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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE

November 2017 Issue



Elevators and escalators: The building operator becomes a common carrier

A HIGHER DUTY OF CARE IS OWED BY OPERATORS OF BUILDINGS THAT HAVE AN ELEVATOR OR ESCALATOR

The owner of property on which there is an operating elevator or escalator is considered a common carrier in the state of California. The law looks at those machines just like a taxi or limo service – they move a person from one spot to another – and therefore a higher standard of care (duty) applies. California is one of only a handful of states to take this

viewpoint, and property owners (and their attorneys!) often forget it. Make sure you do not.

California case law on the duty of owners/operators of elevators and escalators goes way back in history: the policy behind the common-carrier doctrine being applied to owners and operators of elevators was laid out almost 130 years

ago in *Treadwell v. Whittier* (1889) 80 Cal. 574, 592. “The aged, the helpless, and the infirm are daily using these elevators. The owners make profit by these elevators, or use them for the profit they bring to them. The cruelty from a careless use of such contrivances is likely to fall on the weakest of the community. All,

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including the strongest, are without the means of self-protection upon the breaking down of the machinery. The law, therefore, throws around such persons its protection, by requiring the highest care and diligence.”

Of course, the injured plaintiff must have been on the elevator or escalator at the time of the injury for this heightened duty to apply in a negligence analysis. Thinking of injuries on escalators or elevators brings to mind horrific images of mangled bodies, severed limbs, free-falling elevator cars, and trapped individuals gasping for air. But where property owners tend to really forget they have a heightened duty of care is when it comes to everyday cleaning and maintenance of these machines. That means the most common claims are for everyday-type injuries – slips and trips.

So what is the law? Civil Code section 2100 requires a “carrier of persons” to “use the utmost care and diligence for their safe carriage.” (Emphasis added.) Civil Code section 2101 elaborates and requires a carrier “to provide vehicles safe and fit” for use. (Emphasis added.) If it is not safe and fit for use, the carrier is liable. Period. Regular maintenance or hiring a third party to maintain or repair the machinery is no defense. That’s where the term “non-delegable duty” arises.

Do not be fooled by the term “non-delegable duty” or the language of section 2101. This is not a strict-liability scenario where the property owner will always be liable, nor will *res ipsa loquitur* apply in every instance. Even a hint of a failure to fulfill this duty is sufficient to establish negligence, but the plaintiff must still establish the property owner’s negligence.

Is defendant a “common carrier?”

A defendant’s first instinct will be to argue that the higher standard of care does not apply because the defendant is not a common carrier. CACI 901 lists the common factors that can be used to determine whether a defendant is a “common carrier” to whom a higher standard of care applies. These factors are:

- The carrier maintains a regular place of business for the purpose of transporting passengers [or property].
- The carrier advertises its services to the general public.
- The carrier charges standard fees for its services.

A property owner has the requisite regular place of business, so that factor is easily met. The second factor is also easily established as most owners of property that includes an elevator/escalator have advertised to the general public. That third factor seems to have some room for argument, but California Courts have repeatedly ruled in favor of injured plaintiffs on this issue.

Even without charging a fee, the elevator/escalator owner is a “common carrier”

Defendants through the years have argued that because there is no fee charged for the use of an elevator or escalator, the defendant cannot be a common carrier. But the law takes the stance that even if a fee for use of an elevator or escalator is not charged, the property owner profits from its use. (*Treadwell v. Whittier*, 80 Cal. at p. 592.) For example, mall patrons do not pay a quarter for every ride up and down an escalator, but the stores benefit from patrons’ easy access to their retail spaces, and consequently, so does the mall owner. Likewise, a residential-property owner does not charge a specific monthly fee for tenants to access their apartments, but she benefits from rent payments.

In *Harris v. Smith* (1941) 44 Cal.App.2d 694, the plaintiff was injured when she slipped on the recently waxed and polished floor of an apartment-building elevator. There had been no warning signs, no rubber mats, and no indication that the floor was slippery. Defendants in that case tried to argue that they did not owe the plaintiff the heightened duty of a common carrier because she was not a tenant, and she was not a paying guest – i.e., defendant received no reward for her use of the elevator. The Court of Appeal disagreed, stating that the plaintiff was there to look at an apartment, and was considering

renting one. She was likely to become a tenant. Moreover, that is part of the defendant’s business – showing the property to convince people to rent their apartments. That was sufficient to meet the element of “reward” required by the common-carrier doctrine.

