DOES CURRENT UK LAW PROTECT MEMBERS OF THE PUBLIC WHEN ATTENDING AMUSEMENT PARKS, OR IS A REVIEW AND REFORM OF CURRENT LEGISLATION NEEDED?

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Introduction

Momentarily visualise standing in a theme park. People queue up for rides fully expecting to be able to get off in the same condition as when they first got on. They would not expect themselves or their fellow passengers to experience trauma and life changing injuries on what is supposed to be a fun day out. In that connection, people place their faith in the laws and guidance surrounding amusement parks; the engineers that built the rides, and the people that work at the park. This article will highlight the unfortunate incidents where people have suffered serious injuries or loss of life through the lack of health and safety law and guidance in place surrounding theme parks.

Specifically, this article will refer to the case law of Evha Jannath, a child that drowned at Drayton Manor; and the injuries incurred because of a crash at Alton Towers on the rollercoaster known as the 'Smiler'. Both Drayton Manor and Alton Towers are owned and operated by the same company, Merlin Entertainments Limited (Merlin), which operates attractions worldwide. In 2018 and 2019, Merlin peaked at an astounding number of 67 million visitors.[1] With this many people attending amusement parks, there is a higher risk for more people to be injured. It is therefore paramount that the law regulating safety is of a high enough quality to prevent as many people as possible from sustaining injury. If high numbers of people sustain injuries, then the public may lose faith in the law surrounding theme parks, and perhaps the legal system as a whole. The importance of the public's faith in the Health and Safety at Work Act 1974 (HSWA) is therefore vital, as without it, fewer people would want to work in 'dangerous' jobs and attend leisure centres, such as theme parks. A significant decline in visitors would have a detrimental impact, as without theme parks being able to generate any revenue, the closure of established amusement parks would effectively

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[1] Merlin Entertainments 'Annual Reports and Accounts 2019' (Merlin Entertainments Limited) 1

take place. In turn, this would affect people's livelihoods and the economy.

In spite of this, an incident at Alton Towers in 2015 resulted in a decline of people attending the theme park in 2016, but as stated above, in 2019 they went on to reach their highest number of visitors. It was this incident that stemmed the idea for this article. The accident at Alton Towers in 2015, involved a crash that caused serious, life changing injuries for some people on the rollercoaster, the 'Smiler'; this will be discussed further in section 3. The Smiler is still in operation today, which may cause people to call into question its safety and whether they might be victim to a repeat of the 2015 tragedy. In ensuring people are safe to ride on this rollercoaster, it means examining if any changes in the HSWA have been made, and whether any still need to be made, alongside other available guidance.

1.1 Definitions

In trying to establish whether the public are provided with appropriate protection under current legislation when attending amusement parks, it is first important to define some key terms that will appear throughout the article.

For the purpose of this article, the terms 'theme park' and 'amusement park' are interchangeable and apply only to fixed sites. The Oxford Dictionary provides that a theme park is 'a large amusement park based around a particular idea'.[2]

An equally important term is 'rollercoaster', defined in the Oxford dictionary as 'a fairground attraction consisting of a light railway track with many tight turns and steep slopes, on which people ride in small open carriages'.[3]

1.2 The UK's first amusement park and rollercoaster

Having identified relevant terminology synonymous with modern day amusement parks, it is perhaps noteworthy to consider the possibility that current definitions for rollercoasters and amusement parks, may not be applicable to England's first few theme parks and rollercoasters.

Although this article focuses on UK theme parks and rollercoasters, to depict an idea of the

[2] Maurice Waite, *Pocket Oxford English Dictionary* (Oxford University Press, 11th edition, 2013) 954
[3] Ibid, Maurice Waite, 791

origin of the rollercoaster, in the 1600's Russian citizens sled down ice covered wooden ramps known as 'ice slides'.[4] It was only in the early 1800's when a French builder brought the idea to France with the adaptation that their sleds ran over wooden rollers, that the term 'roller coaster' was established.[5]

Today, rollercoasters are primarily manufactured using steel due to the thriving environment of technological progress brought on by the industrial revolution during the Victorian era. Prior to this, it is perhaps unsurprising, that when the UK did not have the tools to build high functioning machinery, rollercoasters were mainly built with wood. With previous rollercoasters being made differently, the outcome in turn may have also looked different, with less height and reduced speed produced.

England's first coaster in 1920, which still runs today, is the Scenic Railway at Dreamland Margate.[6] It is a wooden coaster and is 'one of only 35 in the world which predate 1939'.[7] However, in spite of this being the UK's first rollercoaster, it is not within the grounds of the UK's first amusement park.

The UK's first amusement park, Blackgang Chine, is still operational today situated in the Isle of Wight and was established in 1843 by Alexander Dabell, renowned for its attraction of a whale's skeleton.[8] Blackgang Chine continued to accumulate attractions and it was this that ultimately led to its establishment as an amusement park, despite not having any rollercoasters until 2006.

1.3 The Health and Safety at Work Act 1974

This article largely focuses on the HSWA, which is currently the primary piece of legislation applied to amusement park safety in the UK. The Act received Royal assent and subsequently entered onto the statute books in 1974. Since the Act's introduction, Joyce

[4] Gil Chandler, 'Roller Coasters' (1994) <https://www.doe.mass.edu/mcas/pdf/2010/177365.pdf> accessed 12 February 2023
[5] Ibid, Gil Chandler, accessed 12 February 2023
[6] Dreamland Margate 'Scenic Railway' <https://www.dreamland.co.uk/ride/scenic-railway/> accessed 12 February 2023
[7] Emily Retter, 'Celebrating a century of British roller coaster from Margate to Blackpool' (*Daily Mail*, 27 June 2020) <https://www.mirror.co.uk/features/celebrating-century-british-roller-coasters-22262946> accessed 12 February 2023
[8] Blackgang Chine 'History of Blackgang Chine' <https://blackgangchine.com/explore-the-park/history/> accessed 12 February 2023

notes that 'fatal accident rates have fallen by 83%' across all main occupational sectors'.[9]

Before identifying key legislation and guidance following on from the HSWA, this article will first explain how the HSWA came to be implemented. Prior to the HSWA, legislation regarding safety in the UK was exclusive to specific areas of employment. Workplaces that exposed its employees to a higher level of risk were subject to safety legislation; factories presented dangerous working environments, hence the implementation of the Factories Act 1961.[10]

However, this model of 'limited safety legislation' came under strain. With an 'increase in 'atypical' workers, such as agency workers';[11] a boom in other sectors of employment; and legislation not covering all sectors of employment, it meant 'approximately eight million employees had no legal safety protection at work'.[12] It became apparent that too many people were left without protection as in 1970, the Secretary of State for Employment and Productivity, Barbara Castle, had appointed Lord Robens, the Chairman of the National Coal Board, to chair an enquiry on workplace safety.[13]

Robens, who had been assigned the task on the premise that 'those who create the risks are best placed to manage it',[14] formulated a statutory document known as The Robens Report 1972. The Robens Report introduced 'a broad goal setting, non-prescriptive model' that helped to establish the creation of the HSWA and the Health and Safety Executive (HSE) in 1975.[15]

A case that assisted in the catalyst for change for more inclusive and updated safety legislation arose from the incident of *Flixborough* (1974).[16] The Flixborough incident involved an explosion of a chemical plant whereby '28 people tragically lost their lives in the disaster and 36 others suffered serious injuries'.[17] Due to changing social attitudes and globalisation,

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[9] Jill Joyce, Steve Granger 'Evolution of Health and Safety Regulation, Management, and a Profession in the UK' (2011)
[10] Factories Act 1961
[11] Jonathon Clarke, Michael Ford, Astrid Smart, *Redgrave's Health and Safety*, (10th edition, LexisNexis 2021) [1.1]
[12] Iris Cepero 'The Act that changed our working lives' (2014) <https://www.historyofosh.org.uk/resources/Safety_Management_July_HSWA_40.pdf> accessed 12 February 2023
[13] Ibid, Iris Cepero, 13, 15
[14] Ibid, Iris Cepero, 13, 15
[15] (n 10) Jill Joyce, Steve Granger
[16] Health and Safety Executive, 'Flixborough (Nypro UK) Explosion 1st June 1974' (HSE.gov.uk) <https://www.hse.gov.uk/comah/sragtech/caseflixboroug74.htm> accessed 5 March 2023
[17] (n 13) Iris Cepero 13, 14

the public demanded their right to safety in the workplace and news articles stressed the question, 'why did 28 men die?'[18] The HSWA was brought on partially in response to this as well as to help all dangerous employment conditions.

