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## **“The Ups and Downs of Defending Conveyance Claims”**

### **I. INTRODUCTION:**

In the U.S., there are an estimated 900,000 elevators, each serving an average of 20,000 people per year. Collectively, U.S. elevators make 18 billion passenger trips per year. These numbers do not include statistics regarding use of escalators, moving sidewalks or other common forms of public conveyance. Given the frequency of their use, it is not uncommon that accidents resulting in personal injuries occur while using such forms of public conveyance.

While claims may not be uncommon, the duty owed by businesses providing such conveyances to their patrons and guests is not. Case law in many jurisdictions deem the owner and/or manager of property a "common carrier" with regard to the use of elevators, escalators and other such public conveyances by patrons or guests. The designation as "common carrier" alters the legal duty of care owed in those jurisdictions and thus affects obligations with regard to inspection, maintenance and repair. The difference in the duty owed, its effect on premises liability cases, and suggestions for complying with this duty are discussed in this presentation.

### **II. LEGAL ISSUES ARISING FROM ACCIDENTS INVOLVING ELEVATORS, ESCALATORS AND OTHER FORMS OF PUBLIC CONVEYANCE:**

#### **A. PREMISES LIABILITY IN GENERAL:**

Premises liability claims are a form of general negligence. As implied from the name, premises liability claims are based upon injuries or damages allegedly caused by an “unreasonably dangerous condition” of the property.

The four elements of negligence are (1) a legal duty owed by defendant to plaintiff, (2) breach of that duty by defendant, (3) injury to plaintiff legally caused by defendant's breach, and (4) damages as a result of the injury.

#### **B. DUTY OF CARE CREATED BY SPECIAL RELATIONSHIP**

A legal duty of care can be created or imposed in various ways, including the existence of a special relationship. Nearly all jurisdictions have concluded that a special relationship exists between owners and/or operators of hotels, restaurants, etc. and their guests or patrons. As such, a duty of care exists between guests and/or patrons and the owners and/or operators of such businesses.

In the premises liability setting, a property owner or manager has a duty to use "reasonable care" to inspect the property so as to learn of any dangerous conditions on its premises, and then in turn warn of or remedy those conditions.

C. DUTY TO MAINTAIN PREMISES NON-DELEGABLE

In most jurisdictions, the duty to maintain premises in "reasonably safe" condition is not delegable. As such, the owner of the property remains legally liable for injuries caused by dangerous conditions thereon even though another person or entity is in possession of and/or has been hired to inspect and maintain the property.

D. COMMON LAW ORIGINS OF DUTY RE COMMON CARRIER

Although nearly all jurisdictions have held that the owner and/or possessor of land owes a duty to use "reasonable care" with regard to most portions of its property, some jurisdictions have concluded that a **higher or elevated duty of care** exists with regard to certain components or portions of the property involved in some manner of public conveyance.

"Public conveyances" include items commonly found in many hotels, restaurants, amusement parks and resorts and retail operations, such as elevators, escalators, lifts, moving walkways, and other similar methods of public conveyance.

Courts in over **20 states** have concluded that the owners/operators of property are "common carriers" with regard to the guests' and/or patrons' while using methods of public conveyance. On the other hand, **15 jurisdictions** have concluded that they are not.

Regardless, as the issue very likely could arise in your practice or business, it is important that the higher duty be recognized as an issue and strategies in anticipating, handling and litigating claims involving the higher duty be developed.

Carriers of persons for reward or payment have long been subject to a heightened duty of care. (3 Harper & James, The Law of Torts (2d ed. 1986) The Nature of Negligence, § 16.14, p. 506.) This heightened duty stems from the

English common law rule that common carriers of goods were absolutely responsible for the loss of, or damage to, such goods. (Beale, *The History of the Carrier's Liability in Selected Essays in Anglo-American Legal History* (Assn. of Am. Law Schools, edit., 1909) p. 148.)

The precursor to recognizing a heightened duty of care for carriers of persons came in 1680, when an English court applied the rule regarding carriers of goods to personal property that a passenger on a stagecoach had delivered to the driver, but which the driver failed to return at the end of the journey. (*Lovett v. Hobbs* (1680) 89 Eng. Rep. 836.) The court rejected the argument that the driver of a stagecoach could not be a common carrier regarding property brought by a passenger, stating: “[I]f a coachman commonly carry goods, and take money for so doing, he will be in the same case with a common carrier, and is a carrier for that purpose, whether the goods are a passenger's or a stranger's ... .”