Transportation is not a necessary element in naming the elevator/escalator owner a “common carrier”

In the *Harris* case above, defendants also argued that the elevator was not in motion at the time, meaning the plaintiff was not being transported or “carried.” Consequently, argued defendant, the building owner was not a common carrier, and the heightened standard of care should not be applied. That argument was discarded by the Court of Appeals as well, finding “no authority holding that an elevator must be moving in order that this degree of care should be applied.” (*Harris, supra* at p. 697)

Additionally, even when an elevator’s main purpose is the transportation of freight, not people, the higher standard of a common carrier is applied. In *Gregg v. Manufacturers Bldg. Corp.* (1933) 134 Cal.App.147, a building had two elevator shafts. The first was in the front of the building and was used for people only. The other, in the back of the building, was equipped with automatic devices and was used for getting freight and building materials to the upper floors. There were a few employees who would sometimes use the back elevator to get to and from where they were working on the upper floors.

At the time of the accident, the elevator car was up on the 4th floor, and the doors to the elevator shaft down on the first floor were supposed to be closed. Because of a mechanical issue, they weren’t. The plaintiff, seeing the open doors and assuming he was walking into the freight elevator, instead walked into the open shaft and fell to his death. The trial court found that it does not matter whether it is an elevator for people or freight. If it is possible for a person to ride on the elevator, the

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defendant owes the duty of a common carrier. The Court of Appeal likened it to a freight train. If it can carry people, that's enough to establish the heightened duty of care.

Contributory fault still applies (as do other defenses)

If a defendant is forced to concede that it is a common carrier with a heightened standard of care, they'll take other courses of defense, which may still be applicable. The most common is contributory fault.

In *Rollins v. Department of Water & Power* (1962) 209 Cal.App.2d 526, the plaintiff was making a delivery via a service elevator. He alleged that while in motion, the elevator "jerked" and his foot got stuck in a space between the elevator wall and floor. The elevator operator testified that the plaintiff lost his balance due to his own movements, and other witnesses confirmed there was no "jerk" and that the plaintiff was gesturing at the time his foot got stuck. The Court of Appeals ruled that it was reasonable for a jury to determine that his injury was the result of his own actions, rather than any negligence on the part of the elevator's owner/operator.

But even if the elevator is misused, there is not necessarily contributory negligence. In the movie *Mallrats*, the two main characters walk aimlessly through the mall, and in their travels, they see the same kid on the escalator multiple times. Eventually (offscreen) the kid gets injured. Before the injury, one of the characters says he does not wish injury on the kid, but the parents should suffer that horrific accident so that they learn to be better parents. But California law does not agree with putting the responsibility solely on parents.

It is not only "alert and nimble and adult" escalator riders that must be protected. People can lose their balance easily – especially on a moving staircase – and there will be children on the escalator who are not aware of the dangers of playing on or misusing the escalator. It is not only foreseeable, but expected that an 8-year-old child could sit down and

put his hands on the treads, as did the plaintiff in *Vandagriff v. J.C. Penney Co.* (1964) 228 Cal.App.2d 579. No one saw the injury, and no one knows exactly how the child's finger was pulled into the machinery and amputated. Therefore, the Court of Appeal applied the doctrine of *res ipsa loquitur*. In doing so, the court considered defendant's argument of contributory negligence and ruled that "[s]ome participation in the event" does not negate the application of *res ipsa loquitur* (as long as that involvement is not in the maintenance or repair or state of the escalator itself). The defendant was liable despite some evidence that the child was using the escalator improperly.

Vicarious liability, agency and notice

No matter what, the defendant property owner will argue someone else was assigned the responsibility and/or that there was no notice of a dangerous condition. And almost always, the defendant will be wrong. It is a non-delegable duty, after all, and negligence on the part of the property owner's agents/employees will be imputed to the property owner.