Unique for its time, the HSWA was implemented as an enabling act, meaning other statutory regulations can be made without having to go through the parliamentary process and change the Act itself. Allianz, one of the UK's largest general insurers, provides an example of a statutory instrument brought into place by this Act,[19] which was The Provisions and Use of Work Equipment Regulations (PUWER).[20] PUWER 'places duties on people and companies who own, operate, or have control over work equipment' and 'on businesses and organisations whose employees use work equipment, whether owned by them or not'.[21]

The HSWA was 'written in general terms'[22] and one of the first obligations was to ensure that employers have duties to persons other than their employees. So far as is relevant to this article, this would include visitors to theme parks. The Act provides at s.3(1) that:

> *'it shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety'.*[23]

In applying s.3(1) to the topic of focus of this article, that being amusement parks, this section essentially stresses that all visitors of amusement parks are to be kept out of the way of any physical harm, and any other types of harm that may arise. Focusing on the phrase 'so far as is reasonably practicable', there is a lack of specification regarding what extent employers should go to, to ensure public safety, and what constitutes as a viable threat to someone's health and safety. The effect of the wording is discussed more fully in the following section.

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[18] Ibid, Iris Cepero, 13
[19] Allianz 'Health and Safety at work. ect Act 1974' (*Allianz*, 09 January 2019) <https://www.allianz.co.uk/risk-management/support/legislation/health-and-safety-at-work.html> accessed 12 February 2023
[20] The Provision and Use of Work Equipment Regulation 1998 No. 2306
[21] Health and Safety Executive, 'Provision and Use of Work Equipment Regulations 1988' <https://www.hse.gov.uk/work-equipment-machinery/puwer.htm> accessed 12 February 2023
[22] Carolyn George, Jan Vernon, Meg Postle, Tobe Nwaogu, Rocio Salado, *Assessment of Best Practices in Fairgrounds and Amusement Parks in Relation to Safety of Consumers* (Final Report, 2005), 93
[23] Health and Safety at Work Act 1974 s.3(1) - *emphasis added* due to later discussion of the wording

1.4 Reasonably practicable

The absence of 'many specific requirements for managing health and safety' [24] allows for a wide scope of interpretation when implementing legislation. Referring to the phrase 'so far as is reasonably practicable', it stops short of implementing strict liability as it is not an absolute standard. Had the phrase 'so far as is suitable and sufficient' been used, or even solely 'practicable,' to adjust the phrase to 'so far as is practicable', then it could have governed an absolute liability. The case of *Schwalb v Fass (H) & Son* (1946) defined the word 'practicable', as the means in which the measures must be possible in light of current knowledge and innovation.[25] Whilst the terms 'suitable' and 'sufficient' may also cause difficulty interpreting, it would be more apparent than the phrase 'so far as is reasonably practicable', that a lower level of duty would not satisfy these terms.

With the law failing to shift to different terminology, it is important to understand what is meant by the phrase 'so far as is reasonably practicable'. The HSWA does not define the phrase, but the actual interpretation is identified in the case of *Edwards v National Coal Board* 1949.[26] The case involved the death of a coal miner, Edwards, due to the collapse of a road he was walking along. Although the majority of the road was properly supported, this particular section failed to have any timber supports, hence the collapse. The judge in the case, Lord Asquith, set out a balancing test to decide whether it would have been reasonably practicable to have provided support for the subsided road. Lord Asquith having noted that 'reasonably practicable is a narrower terms than 'physically possible'' established a balance whereby:

> *'the quantum of risk is placed in one scale and the sacrifice involved in the measures necessary for averting risk (whether in time, trouble or money) is placed in the other'.*[27]

Asquith illustrated that where there existed a great disproportion between the quantum of risk against the measures necessary to avert the risk, the person upon whom the obligation is imposed 'discharges the onus on them'.[28] Essentially, the duty to undertake a task 'so far as is reasonably practicable', means that the level of danger has to be balanced against the money, time or trouble involved it would take to prevent the danger.

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[24] (n 23) Carolyn George, Jan Vernon, Meg Postle, Tobe Nwaogu, Rocio Salado, 93
[25] *Schwalb v Fass (H) & Son* (1946) 175 LT 345
[26] *Edwards v National Coal Board* (1949) 1KB 704, 712
[27] Ibid, (1949) 1KB 704, 712
[28] Ibid, (1949) 1KB 704, 712

1.5 The implementation of other safety guidance and legislation

Following on from the implementation of the HSWA, other forms of guidance and legislation have been established to prioritise public and employee safety. In providing a linear timeline of key legislation and guidance, it is important to note that the Amusement Device Inspection Procedures Scheme, ADIPS, provides a timeline on their website, which this article will refer to below.[29] ADIPS was set up 'to ensure that each and every fairground and amusement park ride or device is certified as safe for use', and is managed by the Amusement Device Safety Council.[30]

The first piece of new guidance following the HSWA, was The Code of Safe Practice at Fairs in 1984.[31] The guidance made specific comments to introduce 'design verification' for all new rides and requirements to use independent ride inspectors. Whilst this guidance was helpful, it could be argued that the Consumer Protection Act introduced in 1987 was more beneficial as it amended s.6 of the HSWA. The Consumer Protection Act made specific mention to rides as the words 'of any article of fairground equipment',[32] were inserted, essentially bringing rides within the requirements of the HSWA.

The reason for the amendments made to the HSWA by the Consumer Protection Act, was as a result of the Hansard debates. As of 1909, the Hansard debates became an Official Report of debates; introduced in 1803 as a selective record of debates.[33] In 1985, Merchant MP voiced his opinion that the law was 'vague'[34] surrounding the HSWA as there were 'no mandatory requirements for the Health and Safety Executive to inspect at regular intervals'.[35] This subsequently enabled the statistic the year before the debate: 'three quarters of all fairgrounds not visited'.[36]

Additionally, no legislation existed in the HSWA that clearly identified how rides should be

[29] ADIPS <https://adips.co.uk/about/> accessed 12 February 2023
[30] ADIPS 'Welcome to ADIPS' <https://adips.co.uk/#:~:text=Welcome%20to%20ADIPS%20(Amusement%20Device,certified%20as%20safe%20for%20use> accessed 12 February 2023
[31] Health and Safety Executive, 'The Code of Safe Practice at Fairs' (1984)
[32] Consumer Protection Act 1987 Schedule 3(1)
[33] Hansard Parliamentary Debates (UK Parliament) <https://archives.parliament.uk/online-resources/parliamentary-debates-hansard/#:~:text=Hansard%20(the%20official%20record%20of,the%20House%20of%20Commons%20factsheet> accessed 17 March 2023
[34] Hansard, 'Fairground Safety: Volume 81 debated on Thursday 27 June 1985' <https://hansard.parliament.uk/commons/1985-06-27/debates/c99fee1c-de6e-41d6-aaf2-f330165c3396/FairgroundSafety> accessed 17 March 2023
[35] Ibid, Hansard
[36] Ibid, Hansard

constructed, nor was there legislation for 'requirements on designers and manufacturers, on testing of equipment… often the source of accident statistics'.[37] Merchant quoted Harrison, the managing director of Harrison Brothers Amusements, who had said 'faulty machines are camouflaged… if the inspector can't see inside the mechanism of a ride, then he can't check it properly'.[38] Ultimately, Merchant argued that legislation for rides and fairgrounds was not sufficient, with the law lacking in an arguably much riskier atmosphere than other work environments, like factories, as many children and other civilians are subject to the risks. Luckily, Merchant's debate was agreed to, and so amendments were made to the HSWA through the Consumer Protection Act 1987.

