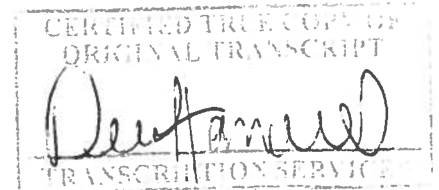
CI 97-01-001990

THE QUEEN'S BENCH

WINNIPEG CENTRE



BETWEEN:

DAMAL FITCH, an infant suing by her grandmother and Litigation Guardian DIANA FITCH,

Plaintiff,

- and -

SELECT SHOWS (BLUE UNIT) LIMITED,

Defendant.

REASONS FOR DECISION delivered by The Honourable Mr. Justice Monnin, held at the Law Courts Complex, 408 York Avenue, in the City of Winnipeg, Province of Manitoba, on the 23rd day of January, 1998.

APPEARANCES:

MS. C.A. DEVINE, for the Plaintiff.

MR. M.G. FINLAYSON, for the Defendant.

1 JANUARY 23, 1998
2
3 THE COURT (Orally): I am ready to give my
4 judgment on the claim by the infant. The issue in this case
5 is whether the infant plaintiff can recover damages from the
6 defendant for an injury she suffered to her finger when on
7 an amusement ride operated by the defendant.
8 The plaintiff is an infant who sues by her
9 grandmother, her litigation guardian. At the time of the
10 incident, she was 11 years of age.
11 On May 27, 1995, the plaintiff attended with some
12 friends to a carnival held on the grounds of the Tyndall
13 Park Community Club at the City of Winnipeg.
14 One of the rides at the carnival was operated by
15 the defendant and known as the "Jail Break". The ride was
16 in the nature of what is called in the trade a "fun house",
17 meaning that the children are invited to wander through a
18 darkened area and walk before a number of different types of
19 mirrors in a sort of maze. In order to exit the ride, they
20 are given the option to go down a flight of stairs, or to go
21 up a flight of stairs to the roof and then to slide down a
22 double slide leading off from the top of the roof of the
23 semi-trailer on which the ride is constructed. There is a
24 sign on the flight of stairs to the roof advising the
25 children to "remain seated in a sit down position when using
26 the slide".
27 Upon reaching the top of the slide, there are two
28 bars which require the children to crouch underneath in
29 order to get onto the slide and, therefore, force them to
30 come down the slide sitting down. Furthermore, there are
31 Plexiglas sides for the first few feet of the slide jutting
32 out from the side of the trailer to prevent children from
33 falling over the sides of the slide at the top.
34 The slide's construction is of a welded one-piece

1 steel slide, 25 feet in length, with a bend for the last
2 5 feet where it straightens out to allow the children to
3 come off. The sides of the slide are 6 inches high, with
4 16 gauge metal welded over pipes and ground down to prevent
5 sharp edges. The slide is divided down the middle such that
6 two children can slide down at the same time.
7 The operator of the ride applies a household
8 cleaner, Lemon Pledge, to the slide in order to render it
9 slippery. The operator will stand at the bottom of the
10 slide to monitor the children coming down in order to
11 prevent them from standing up.
12 The ride was inspected by the Manitoba Department
13 of Labour in 1993, 1994 and early May, 1995. The evidence
14 of Mr. Len Wiens, an inspector of the Manitoba Department of
15 Labour, was that in the usual course of inspection, he would
16 have looked at the slide. The edge of the slide would have
17 been visually checked to ensure that it was properly de-
18 burred, meaning that any sharp points would have been sanded
19 down. His evidence was that the slide was satisfactory in
20 1995 and no requests were made of the owner to make any
21 changes. His evidence was that if something was amiss and
22 required repairs, it would have been noted on the inspection
23 sheet. The inspection sheet was filed and disclosed no such
24 notation.
25 Similarly, Mr. Doug Wiebe of Independent Adjusters
26 Survey was called as a witness. He testified that he also
27 conducted an inspection of the slide for the defendant's
28 insurer as was the common practice with respect to the
29 insurance of amusement park rides. He testified that he had
30 the occasion on the first weekend of May, 1995, to do his
31 annual inspection of the slide in question. He indicated
32 that he had slid down the slide, inspecting it on his way
33 down. He had found nothing untoward and no seams or edges
34 which could cause someone to catch on the way down.

