

Uncommon Perception: The Common Carrier Duty Does Not Rule Out Defense Verdicts in Elevator and Escalator Accident Trials

Guy R. Gruppie

I. INTRODUCTION

Prosser and Keeton define the common carrier duty as requiring “the utmost caution characteristic of very careful prudent men or the highest degree of vigilance, care, and precaution.”¹ Whether an owner or operator of an elevator or escalator is deemed a common carrier is an issue of significant importance because common carriers are held to a heightened duty of utmost care and diligence rather than the ordinary negligence duty of reasonable care under the circumstances. This heightened duty of care standard makes owners and operators vulnerable to negligence suits for which noncarriers are not held liable.

This article first provides a brief survey of the history of the common carrier duty. It then addresses the different ways in which courts across the country have addressed the issue of whether to extend common carrier status to owners and operators of escalators and elevators. Finally, to assist trial lawyers defending elevator and escalator accident cases, this article provides some practical guidelines for demonstrating to the trier-of-fact that the common carrier duty has been discharged.

¹ W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 34 (5th ed. 1984) (internal quotations omitted).



Guy R. Gruppie is a Senior Partner in the Los Angeles office of Murchison & Cumming. He heads the firm's general litigation department and specializes in civil trial defense of commercial and personal injury matters. He was vice-chair of the FDCC's Trial Tactics Section from 2004-2008. Mr. Gruppie is a member of the Los Angeles Chapter of the American Board of Trial Advocates (ABOTA). He is a frequent speaker/author on trial and litigation matters.

II. HISTORY

Although the common carrier duty has existed in American law for centuries, many historians believe that the heightened duty of care imposed upon carriers of persons for reward stems from the English common law rule that common carriers of goods were absolutely responsible for the loss of, or damage to, such goods.² However, others believe that the extension of the heightened duty to carriers of persons “is probably of American origin, finding its earliest expression in 1839 in *Stokes v. Saltonstall*.”³ In 1839, the United States Supreme Court extended the application of the heightened duty of care for carriers of goods to carriers of persons for reward.⁴

In *Stokes*, the plaintiff sued the owners of a line of stage coaches, which were used for carrying passengers from Baltimore to Wheeling, for personal injuries sustained by his wife.⁵ The plaintiff and his wife had been passengers in a stage coach when the stage was “upset” apparently due to the driver’s mistake.⁶ The plaintiff’s wife suffered life-threatening injuries, including a fractured hip, several broken bones, cuts, and bruises.⁷ The Court held that the stage coach driver was required to act “with reasonable skill, and with the utmost

² Joseph Henry Beale, Jr., *The History of the Carrier's Liability*, in SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (ASSN. OF AM. LAW SCHOOLS ED., 1909) 148.

³ 3 FOWLER V. HARPER, FLEMING JAMES, JR., & OSCAR S. GRAY, HARPER, JAMES & GRAY ON TORTS § 16.14 (3d ed. 2007).

⁴ *Stokes v. Saltonstall*, 38 U.S. 181 (1839).

⁵ *Saltonstall v. Stockton*, 21 F. Cas. 275, 276 (C.C.D. Mar. 1838).

⁶ See *Stokes*, 38 U.S. at 190.

⁷ See *id.*

prudence and caution.”⁸ The Court stated that “a contract to carry passengers differs from a contract to carry goods.”⁹ A carrier of goods is absolutely liable for the loss of or damage to such goods regardless of the cause “except the act of God, and the public enemy.”¹⁰ As to passengers, however, the Court reasoned that “although [a carrier] does not warrant the safety of the passengers, at all events, . . . his undertaking and liability as to them, go to this extent: that he, or his agent, if, as in this case, he acts by agent, shall possess competent skill; and that as far as human care and foresight can go, he will transport them safely.”¹¹

III. ACROSS THE NATION

A. *Common Carriers with a Heightened Duty*

Courts in many states have held that owners or operators of elevators are considered common carriers and thus are held to a heightened duty of care; those courts include courts in California,¹² Maryland,¹³ Washington,¹⁴ Alabama,¹⁵ Ohio,¹⁶ Illinois,¹⁷ Pennsylvania,¹⁸ Nevada,¹⁹ Wisconsin,²⁰ Nebraska,²¹ Indiana,²² Utah,²³ and Virginia.²⁴ For example, in *Container Corp. of America v. Crosby*, the Supreme Court of Alabama held that “an elevator,

⁸ *Id.* at 193.