In 1997, new guidance was published as a result of the amusement park industry working in correlation with the HSE to make new and improved changes to previous guidance. The 'Fairgrounds and amusement parks: Guidance on safe practice',[39] was published with the permission of the HSE, which was guidance focusing on the safety of employers, employees, and the public, and advised on how to control risk. This guidance alongside the HSWA and other guidance proved to be effective with amusement parks in the UK successfully going three years without any fatalities prior to 2000.

However, this three-year streak concluded in the 2000 season which saw six deaths within the space of 11 months, prompting the HSE to launch a review into the existing safety regime.[40] This review was undertaken by Paul Roberts, a Review Manager, alongside a Project Board of the Senior Civil Service which consisted of Mike Fountain, Allan Sefton and Jane Willis. The review was titled the Roberts Report and was published in 2002. The purpose of the report was to:

> *'review the current regime for safety at fairground rides… assess its fitness for purpose… make recommendations on any issues needing to be developed… highlight any other issues'.*[41]

The report did identify where areas of improvements were and are needed, such as the introduction of international standards as 'most rides are imported, and overseas makers have no product safety legislation'.[42] However, on the whole the report offered a

[37] Ibid, Hansard
[38] Ibid, Hansard
[39] Health and Safety Executive, *Fairgrounds and amusement parks: Guidance on safe practice* (first edition, HSG 175, 1997)
[40] Paul Roberts, *Review of Fairground Safety* (Report to the Health and Safety Commission, 2001) 2.1
[41] Ibid, Paul Roberts, 2.2
[42] Ibid, Paul Roberts, 5.17

complimentary tone, with the view that the HSWA 'provides a sound and logical set of principles on which duty holders can base effective accident prevention', so long as the guidance is complied with.[43]

Although the Roberts Report concluded legislation was sufficient, the report was published in 2002. Since then, many incidents involving major injuries have occurred at amusement parks, hence why a second edition, 2007,[44] and third edition, 2017,[45] of 'Fairgrounds and amusement parks: Guidance on safe practice' has been published. Each updated edition of the guidance is inevitably more detailed and clearer, with amendments made where appropriate. This article will refer to the third edition as it is the most recent, and so provides the opportunity to understand what the health and safety regime to amusement parks currently is.

1.6 Common law

Common law is obtained through judicial precedent rather than derived from statutory law. Common law includes in this situation civil torts such as negligence and trespass. The duties of an employer under common law were observed in *Wilson's & Clyde Coal Co. Ltd. v English* (1938),[46] those being employers must provide and maintain:

1. A safe working environment with safe means of access and egress;
2. Safe appliances, equipment and plant for working;
3. A safe system for doing the work; and
4. Competent and safety conscious staff.

An employer's liability may also arise by way of vicarious liability caused by their employees to others. The doctrine of vicarious liability is based on employees acting in the realm of their duties, 'negligently injures another employee… or even a member of the public'.[47] Where this occurs, the employer will be liable and not the employee, as the employer 'is deemed to

[43] Ibid, Paul Roberts, 5.9
[44] Health and Safety Executive, *Fairgrounds and amusement parks: Guidance on safe practice* (second edition, HSG 175, 2007)
[45] Health and Safety Executive, *Fairgrounds and amusement parks: Guidance on safe practice* (third edition, HSG 175, 2017)
[46] *Wilson's & Clyde Coal Co. Ltd. v English* (1938) AC 57
[47] Jeremy Stranks, *Health and Safety Pocket Book* (Elsevier Ltd., 2005) 1, 35

have ultimate control over the employee in a 'master and servant' relationship'.[48]

Additionally, an employer will be liable if there is a breach of statutory duty. If this occurs, the claimant can make a claim to recover compensation equal to the damage as a result of this breach.

This section has followed the introduction of the all-inclusive HSWA, after safety law was originally only for certain sectors. Since then, The Code of Safe Practice at Fairs 1984 has been established to prioritise public safety and the Consumer Protection Act 1987 amended to implement the words 'fairground' into the Act. New guidance has since been created with regular updates following the report, 'Fairgrounds and amusement parks: Guidance on safe practice' which as of 2017 is the third edition. With this section having introduced the main legislative basis to the issues, the following section will provide a closer examination of the relevant and applicable parts of the common law, focusing on negligence and occupiers' liability.

2.1 Negligence

The tort of negligence is defined as the 'notion of a failure to take proper care of something'.[49] The foundation of negligence was derived from the case of *Donoghue v Stevenson* [1932], which involved personal injury as a result of the consumption of a ginger beer containing a decomposed snail.[50] The case established a duty of care provided by defendants to claimants; in *Donoghue* as manufacturers to consumers. In the case of this article, this duty of care will be from the employers, and to a certain extent employees, towards the visitors of a theme park. Where negligence arises, compensation can be obtained through way of a civil claim for damages, but only where the three points established by the House of Lords in *Lochgelly Iron & Coal Co Ltd v McMullan* [1934] are satisfied:[51]

1. That the defendant owed a duty of care to the claimant;
2. That this duty of care was breached by the defendant; and
3. Damage, loss, or injury was sustained as a result of this breach.

[48] Ibid, Jeremy Stranks, 1, 35
[49] Linda Chadderton, *Tort Law* (Fink Publishing Ltd, 2021) page 23
[50] *Donoghue v Stevenson* [1932] A.C. 562
[51] *Lochgelly Iron & Coal Co Ltd v McMullan* [1934] AC 1

If these three points are satisfied the tort is made out, however, the defendant may be able to rely on certain defences. One of these is the defence of volenti non fit injuria. This defence is a complete defence, so when pleaded successfully, it absolves the defendant of all liability. Volenti non fit injuria translates in English to: 'to one who is willing, no harm is done.' This defence may be used where the claimant is aware of their actions and the risks involved, and consents, or voluntarily proceeds to undertake said action not in compliance with the safety regulations, despite being aware of them. The defence failed in *Nettleship v Weston* [1971], a case involving a learner driver who caused a car accident which resulted in the passenger suffering an injury.[52] Lord Denning declared:

> *'knowledge of the risk of injury is not enough. Nor is a willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any claim for negligence'.*[53]

However, in *Murray v Morris* [1991] the defence was allowed.[54] The case involved the intoxication of the claimant and defendant who decided to pilot the claimant's aircraft, resulting in the pilot's death and the plaintiff being severely injured. The Court of Appeal allowed the defence despite the plaintiff having not agreed to waive his legal rights; the plaintiff voluntarily boarded the aircraft knowing the pilot was too drunk to discharge his duty of care, and the plaintiff was not drunk enough to not appreciate the risk involved. Therefore, the plaintiff had accepted the risk he may be injured, discharging the pilot from liability for negligence.

