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OUTSIDE COUNSEL

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Defense Protocol for Elevator Accidents

On Nov. 28, an Upper West Side resident plummeted 15 stories down an elevator shaft to his death after departing a freight elevator cab which had stalled between floors.[1] The Thanksgiving weekend tragedy provides a startling reminder of the potentially deadly consequences that can arise when a passenger leaves a stalled elevator.

To prepare for the inevitable personal injury/wrongful death action, defense counsel must spring into action. Unfortunately, defense counsel is often the literal and proverbial "last to know" of the accident; the delay can serve to handicap the defense from making a crucial and timely investigation. However, if a particular accident attracts press coverage, or otherwise provides defense counsel with the opportunity for immediate investigation, counsel can potentially utilize the occasion to minimize, or even eviscerate, liability for the elevator maintenance company.

Investigators, Experts

The investigator and expert are two imperative tools for early factual investigation. The investigator, of course, can identify and interview fact witnesses, speak with building personnel and tenants regarding prior complaints and obtain relevant documentation. Early contact with witnesses will enhance the potential for accurate recollection of information.

In the same vein, many defense counsel are lax in consulting with an expert until it becomes necessary to serve a CPLR §3101(d) disclosure, often at the tail end of the discovery process. However, early expert retention will provide defense counsel with the best opportunity for examination of the elevator and its appurtenances in an effort to determine whether a particular elevator malfunction occurred or, as in the instance referenced above, whether "a gate that might not have been closed properly"[2] caused the elevator to stall between floors.

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In a prior New York Law Journal Outside Counsel column,[3] we examined the law relating to proximate cause when an elevator passenger departs from a stalled elevator cab and attempts to jump to the next floor landing. The determination of whether the passenger's departure from the elevator cab constitutes a superseding intervening cause of the resulting injuries is a highly factual one. From the news reports relating to the accident detailed in this column, one can infer that the elevator functioned appropriately when it stalled, possibly due to the passenger's failure to close the gate properly. Assuming that no emergency situation existed which compelled that the passenger depart from the safety of the elevator cab, see, e.g., *Mas v. Two Bridges*,[4] early investigation and expert retention can provide defense counsel with information relating to the operation of the elevator at the time of the purported malfunction and expose a potential shield to liability by proving that the elevator did not malfunction — rather, it operated properly, exactly as it was designed.

This early investigation and expert retention also provides an added benefit: defense counsel's ability to relay to the jury at trial that the defense's witnesses obtained a timely and relevant inspection of the elevator prior to post-accident remedial measures. In New York City, the building department must inspect an elevator and consent to the elevator being placed back into service subsequent to an injury; indeed, the building owner is required to notify the Department of Buildings after an elevator-related injury occurs and arrange the subject inspection.

The Maintenance Contract

As in any case where liability is predicated by contract, the first step must be a thorough review of the elevator maintenance contract to evaluate the scope of the elevator maintenance company's responsibility. Pursuant to Multiple Dwelling Law §78, a building owner's duty to maintain the dwelling, and "every part thereof … in good repair," is a nondelegable one.[5] Since owners and managing agents are generally "ill-equipped to service the complicated, delicate, and potentially dangerous elevator apparatus,"[6] owners contract with elevator maintenance companies to service the equipment.

The scope of these services can be as limited as a "grease and lube" agreement, where the elevator maintenance company is simply required to periodically conduct service examinations, clean the elevator, lubricate certain components and make minor adjustments; additional repair and maintenance issues are negotiated on an as-needed basis. On the other end of the spectrum, a full-service maintenance contract generally requires an elevator maintenance company to undertake all maintenance and repair issues that arise during the course of the contract, subject to detailed exclusions. A full-service maintenance contract will render the maintenance company liable to passengers for deficient maintenance.

