The Ups and Downs of Elevator and Escalator Litigation

By V. Christoper Potenza and Scott D. Kagan

Elevator and escalator incidents occur for many reasons. In litigation, most elevator/escalator incidents fall within two separate and distinct legal categories: (1) products liability (e.g., manufacturing defect, design defect, or inadequate warning); or (2) premises liability (e.g., negligent installation, maintenance, or repair). In the first, manufacturers and downstream sellers may be liable for designing, manufacturing, or selling a defective elevator/escalator. In the second, property owners and maintenance providers may be liable for failing to safely maintain the elevator/escalator after it is manufactured and sold.

Litigation will often run concurrently along both paths, with products claims asserted against the manufacturing defendants, and premises claims against the owners and maintenance contractors, until there is sufficient discovery and expert review to ascertain whether a viable claim exists under either theory. The preliminary step is to determine if there was a defect that was the cause of the injury, and if that defect was present at the time of sale or arose out of improper maintenance or neglect. Below is a framework of some of the potential defects, causes of action, and defenses that may arise in elevator/escalator accident litigation.

Common Elevator/Escalator Defect Allegations

Various factors can affect and/or be the cause of an alleged elevator/escalator incident. When reviewing a potential elevator/escalator claim, an attorney must consider all relevant factors. When did the hazard or defect come to be? Did the alleged defect arise before the sale of the product or after its installation? Issues to consider are the design of the equipment, the quality of the equipment, the age and wear of the equipment, the subsequent maintenance on the equipment, post-sale modifications to the equipment, and environmental conditions affecting the equipment.

A. Elevators

Common defective elevator allegations include: (1) misleveled elevator; (2) sudden door closure; and (3) sudden acceleration or deceleration.

Elevator accidents may involve instances of an elevator mis-level. Mis-levels can occur when the elevator car stops in a position that is not level with the landing floor. The elevator car will stop inches above or below the landing floor, resulting in a tripping hazard.

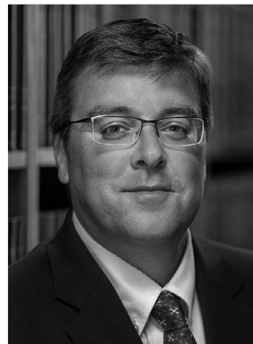
Another often alleged defective condition involves instances where elevator doors unexpectedly close, striking an entering or exiting patron. Alternatively, the force or speed of the doors may be excessive due to improper adjustment.

Less common in elevator litigation is the sudden acceleration or deceleration of the elevator car (i.e., sudden drops/stops), which could be the result of wear and tear or lack of proper maintenance.

B. Escalators

Common defective escalator allegations include: (1) sudden acceleration or stops; (2) comb plate defects; and (3) side skirt defects.

One of the most common alleged escalator incidents is the sudden acceleration or stop of an escalator. An escalator is a complex piece of machinery. Under certain circumstances, a mechanical malfunction could cause an escalator to abruptly



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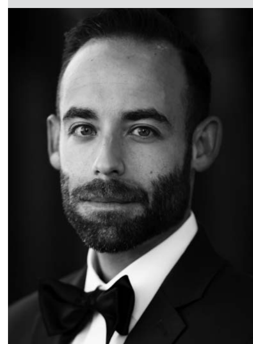

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stop, or alternatively, increase speed. This could cause a user to fall. However, more commonly, one of the safety components of an escalator is designed to bring an escalator to a controlled stop. This controlled stop is often confused with an abrupt stop.

Another commonly alleged condition is a broken or defective comb plate. A comb plate is located on both the upper and lower platforms of an escalator. It is a safety device that will bring the escalator to a controlled stop if obstructed. Normally, comb plates are safe for their intended use; however, under unfavorable conditions (e.g., large opening) it is not impossible for a soft shoe or article of clothing to get stuck in the comb plate, causing injury.

Like the comb plate, a soft shoe or article of clothing canbecome stuck in the space between the side metal panel and the moving stairs, known as the side skirt. The side skirt is designed with a skirt deflector (or brushes), constructed to minimize the risk of an incident. The skirt deflectors will "deflect" loose clothing away from any potential hazards.

Strict Products Liability

An elevator/escalator manufacturer that sells a product in a defective condition is liable for injury resulting from the use of the elevator/escalator where it is being used in a foreseeable manner. An elevator/escalator may be defective (or unsafe) for several reasons. The modern analysis of a defect is driven by the way in which the defect arose. A defect (in the product liability sense) may be attributable to: (1) design defect; (2) manufacturing defect; or (3) inadequate warnings or instructions.