To apply this defence to the context of theme parks, a passenger on a rollercoaster may make a claim for an injured body part that occurred due to that body part being outside the rollercoaster cart. Around most amusement parks, there are signs, and announcements made to 'keep your arms and legs inside the vehicle at all times', and 'to please not stand up and remain seated throughout the ride'. Where this is the case, a theme park may be able to successfully plead volenti non fit injuria. The reasonable person would know that riding in the cart of a rollercoaster without the proper safety precautions could result in an accident.

The reasonable person is not defined in statute but is somewhat defined by common law. In *Hall v Brooklands Racing Club* [1933], the reasonable man is defined by relating it to that of the average person on the bus: a man 'on the Clapham omnibus'', as he 'is like the general

[52] Nettleship v Weston [1971] 2 QB 691
[53] Ibid [1971] 2 QB 691, 701
[54] Murray v Morris [1991] 2 QB 6

citizen and also a man who is a hypothetical person'. [55] Perhaps a clearer definition, although a fictitious case, was Herbert's definition in *Fardell v Potts*, that being 'a reasonable person is an ideal and standard person who is an image of all the nice qualities which everyone wants in a good person'.[56] Moreover, the reasonable person is an objective standard which means that:

> *'it does not matter if an individual defendant has some particular disability or for some other reason was unable to behave as the reasonable person would have done'.*[57]

Nor does it matter if the defendant is usually a careful person; everyone is held to the same standard.

Sadly, the death of Evha Jannath involved a breach of Drayton Manor's rules, on the water ride Splash Canyon. The 11-year-old 'had been standing up' when she fell from the boat after it hit a barrier, and unfortunately drowned.[58] Albeit, there were '11 worded signs which instructed guests to remain seated and hold the centre ring',[59] due to Evha's age and the fact she was unsupervised, she would be an exception to the reasonable person standard, as a child cannot be expected to have acted as an adult would have. A child is classified by UK government standards as 'anyone who has not yet reached their 18th birthday';[60] due to this, minors are held to the standard of the reasonable child. In *Orchard v Lee* [2009], the reasonable child was established as an ordinary child of the defendant's age and intelligence.[61] It is unlikely that any 11-year-old would reasonably foresee death arising as a result of their actions on what they are led to believe is a 'fun' and 'safe' ride. In cases where it is reasonably foreseeable that the incident at hand would occur, as in *Mullin v Richards* [1998],[62] then the defendant can be held liable even if they are a minor.

Had the incident involving Evha Jannath occurred to a visitor that did meet the requirements

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[55] Hall v Brooklands Racing Club [1933] 1 KB 205, 224
[56] Noshin Chowdhury 'The Reasonable Man: Subjective and Objective Standard?' (London College of Legal Studies (South), 2004) <https://lcls-south.com/the-reasonable-man-subjective-and-objective-standard/> accessed 13 February 2023
[57] Elizabeth Handsley 'The Reasonable Man: Two Case Studies' (Sister in Law, Volume 1, 1996) 53, 57 <https://core.ac.uk/download/pdf/20080075.pdf> accessed 13 February 2023
[58] 'Drayton Manor death: Jurors find Evha Jannath died accidently' (BBC, 11 November 2019) <https://www.bbc.co.uk/news/uk-england-50375840> accessed 13 February 2023
[59] Ibid, 'Drayton Manor death: Jurors find Evha Jannath died accidently'
[60] Youth Justice Board for England and Wales 'Case Management Guidance: Definitions: Children' (Gov.UK, 12 October 2022) <https://www.gov.uk/guidance/case-management-guidance/definitions> accessed 17 March 2023
[61] Orchard v Lee [2009] EWCA 295
[62] Mullin v Richards [1998] 1 WLR 1304

of the reasonable person, then it is likely Drayton Manor would be successful in pleading volenti non fit injuria. Any other contributing factors to the death of Evha Jannath will be talked about later on in this article.

Alternatively, the claimant may be able to rely on the doctrine of *res ipsa loquitur*, which in its English translation means 'the thing speaks for itself'. A definitive description of this maxim was provided in *Scott v The London and St. Katherine Docks Company* (1865) where the court held that 'there must be reasonable evidence of negligence', and where it is:

> *'under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use the proper care, it affords reasonable evidence… that the accident arose form want of care'.*[63]

Essentially the maxim provides that an element of negligence arose on part of the defendant and shifts the burden of proof on the defendant to prove they are not negligent.

This doctrine was relied upon by solicitors at Injury Lawyers Devon acting on behalf of the claimant, Crealy Theme Park and Resort. An incident on 'the world's first water coaster', Vortex, resulted in the claimant suffering from a back injury due to the failure of the dinghy the claimant was in to stop or slow down at the end of the ride.[64] With the cause of the accident unknown, it was held that it would not have happened 'without there being some negligence', and so, the case was pursued on the basis of *res ipsa loquitur*.[65]

To rely on the doctrine of *res ipsa loquitur*, three requirements need to be satisfied. The first requirement being 'an injury caused by the operation of an appliance or instrumentality in the exclusive possession and control of the defendant'.[66] This requirement is often satisfied where an object in possession of the defendant falls and strikes the claimant, *Byrne v Boadle* (1863).[67] The second requirement being that the apparatus in its ordinary operation would cause no injury; and the third requirement being the obtained injury was no fault of the claimant.

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[63] Scott v The London and St. Katherine Docks Company (1865) 159 E.R. 665
[64] Injury Lawyers Devon, 'Crealy Park Accident Claim', (injurylawyersdevon, 2018) <https://www.injurylawyersdevon.co.uk/news-articles/crealy-park-accident-claim.html> accessed 21 February 2023
[65] Ibid, 'Crealy Park Accident Claim'
[66] Charles Carpenter, 'The Doctrine of Res Ipsa Loquitur' (University of Chicago Law, 1934) Volume 1, Issue 4, Article 2, 519, 520
[67] Byrne v Boadle (1863) 2 H&C 722

In 2018, an incident occurred on Thorpe Park's Vortex ride whilst the ride was still in motion. At 65 feet in the air, 'part of the seat came flying off'.[68] Fortunately, no one was injured, but had someone been struck from below, it is likely that the claimant would be able to rely on the doctrine of *res ipsa loquitur.* The requirements needed for *res ipsa loquitur* would be satisfied as a piece of apparatus would have fallen and hit someone, at no fault of their own, which would not usually happen in its ordinary course of operation.

Another legal doctrine which acts as a defence for negligence is the Latin maxim *ex turpi causa non oritur actio*. This directly translates to 'out of an illegal act there can be no cause of action', or in other words, the illegality defence.[69] This defence essentially provides that a 'person cannot rely on their illegal act or conduct to found an action against another person', as was used in the case *Pitts v Hunt* [1990] where a motorcycle rider died as a result of his own reckless driving.[70] This defence could be applied to theme parks where someone either breaks into a theme park or gains access through falsified entry. However, this defence will not always succeed, as Lord Kerr established in *Euro-Diam Ltd v Bathusrt* [1988], the defence 'rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice'.[71] If the defence never failed, then 'the courts would appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts'.[72] Hence why, the defence failed in *Revell v Newbery* [1996] where the defendant shot the plaintiff for trespassing, as the injury was not caused due to the state of the premises, but rather an action of the defendant. [73] The action was deemed too violent for the circumstances, and under the Occupiers Liability Act 1984, the defendant owed a duty of care to the plaintiff.