1 On May 27, 1995, the plaintiff went through the
2 Jail Break. Coming down the slide at a point approximately
3 midway, she recalls falling forward and injuring her fifth
4 finger on her right hand. She does not recall the manner in
5 which the fall occurred. She recalls coming down the right
6 side of the slide catching her finger, but she does not know
7 where. Apart from the injury to the finger, there were some
8 abrasions to her chin consistent with her falling forward.
9 At the bottom of the slide, she was spoken to by one of two
10 police officers who were retained by the community club to
11 patrol that evening. The plaintiff does not recall what the
12 police officer said to her. According to her testimony, she
13 did not explain to them what had happened and was unsure
14 whether she had said anything to them.
15 The events were witnessed by the plaintiff's
16 friend Jamie Main, who had preceded the plaintiff down the
17 slide and was waiting for her at the bottom. She indicated
18 that on her ride down the slide, she herself was having a
19 hard time as it was not very slippery. She had to push
20 herself down by grabbing on the sides of the slide. Her
21 evidence was that, although she was not sure, perhaps the
22 plaintiff's shoes got caught on her way down. Approximately
23 half way down, she saw the plaintiff fly down the slide,
24 head first, on her stomach. She did not notice the
25 plaintiff stand up or plant her feet. On cross-examination,
26 Jamie Main testified that the slide was not waxed and was
27 not very slippery. She had to grab the sides of the slide
28 in order to pull herself down.
29 Constable Nicholls testified that he was present
30 at the community club that evening, having been retained to
31 patrol on behalf of the community club. He was at the slide
32 shortly after the plaintiff had fallen. He testified that
33 he calmed her down, sent someone to find her parents, and
34 then spoke to her. He testified that she indicated to him

1 that she had planted her feet when she was coming down the
2 slide. He noted that she was wearing "Doc Martens" type
3 shoes, meaning boots with a deep rubber sole. His notes,
4 which were filed as Exhibit No. 12, have the notation
5 "planted feet down". Further on in his notes, there is a
6 notation which states as follows: "Damal" "I was sliding.
7 I put my feet down. My hand got stuck." The second notation
8 was made by the constable some minutes after the event when
9 he had an opportunity to do so. As to the first notation,
10 it was his testimony that that statement had been made to
11 him by the plaintiff and that he had written it down
12 contemporaneously. He denied that the notation reflected
13 comments made to him by the operator of the ride, but stated
14 that they were in fact the words of the plaintiff.
15 Mr. James Mills, the president of the corporate
16 defendant, testified that he had purchased the Jail Break
17 ride in the fall of 1992. He had operated it as part of his
18 business for 1993, 1994 and 1995. He testified that he had
19 never had an incident with the ride prior to the May 27,
20 1995 incident. The operator on that date, Mr. Art Appel,
21 was no longer employed by the defendant, and he had been
22 unable to locate him.
23 As is the norm in civil cases, the evidentiary
24 onus is on the plaintiff to prove liability of the defendant
25 on a balance of probabilities. In this case, however, the
26 plaintiff is unable to refer to any particular act or
27 omission of the defendant in support of her position that
28 the defendant was negligent. Counsel for the plaintiff
29 relies on the doctrine of res ipsa loquitur to prove
30 negligence by inference that the injuries to the plaintiff
31 can only be explained by negligence on the part of the
32 defendant.
33 In Hunt v. Burgess (1993), 83 Man.R. (2d) 71
34 (C.A.), Madam Justice Helper stated as follows, at pp. 76

1 and 77:
2
3 "Normally in civil cases the
4 evidentiary onus is on the
5 plaintiff throughout to prove
6 liability on a balance of
7 probabilities. However, the
8 doctrine of res ipsa loquitur is
9 available to a plaintiff to prove
10 negligence by inference where
11 damage occurs and the only
12 reasonable explanation is
13 negligence on the part of the
14 defendant. The elements which must
15 be proved by the plaintiff for the
16 application of the maxim are: 1.
17 the thing which caused the loss
18 must be under the sole management
19 and control of the defendant or
20 someone for whom he is responsible;
21 2. the accident or damage would not
22 have occurred without negligence;
23 3. there is no evidence of how the
24 accident or event took place. When
25 those elements are established
26 negligence which might not
27 otherwise be provable may be
28 inferred because the facts giving
29 rise to the accident are within the
30 sole knowledge of the defendant.
31 The evidentiary onus shifts to the
32 defendant to provide an explanation
33 for the accident which is
34 inconsistent with negligence on his

1 or her part."

