

COLUMBUS BAR

LawyerS
QUARTERLY

FALL 2008

On Insults To Sausage Makers
By David W. Hardymon6

A Federal “Drug Court” That Works – And How It Works
By The Honorable Terence P. Kemp12

Mediation – A New Kind Of Federal Offense
By Robert S. Kaiser13

When Johnny Or Joanie Comes Marching Home
By Duncan O. Aukland14

Win A Bet? When Is It Legal To Give An Underage Person A Drink?
By Timothy J. Bechtold16

Better Lawyer21

Elevator And Escalator Injury Claims
By Glen R. Pritchard33

Women’s Journey Through Addiction
By Candace Hartzler37

E-Discovery – Small Steps Can Yield Great Savings
By Christopher F. Shiflet40

Ten Years After: The Columbus Blue Jackets, The NHL And Free Tickets
By Greg Kirstein.....45

A Baltic Blast
By The Honorable David E. Cain47

Elevator And Escalator Injury Claims

UP AND DOWN TRAFFIC LIABILITIES

By Glen R. Pritchard

Elevators and escalators are among the safest modes of transportation. Nevertheless, according to the U.S. Bureau of Labor Statistics and the Consumer Product Safety Commission, each year 30 people are killed and 17,000 are injured in incidents involving elevators and escalators. Here are highlights of some of the unique aspects of liability claims which may arise from such incidents.

Because elevators and escalators are used for transportation of passengers, owners of these devices are considered "common carriers." As such, the duty owed by elevator owners is greater than the usual duty of reasonable care. Common carriers owe a duty to "exercise the highest degree of care of which the situation was reasonably susceptible."¹

Third parties contracted by the elevator owner to service, inspect, and maintain the elevators are also often named as defendants when an elevator or escalator causes an injury. The scope of the service company's duties will be defined by the contract with the owner. To the extent that the contract requires the service company to inspect the machinery or repair any defects it finds, or at least to report defects to the owner, the service company may be held liable to third parties for negligently performing those duties. As noted by the Ohio Supreme Court, privity of contract is not a barrier to such claims.

Where one, under a written contract, undertakes to service and examine the mechanical equipment of another and make a report on the condition thereof, and the equipment is of such a nature as to make it reasonably certain that life and limb will be endangered if such work is negligently performed, he is chargeable with the duty of performing the work in a reasonably proper and efficient manner. And if such duty is negligently or carelessly performed whereby injury occurs to a blameless person, not a party to the contract and lawfully using such equipment, such injured person has a right of action directly against the offending contractor. Liability in such instance is not based upon any contractual relation between the person injured and the offending contractor, but upon the failure of such contractor to exercise due care in the performance of his assumed obligations.²

Plaintiffs are often confronted with the challenge of having access to insufficient information to determine the cause of an elevator or escalator malfunction. For that reason, the doctrine of *res ipsa loquitur* is more readily applicable to cases involving injury or death caused by elevators and escalators.³ The Ohio Supreme Court summarized the doctrine as follows:

In Ohio, it is well established that the *res ipsa loquitur* is rule of evidence which permits trier of fact to draw inference of negligence on part of defendant from circumstances surrounding injury to plaintiff; weight of that inference, as well as weight of explanation offered to meet such inference, is for determination of trier of fact. * * * To warrant application of the rule, however, there must be evidence which establishes that (1) the instrumentality causing the injury was under the exclusive management and control of the defendant, and (2) that the accident occurred under such circumstances that in the usual course of events it would not have occurred if ordinary care had been observed.⁴

The heightened duty owed by common carriers combined with the doctrine of *res ipsa loquitur* may allow the plaintiff's case to escape summary judgment. In *Koepfler v. CRI*,⁵ for example, the plaintiff fell when the escalator she was riding while leaving a Cincinnati Reds baseball game suddenly jerked. The premises owner and the escalator service company were both named as defendants. The trial court granted both defendants' motions for summary judgment because the plaintiff could not explain, with expert testimony, why the fall was caused by a defect or malfunction. The trial court reversed with respect to the premises owner, noting its heightened duty as a common carrier. The Court also observed that the doctrine of *res ipsa loquitur* created an issue of fact because the escalator was in the owner's exclusive possession and control. On the other hand, the appellate court let stand the judgment in favor of the service company because the theory of liability against it was ordinary negligence, and *res ipsa loquitur* did not apply to the service company.

Finally, state regulation of elevators and escalators creates some opportunities for the plaintiff to discover potentially helpful evidence.⁶ The statutes require elevators to be inspected "twice every twelve months."⁷

Certificates of operation may not be issued without the required inspections, and inspectors must send their reports to the superintendent of the division of industrial compliance with a copy provided to the owner. Elevator owners are also required to file a written report within 72 hours after an incident causing bodily injury or death. Finally, any complaints about an elevator or escalator may be submitted within 12 months of the event. OAC 1301:3-6-05.

In many ways, claims for injuries caused by elevators and escalators involve standard negligence principles. However, the unique aspects of these claims discussed here can mean the difference between success and failure for the plaintiff.

1. *May Department Stores Co. v. McBride* (1931), 124 Ohio St. 264; *Welch v. Rollman & Sons Co.*, 70 Ohio App. 515 (1st Dist. App., 1942)
2. *Durham v. Warner Elevator Mfg. Co.* (1956), 166 Ohio St. 31, syllabus para. 2.
3. *Norman v. Thomas Emery's Sons, Inc.*, 7 Ohio App. 2d 41 (1st Dist. App., 1966)
4. *Walker v. Mobil Oil Corp.* (1976), 45 Ohio St. 2d 19, at 21
5. 1998 WL 140090 (Ohio App. 1 Dist.)
6. For purposes of the statutes and regulations, escalators are included in the term "elevator". See R.C. 4505.01(A).
7. Pursuant to OAC 1301:3-6-04, "[a]t least one elevator inspection per year required under section 4105.10 of the Revised Code shall be performed in conformity with the provisions of the "Guide for Inspection of Elevators, Escalators and Moving Walks," ASME A17.2-2004 edition, approved by the American society of mechanical engineers on July 22, 2004, copyright 20056, and published on March 31, 2005."



gpritchard@clarkperdue.com



Glen R. Pritchard,
Clark Perdue & List