2.2 Occupiers' liability

The overarching theme of negligence, and occupiers' liability are relatively similar in that they overlap in certain areas, especially in the context of non-visitors and the negligence defence *ex turpi causa*. Broadly speaking, negligence is an activity duty, whereas occupiers' liability

[68] Kelly-Ann Mills, 'Thorpe Park thrill seekers' horror after claims part of 'Vortex ride falls off' while 65ft in air' (*Mirror*, September 2018) <https://www.mirror.co.uk/news/uk-news/thorpe-park-thrillseekers-horror-after-13267031> accessed 21 February 2023
[69] Benjamin Andoh, 'Illegality as a defence to negligence in English law' (Mountbatten Journal of legal studies, volume 11, 2007) 38
[70] *Pitts v Hunt* [1990] 3 All ER 344
[71] *Euro-Diam Ltd v Bathusrt* [1988] 2All ER 23 at 28-29; [1990] 1QB I, 35
[72] Ibid, [1988] 2All ER 23 at 28-29; [1990] 1QB I, 35
[73] *Revell v Newbery* [1996] QB 567

is an occupational duty.

Elements of the Occupier's Liability Act 1957 and 1984 are shown through common law, and it is common law that has formed some of the basis of these Acts. The Occupier's Liability Act 1957 concerns itself with lawful visitors,[74] whereas the 1984 Act deals with non-visitors.[75] Neither the 1957 Act or the 1984 Act provides a definition for 'occupier', but one is provided by Lord Denning in *Wheat v E Lacon & Co Ltd* [1966] as:

> *'wherever a person has a sufficient degree of control over the premises that he ought to realise that any failure on his part to use care may result in injury to a person coming lawfully there'.*[76]

In *AMF International Ltd v Magnet Bowling Ltd* (1968),[77] it was established that more than one occupier can exist in the same place or over the same construction. Therefore, it is plausible that in the event of a claim being brought forward about a rollercoaster, the owner of the theme park, and the engineers of the rollercoaster would both be considered occupiers.

An occupiers' duty of care extends to people whom they have invited on to their premises, but also people they have not, these people are known as non-visitors, such as trespassers. A definition for trespasser is provided in *Robert Addie & Sons (Collieries) Ltd v Dumbreck* [1929], as 'someone who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to'.[78]

A duty of care arises towards non-visitors when three points are satisfied under s.1(3) of the Occupiers Liability Act 1984. The points being the occupier 'is aware of the danger or has reasonable grounds to believe it exists'; the occupier 'believes that the other is in the vicinity of danger concerned'; and that the occupier 'may reasonably be expected to offer the other some protection'.[79] The application of these points are applied in *Young v Kent County Council* [2005] where a child sustained an injury falling through the roof of a school, which was known to be in poor condition and used as a 'hangout spot'.[80]

[74] Occupier's Liability Act 1957
[75] Occupier's Liability Act 1984
[76] *Wheat v E Lacon & Co Ltd* [1966] AC 552, 577
[77] *AMF International Ltd v Magnet Bowling Ltd* (1968) 1 WLR 1028
[78] *Robert Addie & Sons (Collieries) Ltd v Dumbreck* [1929] AC 358
[79] Occupiers Liability Act 1984 s.3
[80] *Young v Kent County Council* [2005] EWHC 1342

Linking an occupier's duty of care to the focus of this article, it is important to identify who would be the occupier, what the premises would be, and who would constitute as a visitor or non-visitor. The premises of concern in this article is that of theme parks, with the occupier being the manager, or any other authoritative figure of said theme park. It is noteworthy that 'premises' are not limited to buildings and land, and can include temporary structures like ladders as established in *Wheeler v Copas* [1981].[81] A visitor would be someone who had bought entry into the theme park, or was expressly invited; whilst a non-visitor would have no means of invitation, or ticket to attend the theme park.

Merlin Entertainments Limited is 'one of the world's largest attraction operators', mainly located in the UK, with attractions consisting of Alton Towers, Thorpe Park, and Legoland Windsor. Albeit it is probable most people attending any attractions of Merlin are there as visitors, there are incidents which have involved people trespassing. An important case to highlight is the repeated and reckless trespass of Alistair Law, Rikke Brewer and Scott Mackay, into the premises of Legoland Windsor, and Alton Towers.[82]

Luckily, the three individuals were not injured, nevertheless Merlin took steps to try and prevent any future injury and liability occurring by securing an injunction granted by the High Court of Justice on 10th August 2018. With the three individuals unable to visit any premises owned by Merlin without written invitation, it is conceivable that if any of the individuals were to make a claim based on injury due to trespassing at Merlin, it would fail. In *Keown v Coventry Healthcare NHS Trust* [2006],[83] the court dismissed the claim on the basis that the claimant admitted he knew his actions were dangerous. Considering here the claimant was an 11-year-old, it is likely that the court would hold the three adult individuals to the standard of the reasonable person and conclude that they were aware of their actions and the potential consequences of trespassing.

Where case law concerns children, the Occupiers Liability Act 1957 s.3(a), expressly states that 'an occupier must be prepared for children to be less careful than adults'.[84] Hence why in *Taylor v Glasgow Corporation* [1922],[85] where a 7-year-old died from eating poisonous berries in a park open to the public, Glasgow Corporation was held liable. The court held that Glasgow Corporation owed a duty of care to the public; with the belief that it was reasonably

[81] *Wheeler v Copas* [1981] 3 AII ER 405
[82] Trespass injunction: Merlin Entertainments PLC and others listed at Schedule 1 To The Claim Form 2018 (2018-000372)
[83] *Keown v Coventry Healthcare NHS Trust* [2006] 1 WLR 953
[84] Occupiers Liability Act 1957 s.3(a)
[85] *Taylor v Glasgow Corporation* [1922] 1 AC 448

foreseeable that the berries would have been alluring to children, especially with no warning signs or protection to deter the public from the danger.

In spite of this, if a young child were to attend an amusement park as a non-visitor and befall an injury, it is likely the court would bring into *account Phipps v Rochester Corporation* [1955].[86] Here, Judge Devlin J established that whilst the 'law recognises a sharp difference between children and adults',[87] an occupier is 'entitled to assume that normally little children will be accompanied by a responsible person'.[88] The judge also provided that:

> *'the responsibility for the safety of little children must rest primarily upon the parents; it is their duty to see that such children are not allowed to wander about by themselves, or at least to satisfy themselves that the places to which they do allow their children to go unaccompanied are safe'.*[89]

This principle was upheld in *Bourne Leisure Ltd v Marsden* [2009] where a two-year old wandered away from his parents and unfortunately drowned in an unprotected pond.[90] The parents brought a claim against the occupier, but the judge concluded on the balance of probabilities that had the pond been fenced off, the danger present still would have been obvious and the outcome likely the same; the occupier was not held liable. With amusement parks presenting a dangerous environment for unaccompanied children, as provided earlier in the case of Evha Jannath,[91] it is likely the court would hold parents responsible for their children rather than the occupier following *Phipps v Rochester Corporation* [1955] and *Bourne Leisure Ltd v Marsden* [2009].

The court in *Phipps v Rochester Corporation* [1955] picked up on the fact that no warning signs or boundaries were present to help fulfil the occupier's duty of care. Judge Devlin J stated:

> *'a fence might not have been practicable in the circumstances. A notice might not have been sufficient to deter all or most children; but it would have made it plain to parents that children were not allowed'.*[92]

However, an addition of a warning sign would not necessarily absolve the occupier of liability. The Occupiers Liability Act 1957 s.2(4)(a) states 'unless in all the circumstances it was

[86] Phipps v Rochester Corporation [1955] 1 QB 450
[87] Ibid [1955] 1 QB 450, 458
[88] Ibid [1955] 1 QB 450, 459
[89] Ibid [1955] 1 QB 450, 472
[90] Bourne Leisure Ltd v Marsden [2009] EWCA Civ 671
[91] (n 59) 'Drayton Manor death: Jurors find Evha Jannath died accidently' 3
[92] (n 87) [1955] 1 QB 450, 457

enough to enable the visitor to be reasonably safe' the occupier will not be absolved of liability.[93] For example, in the case of Evha Jannath, the main warning sign present at the entrance of the ride, did not specify that passengers should remain seated, only that 'the ride was 'bumpy''.[94] On top of this, the HSE found that signs present later down the line 'telling people to stay seated were 'inadequate or faded.''[95] The signs were so inadequate, that the court had heard '14 incidents of people going into the water' prior to Evha.[96] Ultimately, the judge found that the signs present were simply not enough to remove the risk 'that passengers would ignore the signs telling them to remain seated and would stand or move about'.[97] Therefore, despite there being signs present in this case, it would not absolve the occupier of Drayton Manor of their liability as it technically does not enable the visitor to be reasonably safe.