Under these various theories of strict liability, if the product is defective, a plaintiff has established the basis for liability without proving fault.[1] The purpose of this standard is to relieve a plaintiff of the burden of proving that a defendant manufacturer was negligent. A plaintiff must prove that the product was defective when it left the manufacturing facility, and the defect was the cause of plaintiff's injuries. Below is a summary of the three common divisions of product liability.

A. Manufacturing Defect

A manufacturing defect claim is predicated on an individual product (or unit) being defective because it was not manufactured as designed. Here, the individual unit is defective (i.e., the unit differed from the manufacturer's internal standards or contains structural flaws). Manufacturing defect claims often compare the defective unit to the specifications or blueprints designed by the manufacturer. The question is not whether the product was safely designed, but whether the individual product (or unit) was not built to specification or whether the individual product deviated from specifications or design.[2] In cases alleging a defect in manufacturing, the "harm arises from the product's failure to perform in the intended manner due to some flaw in the fabrication process."[3]

A manufacturing defect is often difficult to prove, particularly when the product in question is destroyed or altered during the incident. This problem may be mitigated using circumstantial evidence. If an expert can eliminate all alternative causes for the product failure, other than the alleged manufacturing defect, the case will go to a jury. However, if the jury determines that "some other cause other than the claimed defect for the occurrence" was the cause, a jury must find for the defendant.[4]

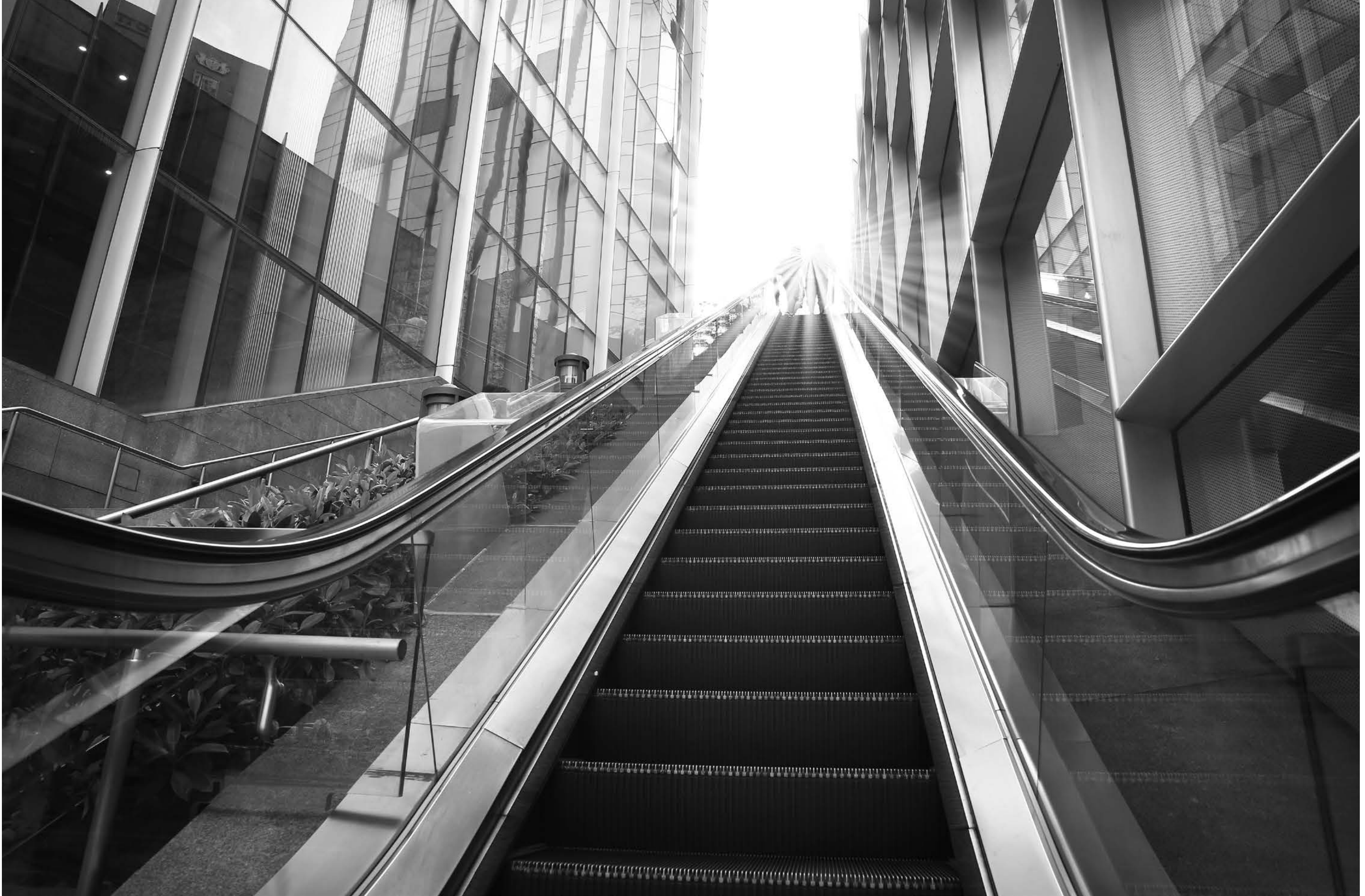
A common defense in an elevator/escalator manufacturing defect claim is that the product was not unreasonably dangerous when it left the manufacturing facility. Evidence of post-manufacture modifications to a product is admissible on the question of the existence of a manufacturing defect. In fact, a manufacturer is not liable, if, after the unit leaves the possession of the manufacturer, there is a subsequent modification that substantially alters the product and is the cause of the injuries.[5] Elevator/escalator manufacturers will often provide evidence that the unit was modified post-sale and installation to defeat a claim of manufacturing defect.