In *Stokes v. Saltonstall* (1839) 38 U.S. 181, 10 L. Ed. 115, a passenger in a stagecoach was injured when the coach was upset. The court noted that a carrier of goods was absolutely liable for the loss of or damage to such goods regardless of the cause “except the act of God, and the public enemy.” An agreement or contract to carry passengers, however, differs from a contract to carry goods.” (*Stokes, supra*, 38 U.S. at p. 191.) “But although he does not warrant the safety of the passengers, at all events, yet his undertaking and liability as to them, go to this extent: that he ... shall possess competent skill; and that as far as human care and foresight can go, he will transport them safely.”

Carriers of persons are treated differently under the statutory scheme depending upon whether they act gratuitously or are paid.

E. CARRIERS FOR HIRE (PUBLIC CARRIERS) VERSUS GRATUITOUS CARRIERS (PRIVATE CARRIERS)

In those jurisdictions which recognize the duties owed by carriers of people, there is an important distinction between those carriers who perform their services for pay and those who do so for free. Those who "carry" persons for free or "Gratuitous Carriers" are subject to the lower standard of care. Such carriers have a duty to “use ordinary care and diligence.”

Carriers of persons for reward, common or public carriers, are subject to the heightened duty of care.

F. OWNERS/MANAGERS OF BUILDINGS WITH ESCALATORS, ELEVATORS, ETC. ARE CARRIERS OF PERSONS FOR HIRE

As suggested above, courts in over 20 jurisdictions have concluded that owners of property are "common carriers" for purposes of the operation or use of elevators, escalators, lifts, moving sidewalks, etc. Those states include California

(*Vandagriff v. J.C. Penney Co.* (1964) 228 Cal. App. 2d 579, 582); Oklahoma (*Smith v. Munger*, 1974 OK CIV APP 48, 532 P.2d 1202, 1205 (Okla. Civ. App. 1975)), Illinois (*Jardine v. Rubloff*, 73 Ill. 2d 31, 382 N.E.2d 232, 236, 21 Ill. Dec. 868 (Ill. 1978)), and Ohio (*Norman v. Thomas Emery's Sons, Inc.*, 7 Ohio App. 2d 41, 218 N.E.2d 480, 482 (Ohio Ct. App. 1966)), and may other jurisdictions.

The jurisdictions which have held otherwise include Arizona (*Lowrey v. Montgomery Kone, Inc.*, 202 Ariz. 190, 42 P.3d 621, 627 (Ariz. Ct. App. 2002); Texas (*Dallas Market Ctr. Dev.Co. v. Liedeker*, 958 S.W.2d 382, 384, 41 Tex. Sup. Ct. J. 142 (Tex. 1997); and New York (*Bethel v. New York City Transit Auth.*, 92 N.Y.2d 348, 703 N.E.2d 1214, 1215, 681 N.Y.S.2d 201 (N.Y. 1998)).

The designation of "common carrier" has been extended to recreational rides and ski lifts in certain jurisdictions as well. Those jurisdictions (and cases so holding) include California (*Gomez v. Superior Court* (2005) 35 Cal.4th 1125, 1128-1142, *Squaw Valley Ski Corp. v. Superior Court* (1992) 2 Cal.App.4th 1499 (the operator of a ski lift is a common carrier and owes the duty of utmost care); Colorado (*Lewis v. Buckskin Joe's, Inc.* (1964) 156 Colo. 46, 396 P.2d 933)) and Oklahoma (*Sand Springs Park v. Schrader* (1921) 82 Okla. 244, 198 P. 983, 987-988).

Similarly, some jurisdictions have ruled just the opposite, concluding that the owners/operators of such rides are not "common carriers". Those jurisdictions (and cases so holding) include Utah (*Harlan Lamb v. B & B Amusements Corp.* (Utah 1993) 869 P.2d 926) and Texas (*Speed Boat Leasing, Inc. v. Elmer* (Tex. 2003) 124 S.W.3d 210))

#### G. ELEVATED DUTY OF "UTMOST CARE" WITH REGARD TO PUBLIC CONVEYANCES

The duty owed by a common carrier (and thus a business providing its guest and patrons with elevators, escalators, moving sidewalks, ski lifts, etc.) in many jurisdictions is one of "utmost care", as opposed to "reasonable care".