That being said, where the danger is obvious, the occupier has no duty to erect warning signs as was the case in *Darby v National Trust* [2001].[98] Here, the claimant sued after her husband drowned in a pond which had no signs warning not to swim. The court held that the occupier was not liable, and there was no need to warn of the danger of drowning; as McLaren QC stated, 'the risk of death by drowning is foreseeable'.[99] Applying this to the Drayton Manor case, had it been an adult that fell in and drowned after standing up on the ride, it is possible that the court would deem the outcome of the adult's actions reasonably foreseeable, and not hold the occupier liable. However, with Evha being a child, she would not be held to the standard of the reasonable person, as an adult would.

3.1 The Statistics

As previously established in section 1 above, the HSWA is currently the primary piece of legislation applied to amusement park safety in the UK. Also, the section noted Joyce's findings, that being since the Act was introduced, 'fatal accident rates have fallen by 83%'

[93] Occupiers Liability Act 1957 s.2(4)(a)
[94] Ben Eccleston 'Drayton Manor inquest: Jury reach decision after 11-year-old's death' (*CoventryLive*, 11 November 2019) <https://www.coventrytelegraph.net/news/local-news/drayton-manor-inquest-evha-jannath-17240304> accessed 7 March 2023
[95] ITV 'Five mistakes which led to the death of Evha Jannath at Drayton Manor them park:' (ITV.com, 18 March 2021) <https://www.itv.com/news/central/2021-03-18/five-mistakes-which-led-to-the-death-of-evha-jannath-at-drayton-manor-theme-park> accessed 7 March 2023
[96] Ibid, 'Five mistakes which led to the death of Evha Jannath at Drayton Manor them park:'
[97] Ibid, 'Five mistakes which led to the death of Evha Jannath at Drayton Manor them park:'
[98] *Darby v National Trust* (2001) 3 LGLR 29
[99] Ibid (2001) 3 LGLR 29, 20

across all main occupational sectors.[100] Whilst this statistic provides a positive from the outset to the implementation of the HSWA, the statistic is not exclusive to theme parks. Therefore, it is important to take a closer look at statistics solely relating to the occurrence of injuries at theme parks.

At the end of each year, Merlin Entertainments Limited releases a report accounting for the health and safety of the public, the number of visitors, their finances, and guest satisfaction, alongside other data. Albeit Merlin is a global company, so the data is not solely for the UK; it is exclusive to amusement parks. In interpreting the data provided from the 2014 report through to the 2021 report, important trends become identifiable. In 2014, the report notes that there were 62.8 million visitors,[101] and in 2019 notes that there were 67 million visitors.[102] This increase of 4.2 million people over the span of 5 years illustrates the growing popularity of theme parks, representing the importance of the health and safety law surrounding amusement parks.

However, the 2020 report noted that that year, only 22.1 million people visited Merlin,[103] and in 2021 that figure only increased to 35.2 million.[104] This decline is the result of the 2020 Covid-19 pandemic that implemented a lockdown of all leisure centres and businesses across the UK and most countries worldwide. With the pandemic and its procedures of lockdown still leading into 2021, the reported decline in visitors over 2020 and 2021 was to be expected.

As of 2016, the annual reports introduce the Medical Treatment Case (MTC) rate which 'captures the rate of guest injuries requiring external medical treatments relative to 10,000 guest visitations'.[105] The number of visitors in attendance each year at theme parks is important to understand whether public injuries have increased or decreased. The MTC in the 2016 report is recorded at a 0.06 rate;[106] this rate decreases with each consecutive year until 2020, where the rate plateaus at 0.02.[107] Whilst this consistent rate of 0.02 throughout 2019, 2020, and 2021 may appear encouraging, in 2019 67 million visitors attended amusement parks, and in 2020 and 2021 only a combined total of 57.3 million visited. This suggests that had the number of visitors in 2020 and 2021 been the same number reported

[100] (n 10) Jill Joyce, Steve Granger
[101] Merlin Entertainments 'Annual Reports and Accounts 2016' (LMC Design) 2
[102] (n 1) Merlin Entertainments, 'Annual Reports and Accounts 2019', 1
[103] Merlin Entertainments 'Annual Reports and Accounts 2021' (Motion JVCO Limited) 1
[104] Ibid, 'Annual Reports and Accounts 2021', 1
[105] (n 104) Merlin Entertainments, 'Annual Reports and Accounts 2016', 2
[106] Ibid, 'Annual Reports and Accounts 2016', 2
[107] Merlin Entertainments 'Annual Reports and Accounts 2020' (Motion JVCO Limited) 1

in 2019, the injury rate would have exceeded 0.02. A reason for the 0.02 MTC rate in 2020 and 2021 may be due to people catching COVID-19, but this has not been confirmed.

Nevertheless, it remains the case that 'you are at greater risk on the journey to the theme park than at the fairground itself', which may help restore some public faith after the potential rise of the 2020 and 2021 injury rate.[108] That being said, significant injuries affected the number of people attending amusement parks in 2015 and 2016, following the case of *Regina (HSE) v Merlin Attractions Operations Limited*. [109] The number of visitors in 2015 significantly declined from the 2014 statistic by approximately 700,000 people, and in 2016 it barely rose. This case will provide important insight into assessing how there has been an 'improvement or at least review of the health and safety issues throughout the UK'.[110]

3.2 The Alton Towers incident

The case of *Regina (HSE) v Merlin Attractions Operations Limited* involved a crash on the 'Smiler' at Alton Towers in 2015. A carriage of 16 people collided with an empty, stationary carriage that had been out on a test run and forgotten about by the employees. The crash resulted in five people being seriously injured, and out of those five, two people having to have their leg amputated. The horrific injuries explain why the public steered away from the theme park in the following years.

The case attracted lots of media attention and the BBC made headlines with 'Alton Towers Smiler ride crash caused due to human error'.[111] This headline was later debunked with the Court establishing that although engineers did intervene with the ride, the crash was the result of a breach under section 33(1) of the HSWA.[112] Before analysing s.33(1) of the HSWA, it is important to account for the events that led to the accident, and in turn the breach.

The first fail-safe of the day occurred when the 'Smiler operated above wind speed limit pre-crash'.[113] Although the Alton Towers website clearly states that 'high winds… result in ride

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[108] (n 102) Emily Goddard, Paul Paxton
[109] *Regina (HSE) v Merlin Attractions Operations Limited* 2016, JCL 80 (403)
[110] Emily Goddard, Paul Paxton, *Personal Injury lessons from the Alton Towers Smiler disaster* (Stewarts Law, 2017)
[111] 'Alton Towers Smiler ride crash due to 'human error'' (*BBC*, 2015) <https://www.bbc.co.uk/news/uk-england-34911943> accessed October 2022
[112] Health and Safety at Work etc. Act 1974 section 33(1)
[113] 'Smiler operated above wind speed limit pre-cash' (*RideRater*, 2016) <https://riderater.co.uk/6247/smiler-operated-above-wind-speed-limit-pre-crash/> accessed October 2022

closures, for health and safety reasons',[114] the sensors on the Oblivion ride, which correlate to the Smiler as they are situated next to one another, 'failed to activate'.[115] The Smiler was found to be operating 'in wind speeds of 45mph',[116] when it has a '34mph limit',[117] and therefore the ride should not have been operating.

