, Wally Rich, but resulted in no charges, with the prosecutors stating that the events in question (most of which had nothing to do with the Monster) were quite old and hard to investigate.<sup>70</sup> A state ethics commission found probable cause that Rich violated 14 ethics laws and he was ultimately fined \$1,400, though none of those fines related to the Monster inspection.<sup>71</sup> Evidence from that investigation was sent to prosecutors, but no criminal charges resulted.<sup>72</sup> A civil suit was settled seven years later.<sup>73</sup>

2. 1997 Bell’s Wildcat, Tulsa, Oklahoma – on April 20, 1997, the anti-rollback device on Bell’s Wildcat coaster (Schwarzkopf) failed and slid backwards into another car, killing fourteen-year-old Patrick Kurek and injuring six others. State investigators found that the park’s use of Nylatron in the device (not used by Schwarzkopf) was the primary cause of

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park’s address. See Tom Powell & Tim O’Brien, *No Knowledge of Problem, Says Show Owner Strates*, AMUSEMENT BUSINESS (June 17, 1989).

<sup>68</sup> See *Grand Jury Examines Carnival Ride Accident*, PALM BEACH POST (April 14, 1989).

<sup>69</sup> See Christopher Wellisz & Sallie Hughes, *Agriculture Chief, Former Ride Inspector Blasted by Grand Jury*, MIAMI HERALD (June 23, 1989) 1A.

<sup>70</sup> See Sallie Hughes, *Probe Into State’s Former Rides Chief Is Dropped*, MIAMI HERALD (Feb. 15, 1990) 1.

<sup>71</sup> See Sallie Hughes, *Ride Alert Unheeded, State Says Broward Prosecutor Is Sent New Evidence*, MIAMI HERALD (March 14, 1990) 1A; Ellen McGarrahan & Sallie Hughes, *Inspector Cleared of Safety Oversight*, MIAMI HERALD (July 20, 1991) 1A. The commission determined that charges that Rich had ignored safety problems with the Monster to be unsubstantiated. See *id.* Investigators in the department had – prior to the Monster incident – prepared a 570-page report, sharply critical of the state’s program and of Rich himself. After the incident, the department denied that it existed, but sixteen months later it resurfaced. See Sallie Hughes, *Fair-Ride Report Found, Conner Says Critical Study Turns Up After 16 Months*, MIAMI HERALD (Mar. 23, 1990) 1A.

<sup>72</sup> See *id.*

<sup>73</sup> See Ronnie Greene, *7 Years Later, Fair Fatality Suit Settled*, MIAMI HERALD (Aug. 1, 1995) 1. Defendants included the Strates company and the fair itself, as well as the original designer and distributor of the ride (presumably Eyerling). See *id.* The amount of the settlement was confidential.

the accident. The Tulsa County District Attorney's Office investigated the incident for over eighteen months. The accident was referred to the prosecutors after the Labor Department concluded that Bell's might have violated the Amusement Ride Safety Act by using the material against the manufacturer's specifications or by not reporting repairs made to the coaster the weekend before the accident. The prosecutor ultimately decided not to file charges based on concerns about the potential attacks on the statute for unconstitutional vagueness. He also considered manslaughter charges but concluded that he could not satisfy the intent requirement.<sup>74</sup>

3. 1998 Fresno County (California) Kiddy Train – In August of 1998, a 13-month-old boy died after falling out of a kiddy train in Fresno County, California. The rides were provided by a company hired by B&B Amusements and owned by a relative of one of B&B's owners. After an investigation, the Fresno County District Attorney's Office Homicide Division decided that there "was neither a statutory nor factual basis for charging B&B Amusements for homicide."<sup>75</sup>