The duty of "utmost care" has been described or defined as requiring that the owner or possessor of property containing such conveyances "possess competent skill; and that as far as human care and foresight can go, he will transport [patrons] safely." In other words, a common carrier must act "with reasonable skill, and with the utmost prudence and caution" with regard to inspection, care and maintenance of public conveyances. That or similar language was used to define the duty imposed upon common carriers in California. (*Vandagriff v. J.C. Penney Co.* (1964) 228 Cal. App. 2d 579, 582), Oklahoma (*Smith v. Munger*, 1974 OK CIV APP 48, 532 P.2d 1202, 1205 (Okla. Civ. App. 1975); Ohio (*Norman v. Thomas Emery's Sons, Inc.*, 7 Ohio App. 2d 41, 218 N.E.2d 480, 482 (Ohio Ct. App. 1966), rev'd on other grounds); and Illinois (*Jardine v. Rubloff*, 73 Ill. 2d 31, 382 N.E.2d 232, 236, 21 Ill. Dec. 868

(Ill. 1978)). The burden imposed is quite different and higher than simply using "reasonable care".

### **III. MEETING DUTY OF "UTMOST" CARE AND DEFENSES:**

The property owner or manager must act with the utmost prudence and caution with regard to public conveyance. The duty imposed mandates a much more pro-active approach with regard to inspection, maintenance and repair than does the duty of ordinary care. It is important then at a minimum to take the following steps.

#### **A. COMPLIANCE WITH SAFETY CODE FOR ELEVATORS AND ESCALATORS**

ASME A17.1/CSA B44 is a Safety Code developed for Elevators, Escalators and other similar forms of public conveyance. Drafted by the American Society of Mechanical Engineers (ASME) in 1921, the safety code developed uniform safety requirements for elevators. The code is intended to serve as the basis for the design, construction, installation, operation, testing, inspection, maintenance, alteration, and repair of elevators and escalators. Clearly, undertaking efforts to comply with the requirements set forth therein would be evidence of discharging one's duty of "utmost" care.

##### **1. SERVICE AND/OR MAINTENANCE CONTRACTS**

Given the highly technical aspects of design, construction, operation, maintenance and repair, one should enter into a comprehensive contract with a competent, experienced, licensed, and insured corporation, firm or company to undertake inspections, repair and maintain elevators, escalators, moving walks and related equipment. As discussed below, those contracts should include provisions for indemnity and insurance.

#### **B. COMPLIANCE WITH LOCAL STATE, COUNTY AND/OR MUNICIPALITY CODES, REGULATIONS AND STATUTES**

Take steps to make sure that employees who manage or operator the property are familiar with local, county, state and municipal requirements pertaining to elevators, escalators, moving side walks. Most jurisdictions have codes, regulations and statutes regarding such methods of public conveyances. Those codes, regulations and statutes may differ from ASME A17.1/CSA B44.

#### **C. STATUTES REQUIRING "FULL AND EQUAL ACCESS"**

It is important to bear in mind that any form of public conveyance must also comply with applicable accessibility standards, such as the Americans With Disabilities Act and similar state and locals statutes (Unruh Civil Rights Act, Disabled Persons Act). Failure to also comply with accessibility standards with

regard to methods of public conveyance may give rise to additional and different liability. In addition, accident occurring to a disabled person may give rise to claims based upon denial of access, alleged discrimination and potentially significant damages. California's Disabled Persons Act, for example, permits the recovery of treble damages. (California *Civil Code* Section 54.3.)

D. DEFENSES AND ARGUMENTS

1. NOTICE OF THE DANGEROUS CONDITION:

For a duty to remedy or warn of a dangerous or defective condition, most jurisdictions hold that a landowner or possessor must have notice or knowledge of the condition. Cases so holding include: *Ortega v. KMart*, 26 Cal.4th 1200, 114 Cal.Rptr.2d 470 (2001); *Keetch v. Kroger Co.* 845 S.W.2d 262, 264 (Tex. 1992); *Smith v. Grove Apts., LLC* 976 So.2d 582, 583 (Fla.Dist.Ct.App. 2007); *Haynes v. Estate of Goldman* (Sup.Ct.) 2007 NY Slip Op 51692, 16 Misc.3d 1134, 847 N.Y.S.2d 902; *Grandberry-Lovette v. Garascia* 303 Mich.App. 566, 844 N.W.2d 178 (2014)

2. STATUTE OF LIMITATIONS

The applicable statute of limitations for personal injuries claims in each jurisdiction remains a defense to such claims, despite the higher duty of care.

3. COMPARATIVE FAULT/CONTRIBUTORY NEGLIGENCE

Each jurisdiction also includes authority which permits the assertion of comparative fault or contributory negligence as a defense. In fact, some jurisdictions have ruled that where the claimant or plaintiff is engaging in conduct which suggests that they were not using the conveyance for purposes of moving within the building, the duty of utmost care does not apply.