It was the extreme wind conditions that caused the empty carriage to stall; this could have been an easy fix. Although the accident was not solely caused by human error, it can be said to have played some part in the incident occurring. With the empty carriage out on the track, the ride's computer system suspended the carriage loaded with people. Warning signs displayed due to the empty carriage being on the track but were dismissed by staff as false alarms. It was around 'eight minutes' that the carriage was suspended before the staff 'overrode the safety mechanism and the carriage plunged down the loop and smashed into an empty car'.[118]

Human error also occurred where the employees failed to account for an extra cart, that cart being the one stuck out on the track. Discussed at court was the fact that the cart 'should have been identified visually, from CCTV cameras or by simple mathematics since it had not been accounted for'.[119] This brings into question the employees and their training. Ultimately, it was all the above that led to the collision on the Smiler.

3.3 Breach of the HSWA

As stated in the case of *Regina (HSE) v Merlin Attractions Operations Limited*, a breach of s.33(1) of the HSWA ocurred the day of the accident. Section 33(1)(a) provides that 'it is an offence for a person to fail to discharge a duty to which he is subject by virtue of sections 2 to 7'.[120] From examining sections 2 – 7 of the HSWA, it is most likely that the court were referring to s.3 and s.6 to outline where the breach had incurred.

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[114] 'Will all rides be open in bad weather?' (*Alton Towers*) <https://support.altontowers.com/hc/en-us/articles/115003484292> accessed October 2022
[115] (n 114) 'Smiler operated above wind speed limit pre-cash', accessed October 2022
[116] Ibid, 'Smiler operated above wind speed limit pre-cash'
[117] Ibid, 'Smiler operated above wind speed limit pre-cash'
[118] Josh Halliday 'Alton Towers Smiler crash footage released for the first time' (*The Guardian*, 26 September 2016) <https://amp.theguardian.com/travel/2016/sep/26/alton-towers-smiler-crash-was-like-car-crashing-at-90mph> accessed 16 March 2023
[119] Aidan Carr 'The Alton Towers case and new sentencing council guidelines' (Burton Copeland) <https://www.burtoncopeland.com/news/alton-towers-case-and-new-sentencing-council-guidelines/> accessed 16 March 2023
[120] HSWA s.33(1)(a)

Section 3(1)(a) of the HSWA provides that:

> *'it shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety'.*[121]

In the context of the article, this essentially means that all employers of theme parks have a duty to keep members of the public on the premises safe so as to not obtain any injuries. As discussed above, the collision on the Smiler resulted in serious life changing injuries, partly due to human error from the employees operating the ride, hence the breach of the Act.

Section 6(1)(a) states:

> *'it shall be the duty of any person who designs, manufactures, imports or supplies any article for use at work or any article of fairground equipment to ensure so far as is reasonably practicable, that the article is so designed and constructed that it will be safe and without risks to health at all time when it is being set, used, cleaned or maintained by a person at work'.*[122]

In the context of the article, the law here provides that rollercoasters are to be constructed in a way as to not cause injuries at any time, including when in operation. Again, as the way in which the law was breached in s.3, the law was breached in the same way here.

Discussed and analysed in section 1 is the wording of 'so far as is reasonably practicable' and the benefits of adapting the phrase to 'so far as is suitable and sufficient'. The constant use of the phrase throughout the Act has perhaps enabled a lower standard of care to be taken resulting in injuries, such as the injuries from the Smiler. The phrase is used in both s.3 and s.6 of the HSWA; to understand the full effect the phrase has, both s.3 and s.6 will interchange the phrase 'so far as is reasonably practicable' and 'so far as is suitable and sufficient'.

The term 'suitable' is defined by the Cambridge Dictionary as 'acceptable or right for someone or something',[123] and the term 'sufficient' as 'enough for a particular purpose'.[124] In section 1, 'practicable' is defined as the means in which the measures must be possible in

[121] HSWA s.3(1)(a)
[122] HSWA s.6(1)(a)
[123] Cambridge Dictionary, 'Suitable', <https://dictionary.cambridge.org/dictionary/english/suitable> accessed 17 March 2023
[124] Ibid, 'Sufficient', <https://dictionary.cambridge.org/dictionary/english/sufficient> accessed 17 March 2023

light of current knowledge and innovation: *Schwalb v Fass (H) & Son.*[125] The current phrase allows room for error to occur as it provides some leeway in fulfilling tasks, whereas 'suitable' and 'sufficient' imply a higher level of responsibility than 'reasonably practicable.'

Had s.3 of the Act used the terms 'suitable' and 'sufficient', then it would be upon the employees to act in better fashion, perhaps by conducting risk assessments. For example, employees would have had to collate enough evidence to decide whether their actions would be deemed as acceptable and right. This may have involved judging the weather conditions and taking it upon oneself to check the sensors monitoring the wind. Not only this but conducting regular checks on the sensors daily to ensure all was running smoothly. Also, closely monitoring the CCTV of the ride especially when sending out test runs to confirm that all carts completed the track successfully. Adding to this, checking the CCTV when warning signs were displayed. The employees worked at a reasonably practicable standard, in that they acted only on their current knowledge; not in a way to make sure something was right, and so not to the best of their ability.

Had s.6 of the Act implemented 'suitable' and 'sufficient', more sensors monitoring the wind may have been installed alongside other safety mechanisms to suspend the ride. Had the ride been suspended twice, it likely would have caused a more thorough investigation to be conducted, and the incident prevented. However, perhaps the most important thing that would have been accounted for by the designers and manufacturers, is a properly managed safe system to reach different parts of the ride in a safe and timely manner. When the ride came to a halt, there was no easily accessible way to reach the trapped passengers, meaning it took 4 – 5 hours to rescue everyone. Had the passengers been reached earlier, injuries could have been significantly reduced.

Analysing s.6 more closely, the wording of the Act places a duty on designers, manufacturers, importers, and suppliers to have constructed the ride to be safe when in use. This duty does not extend to employees who operate the ride, despite them being present when the ride is in use. Seeing as it is these employees who are likely going to have to respond first in the event of an accident, they should be held accountable to the same standard as designers, manufacturers, importers, and suppliers.

Neither the HSWA, or any other guidance, does not once specify the specific qualifications needed of an employee monitoring a rollercoaster, essentially anyone can do it. This

[125] (n 26) (1946) 175 LT 345

potentially includes teenagers working a weekend or summer job. In the case that a rollercoaster malfunctions, a teenager whether with or without specific qualifications is likely not going to be able to handle the situation as well as an adult could. It is vital that employees receive proper training and are equipped with a specific skill set so that they do not put themselves or the public in harm's way.

When the Smiler crashed, employees did not contact the emergency services immediately; it was not until it had been '17 minutes' that they were contacted.[126] Had the staff thought to act quicker in calling the emergency services, the injuries incurred by people may not have been so bad, as the efforts to rescue the passengers would not have been so prolonged. Perhaps had the staff been equipped to deal with accidents and work in time critical situations, the emergency services would have been contacted faster.