⁹ *Id.*

¹⁰ *Id.* at 191.

¹¹ *Id.*

¹² See *Vandagriff v. J.C. Penney Co.*, 39 Cal. Rptr. 671, 673 (Ct. App. 1964); *Champagne v. A. Hamburger & Sons, Inc.*, 147 P. 954, 957 (Cal. 1915); see also 6 WITKIN, SUMMARY OF CAL. LAW (10th ed. 2005), TORTS § 923.

¹³ *Johns Hopkins Hosp. v. Correia*, 921 A.2d 837, 845 (Md. Ct. Spec. App. 2007).

¹⁴ *Pruneda v. Otis Elevator Co.*, 828 P.2d 642, 645 (Wash. Ct. App. 1992). *But see* *Murphy v. Montgomery Elevator Co.*, 828 P.2d 584, 587 (Wash. Ct. App. 1992) (finding no reason to impose the standard of care of a common carrier on an elevator company whose contract with the owner was a limited service contract).

¹⁵ *Wyatt v. Otis Elevator Co.*, 921 F.2d 1224, 1227 (11th Cir. 1992) (applying Alabama law).

¹⁶ *Domany v. Otis Elevator Co.*, 369 F.2d 604, 614 (6th Cir. 1966) (applying Ohio law).

¹⁷ *Jardine v. Rubloff*, 382 N.E.2d 232, 236 (Ill. 1978).

¹⁸ *Connolly v. Kaufmann & Baer Co.*, 37 A.2d 125, 126 (Penn. 1944).

¹⁹ *Smith v. Odd Fellows Bldg. Ass’n*, 205 P. 796, 797 (Nev. 1929).

²⁰ *Dehmel v. Smith*, 227 N.W. 274, 275 (Wis. 1930).

²¹ *Grimmel v. Boyd*, 142 N.W. 893, 895 (Neb. 1913).

²² *Tippecanoe Loan & Trust Co. v. Jester*, 101 N.E. 915, 921 (Ind. 1913).

²³ *Kleinert v. Kimball Elevator Co.*, 905 P.2d 297, 300 (Utah Ct. App. 1995).

²⁴ *White v. Sears, Roebuck & Co.*, 242 F.2d 821, 823 (4th Cir. 1957) (applying Virginia law).

whether passenger or freight, is a common carrier and, as such, is to be operated and maintained with the highest degree of care.”²⁵ Similarly, in *Ruben’s Richmond Department Store v. Walker*, a Georgia court held that an elevator owner is a common carrier and is required to “exercise extraordinary diligence to protect the lives and persons of its passengers.”²⁶

In *Johns Hopkins Hospital v. Correia*, a Maryland court of special appeals held that the hospital, as the owner of self-operating passenger elevator, was a common carrier and “owed passengers the duty to exercise the highest degree of care and skill in operating and maintaining the device.”²⁷

In *Domany v. Otis Elevator Co.*, the court held that an escalator was a common carrier, and the owner owed the plaintiff a heightened degree of care where she was a passenger on an escalator, which had abruptly stopped, causing her to fall and sustain injuries.²⁸ The court held that Sears Roebuck & Co., the store where the escalator was located, owed the plaintiff the highest duty of care and would not allow Sears to delegate this duty, which was imposed upon it by law, to a maintenance contractor.²⁹

In *Treadwell v. Whittier*, the California Supreme Court held that the owner or operator of an elevator or escalator is a common carrier and therefore has a duty to use the “utmost care and diligence” in operating and maintaining the elevator or escalator.³⁰ The court emphasized that

