Escalator Claims:
Best Practices for Prevention & Defense

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I. Introduction

Escalators are found in a high percentage of retail and hospitality spaces that involve more than one level. They are an efficient vehicle to move people, a lot of people. They are also complex and powerful pieces of machinery that include sharp metal edges, pinch points, and involve heights so that if even a small fraction of one percent of the millions using escalators have accidents resulting in injuries, the potential number of claims, and serious claims, is large. The injuries from escalator accidents can be catastrophic, including death.

The outcomes for an escalator operator (from now on “Operator”) in dealing with claims from escalator mishaps is often dictated by the prevention efforts before the accident, the investigation immediately after the accident, the level of duty being applied to the Operator, and the indemnity agreements and insurance in place. The prevention efforts before the accident will determine whether the Operator will be found negligent in owning and maintaining the escalator. The indemnity agreements and insurance will control whether the expense of defending against a claim, as well as payment of any settlement or verdict, will be covered by the escalator manufacturer or maintenance company, or an insurance company, resulting in no harm to the Operator’s bottom line.

II. What Duty of Care Is Owed by an Operator to Those Using Its Escalator?

When a personal injury or wrongful death claim is made against an Operator arising out of an escalator mishap, the typical allegation is that the Operator was negligent in the ownership and maintenance of the escalator. The level of duty an Operator owes to people using the escalator varies depending on the state. Under the laws of many states, an Operator may face a heightened negligence standard as a common carrier against which it will be judged.

In California, a common carrier is defined by Civil Code section 2168, which says: “Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry.” Operators offering escalators for use by the public are considered common carriers under this definition. *Hendershott v. Macy’s*, 158 Cal. App. 2d 324, 327 (1958). The heightened duty for a common carrier of persons in California is “… to use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.” California Civil Code section 2100. In Ohio, an Operator must use the highest degree of care for escalator passengers. *May Dept. Stores Co. v. McBride*, 124 Ohio St. 264 (1931). In Georgia, the duty is of extraordinary care. *Millar Elevator Service Co. v. O’Shields*, 222 Ga. App. 456 (1996). In Pennsylvania, the standard is the highest degree of care. *Petrie v. Kaufmann & Baer Co.*, 291 Pa. 211, 213-14 (1927).

Other states apply a standard negligence duty to escalator operators. Although the language varies from state to state, the general (not heightened) definition of negligence is the failure to use reasonable care to prevent harm to another. This failure can be the doing of something that a reasonable person would not do, or the failure to do what a reasonable person would do in the same situation. Restatement Second of Torts, sections 282-284. Examples of states applying this level of duty to Operators are Connecticut, *Stratton v. J.J. Newberry Co.*, 117 Conn. 522 (1933), Illinois, *Tolman v. Wieboldt Stores, Inc.*, 38 Ill. 2d 519, 525 (1967), and South Carolina, *King v. J.C. Penney Co.*, 238 S.C. 336 (1961).
Obviously, the requirement of using the utmost, extraordinary, or highest degree of care is a significantly higher burden than using reasonable care. Knowing the standard in the state where the accident happens is important to an evaluation of the risks associated with the claim.

The duty of care for a business with an escalator on its premises, whether under a heightened standard or the reasonable care standard, typically cannot be delegated to another. *Brown v. George Pepperdine Foundation*, 23 Cal. 2d 256, 259-60 (1943). So an Operator has an obligation to use the applicable level of care in maintaining an escalator, and because this duty is nondelegable, the duty will not be satisfied by hiring a competent maintenance company. If the escalator is not in proper working condition and its operation results in an injury, the Operator has potential liability. If there is liability under the state's standard, the Operator will be left to recover what it owes to the claimant from the manufacturing or maintenance companies to the extent it can prove their fault (or subject to insurance and indemnity clauses in an agreement, which will be discussed below), but it cannot avoid the liability to the claimant in such a scenario.

III. Excellent Prevention Techniques are the Best Way to Defeat a Negligence Claim

Whether the standard is reasonable care or a heightened duty, the best way to avoid liability in negligence for an escalator mishap is to have an outstanding prevention program in place before the accident happens. In addition to having the program in place, the ability to show compliance with the program in regularly maintained business records that can be produced in litigation is critical. If inspection, maintenance, or repair activity is not documented, it will be assumed it never happened.

The first rule of good prevention is to understand the rules that apply to escalators. Each state has similar but slightly different standards applying to escalators. They are typically based on the ASME A17.1 standard from The American Society of Mechanical Engineers. This is the comprehensive safety standard for both elevators and escalators. If an escalator claimed to have caused injury is not in compliance with the applicable standards, it is difficult to argue reasonable care, let alone that a heightened level of care has been taken.

In addition to showing responses to any problems or concerns with the equipment, at least monthly maintenance and inspections by a qualified technician will need to be shown, preferably by an outside company.