4. 1999 Paramount's Great America – on August 22, 1999, twelve-year-old Joshua Smurphat, who suffered from spina bifida and other disabilities, fell from the Drop Zone Stunt Tower (an Intamin tower ride) and died. Police conducted a two-month investigation including over 100 interviews. They also hired their own safety engineers to inspect the ride, but concluded that they were unable to determine precisely what happened – they "found no smoking gun." The police concluded that Smurphat was able to slip between the locked harness and the seat. The police report indicated that a local fire official had suggested the addition of a strap between the harness and the seat three years before the incident (when the

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<sup>74</sup> See Brian Barber, *No Charges Filed in Bell's Accident*, TULSA WORLD (May 8, 1999)

<sup>75</sup> See Tiffany Horan, *Carnival Company May Not Face Charges in Fresno County, Calif., Death*, ORANGE COUNTY REGISTER (December 11, 1998).

ride first opened). Paramount, whose spokesman said that he was unaware of that suggestion, added such a strap to all of its Intamin drop rides after Smurphat's death.<sup>76</sup>

5. 2000 Lake Compounce Drowning – A six-year-old boy drowned at Lake Compounce's water park on July 1, 2000, after falling off of an inner tube at the end of a slide. Though the police investigators concluded that attendants were underage and improperly trained, the state's attorney concluded that the criminal statute available to him only permitted prosecution of the ride owner, and that the person who had potentially violated that statute was the general manager Tom Wages rather than the owner (Kennywood Entertainment).<sup>77</sup>

6. 2003 Six Flags New Orleans – On July 9, 2003, Rosa Donaldson was killed when a ride she was placing her grandson in was started while she was still in the ride area. The ride (a Schwarzkopf Polyp) slammed into her head and then her abdomen. Initial reports indicated that the police were investigating but also that they called the death "an accident." No charges were filed.<sup>78</sup>

### **III. Conclusion**

More prosecutors are charging a wider array of people with crimes based on injuries or deaths at amusement attractions, including those I described in the first part of the Paper. In the second part, I have at least suggested several explanations for what appears to be a trend – an increase in attendance (and thus an increase in injuries or deaths that could result in charges); increased press relating to amusement injuries; a general increase in criminal prosecutions of corporations and other businesses; and a suggestion that, if we consider the incidence of criminal investigations rather than only those where charges ensue, the trend may

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<sup>76</sup> See Tracy Seipel et al., *Police Say No Evidence of Criminal Wrongdoing In Amusement Park Death*, SAN JOSE MERCURY NEWS (Nov. 5, 1999).

<sup>77</sup> See Loretta Waldman, *State Won't Press Case; Manager Spared Prosecution in Death at Park*, HARTFORD COURANT (Dec. 27, 2000) A3. Note that this Polyp is from Wieland Schwarzkopf, not his father's. They are separate companies.

<sup>78</sup> See Michael Perlstein, *N.O. Grandmother Dies At Six Flags*, TIMES-PICAYUNE (July 11, 2003) 1.



not be as stark as it appears.<sup>79</sup> As for the final factor, the criminal investigations resulting from the 1988 Broward County Fair and the 1997 Bell's Wildcat accident may be particularly good examples. Those events came as close as possible to criminal charges, but did not quite reach that point, and so they do not get considered in trend considerations. If those were included in lists of prosecutions, the recent prosecutions would seem less out of the ordinary – *i.e.*, less of a unique trend. For one thing, they would partially fill in the gap between the 1984 Great Adventure prosecution and the later prosecutions, and they also suggest that prosecutors have been paying attention all along.

Nonetheless, everyone involved in the industry should be on notice of the potential for not just civil suits but criminal prosecutions if a prosecutor concludes that their conduct did not satisfy either a generally-applicable criminal statute or an amusement-specific criminal statute. For any number of reasons, operators, inspectors, and everyone involved in the industry should be careful – and know a good lawyer.

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<sup>79</sup> While others are better qualified to discuss such items, I think it is possible that additional statutory provisions relating to amusement rides increase the likelihood of criminal charges. See, *e.g.*, New Hampshire's 2005 proposed statute establishing criminal penalties for negligent operation of a carnival or amusement ride (HB 128, available at 2005 WLNR 3424479).