[p]ersons who are lifted by elevators are subjected to great risks to life and limb. They are hoisted vertically, and are unable, in case of the breaking of the machinery, to help themselves. The person running such elevator must be held to undertake to raise such persons safely, as far as human care and foresight will go. The law holds him to the utmost care and diligence of very cautious persons, and responsible for the slightest neglect. Such responsibility attaches to all persons engaged in employments where human beings submit their bodies to their control by which their lives or limbs are put at hazard, or where such employment is attended with danger to life or limb. The utmost care and diligence must be used by persons engaged in such employments to avoid injury to those they carry.³¹

²⁵ 535 So. 2d 154, 156 (Ala. 1988).

²⁶ 490 S.E.2d 536, 538 (Ga. Ct. App. 1997).

²⁷ 921 A.2d 837, 852 (Md. Ct. Spec. App. 2007).

²⁸ 369 F.2d 604, 607, 614 (6th Cir. 1966).

²⁹ *Id.* at 614.

³⁰ 22 P. 266, 271 (Cal. 1889).

³¹ *Id.*

B. *Not Common Carriers—Heightened Duty of Care*

Though courts in other states have refused to consider operators and owners of an escalator or elevator common carriers, some of those courts still find these owners and operators subject to the same heightened duty of care imposed on common carriers.³² In *Millar Elevator Service Co. v. O’Shields*, the plaintiff was injured when he and a coworker fell while riding a descending escalator that suddenly stopped and threw them forward.³³ The court held that the owner of the escalator owed a duty of extraordinary care to escalator riders, noting that while the “owner or operator of an elevator or escalator ‘is not common carrier in the sense that he is bound to serve all the public[,] . . . his duty as to protecting passengers in the elevator is the same [heightened standard of extraordinary care] as that chargeable to carriers of passengers by other means.’ It is not, however, an insurer of safety.”³⁴

In *Vallette v. Maison Blanche Co.*, the Court of Appeals of Louisiana held that while owners or operators of escalators are excluded from common carrier status, they owe business invitees using their escalators the same heightened degree of care that is owed by common carriers to passengers.³⁵ The court rejected the plaintiff’s argument that “[a] store which operates an elevator in which persons desiring to trade in the store are carried up and down, is to be classified as a common carrier.”³⁶ Instead, the court declared that in Louisiana such an operator “is under obligations similar in many respects to those imposed by law upon common carriers.”³⁷ The court quoted the Louisiana Supreme Court’s language from *Ross v. Sisters of Charity of Incarnate Word*:

While the owner of a passenger elevator operated in a business building for carrying passengers up and down may not be a carrier of passengers in the sense that he is bound to serve the public, yet his duty as to protecting the passengers in his elevator from danger is the same as that applicable for the carrier of passengers by other means, and he is bound to do all that human care, vigilance, and foresight can reasonably suggest under the circumstances, and, in view of the character of the mode of conveyance adopted, to guard against accidents and injuries resulting there from; and a failure in this respect will constitute negligence rendering him liable. He owes the same duty to those who by invitation, express or implied, are

³² See, e.g., *Millar Elevator Service Co. v. O’Shields*, 475 S.E.2d 188, 191 (Ga. Ct. App. 1996).

³³ *Id.* at 189.

³⁴ *Id.* at 191 (quoting *Grant v. Allen*, 80 S.E.2d 279, 280 (Ga. 1913)).

³⁵ 29 So. 2d 528, 531 (La. Ct. App. 1947).

³⁶ *Id.* at 530.