4. COMPLIANCE WITH STATUTES, CODES AND ORDINANCES

*Brinson Ford, Inc. v. Alger* 228 S.W.3d 161, 163 (Tex. 2007) (holding compliance with applicable safety standards supports summary judgment).

5. STANDING RE ADA

A litigant seeking to assert a claim based upon denial of access stemming from the use of a public conveyance, must still demonstrate that

he/she has standing to assert the claim. In other words, a person whose disability is unrelated to sight lacks standing to assert a claim based upon failure to provide Braille signage.

#### 6. INDEMNITY AND CONTRACTUAL ISSUES

As indicated above, a service and/or maintenance contract should be secured, efforts should be undertaken to include broad indemnity and insurance provisions in favor of the owner/operator of the business. If claims related to the scope of work of the contract arise, they can be tendered to the service/maintenance company and/or its insurance carriers.

### IV. CLAIMS REPORTING, INVESTIGATION AND ADJUSTING

#### A. INITIAL INTAKE AND TRIAGE OF CLAIM

Initial evidence gathering is critical to a proper defense. It is important to secure all video or other images available of the scene, obtain photographs of the scene if surveillance footage is unavailable, secure and preserve inspection, maintenance and repair records pertaining to the subject conveyance, and identify necessary contracts.

#### B. OBTAINING STATEMENTS AND NECESSARY DOCUMENTS

Secure, if possible, statements from known witnesses, including the claimant and/or plaintiff as well as known witnesses. Documents related to injuries and medical care and treatment should also be secured if possible.

#### C. WORK WITH INSURED TO TENDER TO SERVICE COMPANY

After gathering necessary documents and evidence, we recommend that one commence efforts to tender the claim to outside vendors, including but not limited to repair or maintenance contractors related to the conveyance.

#### D. DETERMINE WHEN TO RETAIN COUNSEL

The timing of retention of counsel is important. In fact, retaining counsel only after the lawsuit is filed or served may be Doing so can trigger application of the attorney-client and work product privileges to investigation efforts.

### V. THE EXPERT AND INVESTIGATION

Given the nature of the claim, consideration of early retention of expert witnesses is recommended. Most critically, of course, is retention of an expert in inspection, repair and maintenance of the particular form of conveyance (i.e., elevator, escalator, etc.). Such an expert can not only perform an inspection and

analysis of the equipment involved, he or she can also assist in evidence gathering, preservation and an early evaluation of liability. Depending upon the issues raised, one should also consider retention of experts in accident reconstruction; standard of care and/or code compliance.

## **VI. UPDATES ON SAFETY CODE FOR ELEVATORS AND ESCALATORS:**

Presenters will relate any and all pertinent updates impacting the duties and requirements for inspection, maintenance and repair of elevators, escalators and other forms of public conveyance.

## **VII. EXAMPLES OF FALLS/INVESTIGATION AND DEFENSE/BEST PRACTICES:**

### **A. DISCUSSION OF UNIQUE ISSUES**

#### **1. ELEVATORS AND ESCALATORS**

The pertinent fact to remember is that 55% of all elevator problems occur within the elevator entranceway. This area has several components that should be consistently monitored by building personnel to help ensure safe elevator usage by the riding public.

Elevators are protected by a several types of door reopening devices: (1) infrared safety curtains – these devices scan the areas adjacent to the elevator door(s) and automatically reopen the door(s) when the presence of an object is detected (this is the most modern means of door protection); (2) electronic photo-eyes – these devices send out two or more fixed beams that cause reopening when someone or something breaks the beam. These are used in conjunction with mechanical safety edges; and (3) mechanical edges – these devices must make physical contact with a person or object to trigger reopening. All of these devices are designed to function as safety measures only. they are not intended to provide added convenience for the passengers.

If someone is moving towards the elevator, utilize the "door open" button on the car control panel to wait for them. The foregoing door reopening devices may turn off during the last 2 to 4 inches of travel. Thus, someone should never stick an object or limb in the path of a closing door.

Elevators are required to stop at each floor within plus or minus ½” of the floor landing. A simple method of assessing that your elevator is approaching the maximum ½” tolerance allowed by code is to draw the sole of your shoe across the landing sill.

Tolerances exist with regard to opening and closing speeds for elevator doors. The speed of opening and closing should be monitored to ensure they are within those tolerances.

In the event that an escalator is turned off or loses power, there is a question as to

whether they can or should be used as stairs since they are technically not compliant with the building codes as stationary stairs.

## **VII. CONCLUSION-QUESTIONS AND ANSWERS**