2

3 In this case, it is admitted by the defendant that
4 the ride was under its sole management and control.
5 However, the plaintiff has not demonstrated that the
6 accident would not have occurred without the negligence of
7 the defendant. Mr. Mills did admit, under cross-
8 examination, that a child would not normally break her
9 finger on the slide. That statement does not lead to a
10 conclusion that an injury suffered by a child on a slide of
11 this nature can only arise as a result of negligence on the
12 part of the operator or manufacturer.
13 Furthermore, there is evidence as to how the
14 accident or event took place. I am satisfied from the
15 evidence I have heard that the probable reason for the cause
16 of the accident was the plaintiff using her feet to attempt
17 to slide faster, losing her balance and falling forward.
18 Given that there is no evidence whatsoever of any sharp or
19 protruding part of the slide upon which she could have
20 caught her finger, I also find that the injuries were caused
21 by her fall.
22 The evidence does not demonstrate that an event of
23 such nature was something the defendant had knowledge of or
24 of which it ought to have had knowledge. Nor does the
25 evidence provide suggestions of steps which could have been
26 taken by the defendant to prevent the accident which the
27 defendant had failed to do. While the failure of the
28 defendant to call the operator, Mr. Appel, may have been
29 significant, if the allegation of negligence was of that
30 individual's failure to take certain steps to prevent the
31 fall, there is no evidence which would support such an
32 allegation.
33 I have not been referred to any cases on facts
34 dealing with amusement rides; however, I refer to the

1 decision in Richer v. A.J. Freiman Ltd., [1965] 2 O.R. 750
2 (C.A.). In that case, a three-year-old child suffered a cut
3 on her leg while descending on the defendant's escalator.
4 The trial judge had found that, applying the principle of
5 res ipsa loquitur, the fact of the child being injured while
6 on an escalator operated by the defendant raised an
7 inference of negligence by the defendant which the defendant
8 was unable to meet. On appeal, overturning the trial
9 decision, Mr. Justice McGillivray, speaking for the court,
10 stated at p. 752 as follows:
11
12 "... With all deference to the
13 conclusion of the learned trial
14 Judge, I am of the opinion that he
15 misdirected himself in applying the
16 *res ipsa* principle in this
17 instance. The doctrine can only
18 apply where a *prima facie* case has
19 been established whereby the *res*
20 not only speaks of negligence but
21 attaches it to the defendant."
22
23 Further on he stated:
24
25 "... Were it otherwise in either
26 case the operator would become an
27 insurer and the Court has stated on
28 more than one occasion that the
29 operator is not such. It must
30 follow, in the present instance,
31 that the plaintiffs, in order to
32 recover, must first establish that
33 the injury to the infant plaintiff
34 was caused by the escalator itself,

1 its operation, or by something upon
2 it which ought not to have been
3 there. In my opinion this has not
4 been done."
5
6 The Ontario Court of Appeal further held that had there been
7 an inference of negligence in that case, it would have been
8 disproved by the evidence adduced by the defendant as to
9 inspections and maintenance of the escalator. I would adopt
10 the same reasoning in this case in that the defendant has,
11 through its evidence, provided ample evidence of steps it
12 has taken to ensure that the ride was safe and inspected on
13 a regular basis.
14 For these reasons I would find that the plaintiff
15 has not met the evidentiary onus of proving that her
16 injuries arise from the defendant's negligence.
17 I have been advised by counsel, at the outset of
18 the trial, that damages had been agreed to and, therefore, I
19 need not express anything further on that point.
20 Costs may be spoken to.
21
22 (SUBMISSIONS BY COUNSEL)
23
24 I will accept counsel's submission that Class I
25 costs should be assessed in this case.
26 MR. FINLAYSON: Class I?
27 THE COURT: Class I, plus reasonable
28 disbursements.

These are my reasons for judgment in the case of DAMAL FITCH, an infant suing by her grandmother and Litigation Guardian DIANA FITCH v. SELECT SHOWS (BLUE UNIT) LIMITED.

Monnin, J.