³⁷ *Id.*

transported in the cars of such elevator, to exercise the highest care, in view of the character of the mode of conveyance adopted, as to the safety of the car and all appliances.³⁸

In *Farmers' and Mechanics' National Bank v. W.T. Hanks*, the Supreme Court of Texas declined to classify owners and managers of passenger elevators as common carriers; nevertheless, it stated that the law imposed duties precisely similar to those exacted of common carriers as of such proprietors of passenger elevators.³⁹ There, the plaintiff was killed by a descending elevator car while plastering the walls of the elevator shaft. At the time of the incident, the building owner's employee was operating and in control of the elevator car. The decedent's family sued the building owner for decedent's wrongful death.⁴⁰ The court emphasized that elevator passengers must necessarily entrust their safety in the hands of such operators.⁴¹ Although the owners of such passenger elevators are not insurers of safety of their passengers, they are "bound to exercise in their behalf the highest degree of skill and foresight. . . . And this measure of care applies as well to the selection of competent operators as to the operation of the machinery and cars."⁴²

In *O'Connor v. Dallas Cotton Exchange*, the court held that "the owner of the building was not a common carrier in the full sense of that term, yet, as operator of passenger elevators, was held to a high degree of care in respect to safety and comfort of those who, on the implied invitation [of the owner], use the elevator service."⁴³

C. *Not Common Carriers—Ordinary Care*

Courts in some states have been reluctant to extend the common carrier duty to owners and operators of elevators and escalators; those courts include courts in Kansas,⁴⁴ Massachusetts,⁴⁵ West Virginia,⁴⁶ Illinois,⁴⁷ New York,⁴⁸ and the District of Columbia.⁴⁹ In these

³⁸ *Id.* at 530–31 (quoting *Ross v. Sisters of Charity of Incarnate Word*, 75 So. 425, 425 (La. 1917)).

³⁹ 137 S.W. 1120, 1124 (Tex. 1911).

⁴⁰ *Id.* at 1121.

⁴¹ *See id.* at 1124–25.

⁴² *Id.* at 1125.

⁴³ 153 S.W.2d 266, 268 (Tex. Civ. App. 1941).

⁴⁴ *Summers v. Montgomery Elevator Co.*, 757 P.2d 1255, 1261–62 (Kan. 1988).

⁴⁵ *Clarke v. Ames*, 165 N.E. 696, 697 (Mass. 1929).

⁴⁶ *Brown v. DeMarie*, 46 S.E.2d 797, 803 (W. Va. 1948).

⁴⁷ *Ludgin v. John Hancock Mut. Life Ins. Co.*, 495 N.E.2d 1237, 1241 (Ill. App. Ct. 1986).

⁴⁸ *Griffen v. Manice*, 59 N.E. 925, 928 (N.Y. 1901).

⁴⁹ *Woodward & Lothrop v. Lineberry*, 50 F.2d 314, 317 (D.C. 1931).

states, not only do owners and operators of elevators fail to fall within the common carrier classification, but they also owe passengers only a duty of ordinary care.

In *Summers*, the Kansas Supreme Court held that a shopping center's private service elevator was not a common carrier; thus, owners did not owe a heightened duty of care to passengers.⁵⁰ The plaintiff in the case sued a shopping center to recover for injuries he suffered while trying to close the service elevator door. The court held that the duty owed to the public was only that of ordinary care.⁵¹

In *Ludgin v. John Hancock Mutual Life Insurance Co.*, the plaintiff, an eighty-nine year old tenant of the John Hancock building, had finished shopping in a store on the lower level of the building when she approached an upward moving escalator.⁵² She testified that when she stepped onto the escalator and put her hand on the right hand rail, the steps were moving but the hand rail was not. As a result, she was thrown backwards and sustained a fractured left clavicle, bruises, and contusions to her head and left side of her body.⁵³ The court held that the building owner, which contracted with outside companies for building management and service maintenance of an escalator, owed a duty to business invitees to use reasonable care and caution to keep its premises reasonably safe.⁵⁴

IV. COURTROOM POINTERS

A. *Non-delegable? Not really!*

Technically, the common carrier doctrine states the duty is non-delegable; however, this is not always the practical outcome of the law. A property owner with an elevator, an escalator, or both, demonstrates common sense and reasonable conduct by retaining the best maintenance company it can afford for the equipment, regardless of the age or manufacturer of the equipment.