B. Design Defect

A manufacturer has a duty to design a product to avoid an unreasonable risk of harm to persons likely to be exposed to danger when the product is being used as intended. This principle extends to unintended use that is foreseeable. While the manufacturing defect claim asserts that a specific unit was defective, the design defect claim alleges that an entire model line is defective.

The seminal case in design defect law is *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102 (1983). In a design defect case, a plaintiff is required to present evidence that the product, as designed, was not reasonably safe because there was a substantial likelihood of harm, and it was feasible to design the product in a safer manner. A manufacturer may present evidence that the product was safe by proving that the utility of the product outweighs its risks and that the risk was reduced to the greatest extent possible while retaining the product's inherent usefulness at an acceptable cost.

A requirement to establishing a design defect is the demonstration of a reasonable alternative design (RAD). Plaintiff must not only present evidence that the product was unreasonably dangerous, but that a RAD exists and that the RAD would have prevented the injuries. Courts will review the RAD alongside a risk/utility analysis of the product's design. The Court of Appeals in *Voss* identified seven factors in balancing risks inherent in the product against the utility and cost of the product: (1) the utility of the product to the public



as a whole and to the individual user; (2) the nature of the product—that is, the likelihood that it will cause injury; (3) the availability of a safer design; (4) the potential for designing and manufacturing the product so that it is safer but remains functional and reasonably priced; (5) the ability of the plaintiff to have avoided injury by careful use of the product; (6) the degree of awareness of the potential danger of the product which reasonably can be attributed to the plaintiff; and (7) the manufacturer's ability to spread any cost related to improving the safety of the design.

A RAD may be demonstrated several ways: (1) utilization of expert testimony to show that it was feasible to design the product in a safer manner through designing and testing a "better" product;[6] (2) comparing the original "defective" design to a competitor's existing product with a "safer" design;[7] (3) presentation of safety standards promulgated by regulatory bodies or private associations.[8]

An elevator/escalator manufacturer may point to deficiencies in plaintiff's proof of a RAD. For example, a manufacturer may allege that the expert's opinion was "junk science" or lacking in scientific support.[9] An expert's opinion may also be rejected for failing to properly test the defective product or because the methodology in testing the RAD was unreliable. Nonetheless, the manufacturer must demonstrate that the elevator/escalator was reasonably safe for its intended use (i.e., the utility of the product outweighs its inherent danger) and that it complied with applicable industry standards.

There are several defenses to a design defect claim including: (1) availability of optional safety equipment;[10] (2) manufactured in accordance with custom plans and specifications of purchaser;[11] (3) post-sale modifications;[12] (4) misuse of the product (if the misuse was unforeseeable); and (5) compliance with all federal safety standards.[13] A manufacturer may meet its burden on summary judgment by showing that the product was "state of the art" at the time of its design and manufacture and complied with all applicable industry standards.