Under the doctrine of respondeat superior a principal is vicariously liable for an agent's torts committed within the scope of agency. (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967.) This is true for elevator maintenance companies as well as janitors who clean elevator floors. "[T]he nondelegable duty rule is a form of vicarious liability because it is not based on the personal fault of the landowner who hired the independent contractor. Rather, the party charged with a nondelegable duty is 'held liable for the negligence of his agent, whether his agent was an employee or an independent contractor.'" (*Koepnick v. Kashiwa Fudosan America, Inc.* (2009) 173 Cal.App.4th 32, 38, citations omitted.)

Of course, to be held liable under a premises liability cause of action, the defendant must have received notice of a dangerous condition. "The fact alone that a dangerous condition existed at the time the accident occurred will not warrant an inference that the defendant was

negligent. There must be some evidence, direct or circumstantial, to support the conclusion that the condition had existed long enough for the proprietor, in the exercise of reasonable care, to have discovered and remedied it." (*Girvetz v. Boys' Market, Inc.* (1949) 91 Cal.App.2d 827, 829.)

However, it is also true that if the dangerous condition was created by the defendant's employee, notice is imputed to the defendant. (See CACI 1012). There may be an argument as to whether the third party assigned to perform maintenance is an employee or agent, but that argument "does not materially alter the rule" in such a circumstance. (See *Cagle v. Bakersfield Medical Group* (1952) 110 Cal.App.2d 77, 82; *Koepnick v. Kashiwa Fudosan America, Inc.*, 173 Cal.App.4th at p. 38.)

In *Brown v. George Pepperdine Foundation* (1943) 23 Cal.2d 256, a child was injured after falling down an elevator shaft in an apartment building. The building's owner had contracted with an elevator maintenance company to inspect the elevator weekly. The Supreme Court held that a landlord cannot escape liability by delegating its duty to an independent contractor. Moreover, the Court ruled that the trial court erred in instructing the jury that the elevator maintenance company's negligence could not be imputed to the building owner.

Additionally, while the defendant property owner is certainly liable, the maintenance or repair agent may also be liable. This liability is not based on the idea that it is a common carrier, however. It is based "on the proposition that an independent contractor who engages to supply and keep in repair articles which are reasonably certain to place life and limb in peril if they are negligently prepared or constructed, may be held liable for negligence." (*Dahms v. General Elevator Co.* (1932) 214 Cal. 733.)

Other pitfalls to watch for in elevator/escalator injury cases

Expert testimony can be key, especially if it is a design defect or warning issue, so make sure it is accurate and

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adequately supported. In *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, an escalator abruptly stopped when the power to the entire store was cut due to a nearby auto accident. The plaintiff's foot was injured as a result of the abrupt stop, and the plaintiff argued that the defendants had a duty to either provide an alternate power supply to prevent such an abrupt stoppage, or design the escalator to come to a gradual stop if power was lost. Defendants filed summary judgment motions that ultimately came down to a battle of experts. In the end the court ruled that because plaintiff's expert failed to physically inspect the escalator in question, there was no foundation for his opinions. Without

such a foundation, there was not enough evidence to allow a reasonable jury to hold the defendants liable.

Additionally, when the injured party was on the elevator or escalator during work, there is most likely a companion workers' compensation claim. Be aware of how the two claims intersect and how each affects the other.

Conclusion

Attaching the status of "common carrier" to a defendant can be extremely helpful in proving a case against a defendant property owner, and can be used as settlement leverage. Defendants can forget or willfully ignore the elevated (get it?) duty of care associated with the

maintenance and upkeep of an elevator or escalator, and will tend to try to distract a plaintiff with issues of notice or agency. Do not let them!

Brooke Bove is the principal and founding attorney at Bove Law Group, a practice dedicated to the science of legal writing. BLG focuses on civil appeals for plaintiffs, as well as other litigation law and motion, trial briefs and summary judgment oppositions. Ms. Bove is also of counsel for DiMarco | Araujo | Montevideo where she focuses on appeals, legal writing and cases involving third-party liability for work injuries. She can be reached at bbove@bovelawgroup.com