A set of trial exhibits demonstrating the degree of effort and expense a property owner incurred in making sure its elevators or escalators ran safely can be meaningful to a jury. Such exhibits might (1) calculate the costs over time for routine maintenance, which can run into the six figures even for relatively small buildings over the course of one year; (2) list each regular service call made by the contractor; or (3) demonstrate with invoices or

⁵⁰ *Summers*, 757 P.2d at 1261.

⁵¹ *Id.* at 1261–62.

⁵² *Ludgin*, 495 N.E.2d at 1238.

⁵³ *Id.* at 1240.

⁵⁴ *Id.*

correspondence how the property owner timely responded to each suggestion for repair made by the service company.

This evidence may persuade a jury that the property owner did its best to keep its internal transportation equipment running as safely as possible and that someone other than the property owner is responsible for the accident. Moreover, service records may buttress any claims the property owner may have against the service company for indemnity, including contractual indemnity.

B. Accidents Rarely Occur in a Vacuum

Legitimate escalator accidents due to some equipment malfunction tend to involve more than one claimant. (To a lesser extent, this is true with respect to elevator mishaps as well.) Beware of cases, particularly in a busy commercial or residential building, where there is a single claimant. Such circumstances more often than not do not involve a true malfunction of equipment (no matter how strongly the plaintiff or his lawyer believe otherwise) but more likely involve a circumstance where the plaintiff was injured as a result of losing his footing, a trivial misleveling, or an unexpected activation of an emergency stop apparatus. On the other hand, where there are multiple claimants, the sheer number of claimants tends to corroborate a tortious and recoverable event.

C. What Happened After the “Alleged” Accident?

In many states, an injury-causing event involving an elevator or escalator permits some government agency authority to inspect the system at issue. When the inspection results in a “clean bill of health,” and the equipment is returned to service with no adverse comments or demands for repair, this evidence is critical in support of the defense. Essentially, the inspection results amount to a free, non-biased expert opinion concluding there was no negligence in the operation of the escalator or elevator. Keep in mind that most of these government inspectors have authority to keep a system shut down in the aftermath of an alleged injury-causing event. When they choose not to do so, they are betting their professional reputation on the safety and security of the owner’s elevator or escalator system, and the defense would be wise to respond to that bet by going “all in.”

D. Not Just Any Expert

Many people hold themselves out as possible defense experts on the issue of the standard of care for operation and maintenance of elevator and escalator systems. When retaining an expert, make sure to select someone who is charismatic, whose testimony will be understood by the jury, and who has the requisite credentials and experience. You must also ensure, however, that the expert is familiar with the common carrier duty of the state where the matter is venued.

During depositions and at trial, if the expert uses nuanced language regarding a property owner’s obligations and responsibilities regarding its transportation systems, the expert’s testimony may help persuade decision-makers that the common carrier duty, however high, was met, and that the plaintiff cannot recover on that theory of liability.

E. *Habituated Sense of Security*

The days when escalators and elevators were considered even a minor safety risk have long passed. When was the last time you read about an elevator that came with an attendant? One way of dealing with common carrier concerns and also defending against claims of misuse and comparative fault is to underscore the modern safety records of most elevator and escalator systems. This safety track record is part of the common experience of most people as well as most jurors. Incorporating this theme throughout trial, starting with voir dire and ending with closing argument, may persuade the trier-of-fact that your client met its common carrier duty.

V.

CONCLUSION

The standard of care imposed on owners and operators of escalators and elevators varies by jurisdiction. Some states classify owners and operators of escalators and elevators as common carriers and impose a heightened standard of care. Other states do not consider owners and operators of escalators and elevators common carriers but nevertheless impose the same heightened standard of care. Still others impose only an ordinary standard of care on owners and operators of elevators and escalators. Whatever the standard of care, defense counsel may build a successful defense to a claim of negligence by demonstrating that its client took all necessary precautions through proper maintenance of all escalators and elevators on the premises.