C. Inadequate Warnings/Labeling

While less common in the vertical transportation world than design or manufacturing defect claims, an elevator/escalator may be defective if the manufacturer fails to adequately warn about the danger related to the use of the product. The duty to warn of dangers in the use of a product exists even if the product is perfectly designed and manufactured. This theory is predicated on the presumption that a manufacturer has a superior knowledge of its product. While a manufacturer has a duty to warn, a contractor hired to correct a specific problem with an elevator has no duty to warn of defects unrelated to the problem it was hired to correct.[14]

Common defenses to failure to warn claims include: (1) open and obvious condition;[15] (2) knowledgeable user;[16] (3) post-sale modifications of the product;[17] and (4) post-sale modification/destruction of warnings.[18]

Premises Liability

The common law duty of owners or possessors of land to maintain a premise in a reasonably safe condition extends to elevators and escalators on the premises. Like any premises liability matter, a plaintiff must allege and prove that a defendant had a duty to keep the elevator/escalator in a reasonably safe condition, failed to do so, and that failure caused injury. A plaintiff must also prove that the defendant either created the defect or had actual/constructive notice of the defect that caused the injury.

In most instances, an elevator/escalator maintenance contractor is hired under a full-service vertical transportation agreement to maintain, service, and repair elevators/escalators on the premises. A maintenance contractor that enters an exclusive maintenance contract may also be liable for failure to correct a defective condition under the same duty principles applicable to the property owner. It is quite common for these maintenance contracts to contain a requirement that the contractor defend and indemnify the property owner and manager for the contractor's negligence since the maintenance contractor has exclusive control of the equipment. This is consistent with the relevant caselaw.[19] Thus, the comprehensiveness of the maintenance contract and the exclusiveness of control of the equipment should be given due consideration in defending the lawsuit.

A. *Res Ipsa Loquitur*

As discussed above, a negligence case typically requires a finding that the defendant owed a duty to keep the elevator/escalator in a reasonably safe condition, failed to do so, and that failure caused injury. In elevator/escalator cases, it is often difficult or expensive for a plaintiff to prove that a defendant breached its duty, and thus will often seek to apply the doctrine *res ipsa loquitur*, Latin for "the thing speaks for itself." This hot button issue permits a factfinder to infer negligence based upon the sheer occurrence of an event where a plaintiff proffers sufficient evidence that (1) the occurrence is not one which ordinarily occurs in the absence of negligence; (2) it is caused by an instrumentality or agency within the defendant's exclusive control; and (3) it was not due to any voluntary action or contribution on the plaintiff's part.[20]

As an example of its application, the First Department in *Aponte* recently addressed the issue that elevator mis-leveling does not occur in the absence of negligence, which gives rise to the possible application of *res ipsa*. However, summary judgment was denied on the application of *res ipsa*, finding that this was not one of "rarest of *res ipsa loquitur* cases" in which the plaintiff is entitled to summary judgment based on the doctrine, which allows but does not require the jury to infer that the defendant was negligent based on the circumstantial evidence.[21]

Of import, *res ipsa* does not apply to an owner or manager of a premise where the maintenance and repair is ceded to a service provider pursuant to a comprehensive maintenance and repair agreement. This is because the owner and/or manager do not retain sufficient control of the elevator/escalator to render *res ipsa* applicable. For an owner or property manager, a defense of *res ipsa* will be contingent on providing a copy of the comprehensive maintenance agreement.

B. Notice Requirements

A property owner can be held liable for an elevator-related injury where there is a defect in the elevator, and the property owner has actual or constructive notice of the defect, or where it fails to notify the elevator company with which it has a maintenance and repair contract about a known defect.[22] Similarly, a maintenance provider that agrees to maintain an elevator/escalator in a safe operating condition may be liable for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found.

In a recent application, the court found that an owner made a showing that it did not create or have actual notice of the condition; however, the owner's outline of its general practice to inspect the premises was insufficient to preclude constructive notice of the alleged dangerous condition.[23] It is vital that a defendant produce evidence of the inspection immediately prior to an incident. Proof of regular inspections and maintenance, including inspection and remedial action just prior to incident, is ordinarily sufficient to satisfy a defendant's burden of proof.[24]

Defendants should be prepared to produce evidence of: (1) when the elevator area was last inspected before the incident; (2) details of what the inspections entail; and (3) whether they were conducted each visit. This showcases the importance of documenting inspections and maintaining proper policies and procedures for inspection of an elevator/escalator. Failure to do so may be fatal to a defense.