3.4 Changes made following the Alton Towers incident

With the Alton Towers incident being the biggest, most recent accident to occur in the UK at a theme park, it became clear changes needed to be made to safety law and guidance. Beginning with the changes made to the Smiler, more CCTV cameras were installed across the ride, so as to not leave any blind spots. In addition to this, according to the Safety and Health Practitioner, an alarm to monitor wind speed was installed specifically for the Smiler so that it no longer would be dependent on the monitors at Oblivion.[127] A new emergency stop button was also installed at ground level, as well as 'improved access to the 'pit' section of the ride'.[128] In making these amendments to the ride, although the actual layout of the Smiler remains unchanged, it seems as though Merlin have responded appropriately, acting in a way that is 'suitable' and 'sufficient'.

In 2016, Merlin made a self-imposed change to their annual reports to include an MTC. With the Smiler incident having occurred in 2015, it is plausible that the MTC was implemented as a result of the crash. By adding an MTC to the report Merlin are able to monitor the health and safety of the public, seeing if it improves or not. From this, Merlin can act accordingly implementing more safety measures where it is necessary.

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[126] (n 101) 2016, JCL 80 (403), page 4
[127] Safety and Health Practitioner 'Alton Towers crash victims to sue' (SHP, Safety and Health Practitioner, September 2018) <https://www.shponline.co.uk/headline-news/alton-towers-smiler-ride-crash-sentencing/> accessed 24 March 2023
[128] Ibid, 'Alton Towers crash victims to sue'

Aside from changes made by Merlin as a result of the crash, a third edition of 'Fairgrounds and amusement parks: Guidance on safe practice' was also released in 2017 by the HSE.[129] Again, whilst the publication of this guidance has not been confirmed to be as a direct result of the Smiler incident, it is plausible that this is the case. The third edition guidance even went so far as to state that it 'gives a clearer explanation of what action to take and why' compared to the 2007 second edition guidance,[130] which would have been in use at the time of the crash.

The new guidance updated references to health and safety law; the guidance on maturity risk assessments (MRAs); and the terminology used in the section 'Inspecting an amusement device'.

The section 'Managing for Health and Safety' updated references to health and safety law to include a minimum standard for self-employed people working at theme parks. This minimum standard requires that 'any risk assessment must be suitable and sufficient', and that 'instruction and training for employees in how to control the risks' is provided.[131] Whilst this new section does not stretch to the likes of Merlin and its theme parks as its employees are not self-employed; the introduction of the terms 'suitable' and 'sufficient' into guidance is advantageous. If the terms begin to be used more within safety guidance, then it is not likely to be long before the terms will be implemented in the HSWA. As well, the requirement for training employees in dealing with risks is beneficial as it will better equip staff to deal with incidents that occur.

Regarding the guidance on MRAs, under 'Appendix 2 Risk assessments to establish maturity of design for fairground devices', the new edition makes a point that MRAs are now expired.[132] This is something the guidance did not explicitly specify in the 2007 edition. The clarification of the expiration of MRAs means there will be no confusion around whether MRAs should still be in use, something the 2007 edition did not provide.

The section 'Inspecting an amusement device' has been updated to include that regular inspections take place of rides and that it be 'by a competent person'.[133] A definition for 'competent' is provided by the Collins New English Dictionary as 'having sufficient skill or

[129] (n 46) Fairgrounds and amusement parks: Guidance on safe practice
[130] (n 45) Fairgrounds and amusement parks: Guidance on safe practice
[131] (n 46) Fairgrounds and amusement parks: Guidance on safe practice, 14
[132] Ibid, Fairgrounds and amusement parks: Guidance on safe practice, 82
[133] Ibid, Fairgrounds and amusement parks: Guidance on safe practice, 27

knowledge'.[134] Using this term in the guidance illustrates that this is a job that must be done by a professional. The updated terminology in this section and across the whole guidance, demonstrates how the guidance has become more constrained, as it leaves little room for error. With this newer and stricter guidance in place, there should hopefully not be a reoccurrence of the Smiler incident.

This section has analysed the number of visitors to the number of injuries from the years 2016 – 2021 at Merlin. Having addressed the consecutive trend of more visitors and less injuries; the only main anomalies are that of the decline in 2020 due to COVID, and in 2016 following on from the Smiler incident. The section then went on to explain what happened at Alton Towers that resulted in this decline of visitors, and why the crash occurred. Discussing where and how there was a breach of the HSWA, namely s.3 and s.6, the section then went on to explain how guidance since the crash has been updated to be more specific.

Conclusion and Future Focus

This article has discussed the implementation of the main legislation surrounding theme park safety in the UK, known as the HSWA, and the introduction of other safety guidance for theme parks in the UK. In doing so, the wording of the phrase 'so far as is reasonably practicable' has been challenged, with the suggestion of replacing it with the better fitting phrase: 'so far as is sufficient and suitable'.

Following this, the common law surrounding negligence and occupiers' liability was examined. Here, the article applied relevant common law to theme park incidents to predict what the outcome would be had the incidents been taken to court. Looking at incidents that had been taken to court, both the case of Evha Jannath and *Regina (HSE) v Merlin Attractions Operations Limited* were analysed in great detail. The events that led up to the incidents were discussed, as well as what law was breached, and in the case of Evha Jannath, why the law was different when dealing with a child rather than an adult.

Throughout the article, a recurring theme of the terminology used in the HSWA has been mentioned, in that it is too flexible so provides room for error to occur. Whilst the third edition guidance of 'Fairgrounds and amusement parks: Guidance on safe practice' has updated its terminology to include terms such as 'suitable', 'sufficient', and 'competent', the HSWA has not. Although it is beneficial the guidance has made these changes, the guidance only

[134] Robert McMillan, Collins New English Dictionary, (first published 1997, latest reprint 1999)

provides recommendations for occupiers of theme parks; it is not law that everyone must abide as is the HSWA. Therefore, despite the fact that current safety law does to some extent protect the public, the HSWA should be amended so as to better protect the public when attending amusement parks.

A reform of the HSWA is needed now to ensure a greater level of responsibility is placed on employees and manufacturers to keep the public safer; especially when considering the future of theme parks. With advancing technology and machinery, manufacturers will have the ability to create rollercoasters that are faster and higher than they already are. When trying to break new record heights and speeds, it is paramount that the safety of the public is still the priority. The Smiler broke the world record of having '14 loops: that is four more than the previous world record',[135] but the Smiler was the result of one of the UKs biggest theme park accidents, where tragic, life-changing injuries were suffered. Just last year, in October 2022, RideRater reported 'Government to decide on Thorpe Park rollercoaster',[136] which if allowed, plans to be '72 meters'[137] tall, making it the tallest and fastest, at '81 mph',[138] rollercoaster in the UK.

The HSWA is vital to ensure that the public remain safe when attending amusement parks. It is therefore important that as technology advances, the law does too. It is not enough to allow the law to remain the same in an everchanging and growing world. The law does not currently do enough to protect the public at theme parks, as this article has discussed, and so will not be enough when dealing with bigger and more daring rides. This article therefore concludes that current UK legislation needs to be reformed as it does not fully ensure the protection of the public when attending amusement parks.

A good starting point for recommended amendments to be made to the HSWA may arise from the third edition guidance of 'Fairgrounds and amusement parks: Guidance on safe practice'. Although all sources used throughout the article have provided valuable insight, this particular source has made the necessary changes needed to the HSWA.

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[135] 'Smiler rollercoaster breaks record for the most loops' (*BBC*, May 2013) <https://www.bbc.co.uk/newsround/22468381> accessed 25 March 2023
[136] 'Government to decide on Thorpe Park rollercoaster' (*RideRater*, October 2022) <https://riderater.co.uk/9925/government-to-decide-on-thorpe-park-rollercoaster/> accessed October 2022
[137] Ibid, 'Government to decide on Thorpe Park rollercoaster'
[138] Ibid, 'Government to decide on Thorpe Park rollercoaster'