In addition to professional inspections, a log of regular visual inspections by members of the retailer’s management or in-house maintenance team shows that any obvious abnormalities will be seen and the escalator shut down until a professional evaluation can be made. These visual inspections should be daily, and preferably multiple times each day.

The Operator should have a written policy setting out what is to be done by professional mechanics, and how often, what is to be done in house and the frequency, and the how these programs will be documented. A strong defense is being built when there is a sound and comprehensive policy that is followed and documented.

It will help to show that an escalator maintenance audit company is used on some regular basis, but at least annually, to have an independent professional review the work of the escalator maintenance company. Such an audit company adds a professional layer of oversight, and often has the beneficial effect of keeping the maintenance company on its toes.
IV. A Thorough Accident Investigation Increases the Chances of a Successful Defense

Even with the best prevention plan possible, people on escalators will get hurt. They misstep, they misjudge, they sometimes do foolish things, and they make mistakes. The period immediately after the accident is critical in gathering information that will quickly disappear, and without which, a successful defense of a claim becomes more difficult.

Rule No. 1 after an accident is to help the person who is claiming to be hurt. This is not just the right thing to do, it is also an important part of the ultimate defense of the claim for a couple reasons. A person who is hurt, who feels like the Operator cared about him/her, and who feels that she/he was taken care of, is a person who is less likely to make a claim. The same person who is angry because the Operator did not care for her/him, is a person who will seek out a lawyer and make a claim so that, “No one else will get treated like I was.” The second reason is jurors. If a case goes to trial, jurors will respect and treat fairly a retailer who takes care of its customer in this kind of situation. Jurors who think that an Operator did not care about its customer, and did not take care of the customer, are difficult jurors to persuade to find for the defendant.

While at least one employee, or preferably a member of the management team is helping the injured customer, another can start the investigation of the accident. It is important to document the scene, and having a standard accident report form seeking basic information is a good start. Photographs of the scene, the escalator, signs relating to escalator use, and (if reasonable) the injured person are often critically important. Get close-up photos of conditions, and get photographs from farther back to provide perspective. If the store has surveillance cameras, then the video should be checked to determine if the accident was picked up. If it was, the video should be preserved.

When the claim is that the escalator malfunctioned, it should be taken out of service immediately until it can be checked by a technician. Since the regular maintenance company may be a defendant in the case, it often makes sense to call an outside technician to do the post-accident inspection so that any maintenance problems will be objectively discussed. All reports, photos, video, and inspection reports relating to the accident must be segregated and maintained pending a claim.

The accident scene investigation should also include seeking witnesses to the accident, which includes the claimant, but only if the claimant’s injuries make it reasonable to seek information from the person. Identifying information should be obtained. A statement should be sought, and have the witness sign the statement as to its accuracy.

V. If Money Must Be Paid on a Claim, Have Someone Else Pay It

When prevention efforts do not avoid the mishap, and the evaluation is that the claimant should be paid a settlement (or a jury says that there is a verdict against the Operator), the goal should be that someone else has to pay. There are two primary means for making this happen, insurance and an express (contractual) indemnity provision in the maintenance agreement. When insurance is being discussed, the Operator can, and certainly should, have insurance coverage of its own for claims related to injuries on the property, including those related to escalators; however, that is not the insurance that is being referenced. The insurance that an Operator wants paying is the insurance of the maintenance company.

It is standard in the escalator industry that maintenance agreements have insurance clauses. They require the maintenance contractor to have liability insurance, with minimum limits of coverage that will provide the primary coverage for claims arising out of all operations and services performed or required under the contract. This means that the contractor’s coverage will apply before the Operator’s own coverage. The con-
tractor is required to have the retailer named as an additional insured on the contractor’s policy. When this is done properly, if the Operator is named in a lawsuit, the contractor’s insurer will provide the Operator with a defense at the insurer's expense, and pay for any settlement or judgment up to the policy limits. The Operator is fully protected by insurance for which it did not pay.

Express indemnity clauses in maintenance agreements routinely run in favor of the Operator. In such an agreement, the clause makes a contractual duty in which the maintenance contractor agrees to make good any loss, damage, or liability as a result of injury incurred by another. This indemnity duty is often limited to those liabilities arising out of, or incurred in connection with, the contractor’s performance under the maintenance agreement.

When the maintenance agreement has the additional insured provision and indemnity provision in favor of the Operator, this provides strong protection for the Operator’s assets in dealing with an injury claim arising out of an escalator-related accident.

VI. Conclusion

Often operators of escalators are common carriers which must use heightened care in protecting its customers from harm when using its escalators. The best defense to future claims is a comprehensive escalator accident prevention and maintenance policy that is followed and documented. Given the volume of people using escalators, related accidents will happen, and claims will be made. It is critical to investigate and document an escalator mishap promptly and thoroughly. When a claim is likely to result in an award to a claimant, have someone else pay it through favorable insurance and indemnity agreements.