Conclusion

Elevator and escalator accidents can and do occur, resulting in litigation. It is imperative to identify whether the claim arises from a product defect (design defect, manufacturing defect, or failure to warn) or negligent installation, maintenance, or repair. A situation semi-unique to elevator/escalator litigation is that the unit will be maintained and repaired by a sophisticated contractor pursuant to a comprehensive

maintenance contract. If the unit is improperly maintained or modified post-sale, a defendant manufacturer should use this information in its defense of a product liability claim. It will be vital to obtain maintenance, repair, and inspection records and have an opportunity to inspect the unit.

Elevator and escalator litigation is often complex and expensive to litigate, involving intricate mechanical and digital components that require expert consultation and knowledge on issues of both design and proper maintenance. Understanding the issues from the onset can help reduce the complexity and cost of litigation.

Endnotes

1. *Lancaster Silo & Bock Co. v. Northern Propane Gas Co.*¸75 A.D.2d 55 (4th Dep't, 1980).
2. *Repka v. Arctic Cat, Inc*., 20 A.D.3d 916 (4th Dep't, 2005); *McArdle v. Navistar Intern. Corp*., 293 A.D.2d 931 (3rd Dep't, 2022).
3. *See Denny v. Ford Motor Co*., 87 N.Y.2d 248 (1995).

4. *See* PJI 2:120.1.
5. *See e.g*., *Bauerlein v. Salvation Army*, 74 A.D.3d 851 (2nd Dep't, 2010).
6. *Argonaut Ins. Co. v. Samsung Heavy Indus. Co. Ltd.*¸ 929 F. Supp.2d 159 (N.D.N.Y. 2013).
7. *Wald v. Costco Wholesale Corp*., No. 03-CV-6308 [JSR], 2005 WL 425864 (S.D.N.Y. Feb. 22, 2005).
8. *Rivera v. MKB Indus.,* 149 A.D.2d 676 (2nd Dep't, 1991).
9. *See Delehanty v. KLI, Inc*., 663 F. Supp.2d 127 (E.D.N.Y. 2009); *Spierer v. Bloomingdale's*, 43 A.D.3d 664 (1st Dep't, 2007).
10. *Scarangella v. Thomas Built Buses, Inc*., 93 N.Y.2d 655 (1999).
11. *Houlihan v. Morrison Knudsen Corp*., 2 A.D.3d 493 (2nd Dep't, 2003).
12. *Robinson v. Reed-Prentice Div. of Package Mach. Co*., 49 N.Y.2d 471 (1980).
13. *Lugo by Lopez v. LJN Toys, Ltd*., 146 A.D.2d 168 (1st Dep't, 1989), aff'd, 75 N.Y.2d 850 (1990).
14. *McMurray v. P.S. Elevator, Inc*., 224 A.D.2d 668, 638 N.Y.S.2d 720 (2nd Dep't, 1996).
15. *Liriano v. Hobart Corp*., 92 N.Y.2d 232 (1998).
16. *Palmatier v. Mr. Heater Corp*., 159 A.D.3d 1084 (3rd Dep't, 2018).
17. *Robinson v. Reed-Prentice Div. of Package Mach. Co*., 49 N.Y.2d 471 (1980).
18. *Van Buskirk v. Migliorelli*, 185 A.D.2d 587 (3rd Dep't, 1992).
19. *See Rogers v. Dorchester Assoc*., 32 N.Y.2d 553 (1973) (Where liability of owner and manager of a building for injuries sustained by passenger in an elevator arose solely by reason of their nondelegable duty to passenger to maintain and repair the elevator, but elevator company was responsible for continued maintenance of the elevator and its negligence in performance of such accounted circumstantially for the accident, owner and manager were entitled to be indemnified by elevator company.).
20. *Aponte v. Bronx Pres. Hous. Dev. Fund Corp*., 202 A.D.3d 401 (1st Dep't, 2022).
21. *See also, Morejon v. Rais Constr. Co*., 7 N.Y.3d 203 (2006).
22. *See Syrnik v. Bd. of Mgrs. of the Leighton Hous. Condo*, 198 A.D.3d 835 (2nd Dep't, 2021).
23. *Lloyd v. 797 Broadway Group, LLC*, No. 2016-1393, 2022 WL 3279602, (Sup. Ct. Schenectady Cnty. July 15, 2022).
24. *See Hagin v. Sears, Roebuck and Co*., 61 A.D.3d 1264 (3rd Dep't, 2009).