> An elevator company that agrees to maintain an elevator in safe operating condition may be liable to a passenger 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.[7]

At stake in all of this is the coveted concept of indemnity. A savvy building owner will generally require a hold-harmless or indemnity clause in the service contract. Pursuant to that clause, the

maintenance company will be liable for damages, including defense costs and counsel fees, which the owner sustains purely as a result of its statutory liability pursuant to Multiple Dwelling Law §78. The clause is effective when plaintiff's damages result from the negligence of the elevator maintenance company incident to performance of the service contract. The owner, managing agent and elevator maintenance company will undoubtedly file cross-claims against each other seeking indemnity. In the situation where a mere "grease and lube" contract exists, an owner/agent may not have a viable claim for indemnity if the maintenance company can establish that its undertaking pursuant to the maintenance contract was limited (i.e., "grease and lube") and not related to the malfunction that caused plaintiff's injuries. To the contrary, the maintenance company which has undertaken full responsibility for the elevator and its appurtenances, by virtue of the full-service contract, may be compelled to hold the owner/agent harmless.

Other Document Review

Proper document investigation in an elevator case is extensive. There exist a host of sources for obtaining records, including inspections and complaints, regarding elevators. For example, counsel should conduct a public records search at the local municipal office to obtain violation notices, copies of inspection certificates and confirmation of the annual test filing fees. From the building owner, he also should obtain copies of any correspondence by the owner to the elevator maintenance company, along with the lobby sign-in book to review for complaints, service issues and visits to the building by elevator service company personnel and the public inspectors.

The building management or board of directors may possess meeting minutes, along with annual financial statements, which reveal whether the topic of elevator upgrades or repairs had been addressed and whether a reserve or assessment had been established for those upgrades or repairs. Finally, from the elevator maintenance company, immediately obtain an original and all amendments and updates to the service contract; work tickets for at least threee years prior to the accident; correspondence with the building owner; and proposals to upgrade or overhaul the system.

Liability

Subsequent to the review and exchange of initial discovery documentation, plaintiff will attempt to elicit facts during the examination before trial to cement the defendants' liability via two avenues. First, plaintiff will rely upon a general common-law negligence charge to hold the maintenance company liable for plaintiff's injuries. Notice, whether actual or constructive, is an element of the charge, and is a potentially fertile ground for seeking dismissal on summary judgment. To avoid liability on the notice prong, defendant maintenance company must make a prima facie showing that it had no actual or constructive notice of the defective condition. This task can be accomplished through an affidavit of the assigned elevator mechanic along with exhibits of documentary evidence establishing, for example, the absence of complaints regarding the elevator stalling between floors.

A well-drafted affidavit, averring that the elevator was in good working order and confirming that the work tickets, call logs and inspection charts for the prior year fail to establish notice of the condition, is generally sufficient to shift the burden to plaintiff to establish notice. In the event that plaintiff counters that some of the documentation highlights notice of purportedly deficient maintenance, the maintenance company is free to reply that the complaint was addressed and resolved, and, since that time, no new indication of elevator problems exist.

Early expert retention provides the defense with its best chance to examine the elevator to find whether "a gate that might not have been closed properly" caused the elevator to stall.

Second, plaintiff will also request a charge pursuant to Pattern Jury Instruction §2:65 seeking to rely upon the doctrine of res ipsa loquitur if sufficient evidence exists to establish three elements:

> First, the event must be of a kind that ordinarily does not occur in the absence of someone's negligence; second, it must be caused by an agency or instrumentality within the exclusive control of the defendant; and third, it must not have been due to any voluntary action or contribution on the part of the plaintiff.[8]

A review of the case law interpreting the foregoing elements reveals that the most viable ground to obtain summary judgment as a maintenance company rests with prong number two, exclusivity. The first element, whether the event occurs in the absence of someone's negligence, is often relegated to a battle of the plaintiff's and defendant's experts, highlighting an issue of fact on this component. Likewise, rare are the instances, such as the case detailed above, when the purportedly negligent event is linked to voluntary action attributable to plaintiff.

However, exclusivity is an issue that can more readily be disposed on summary judgment. For example, with respect to a full-service maintenance contract, the maintenance company may contractually retain exclusive control over the elevators, actually precluding building employees from any contact with the elevator with the exception of cleaning in cab floor. On the other hand, the service contract may contain a clause that permits building employees to make minor adjustments and further declares that the elevators are only deemed in the maintenance company's exclusive control when they are actually out of use while being serviced by the maintenance company. As noted above, a thorough review of the contract, and controlling case law, is essential to resolve these issues.

However, certain elevator equipment is so accessible to the general public that, as a matter of law, exclusivity cannot be established by the plaintiff. See *Dermatossian v. N.Y.C.T.A.*[9] (plaintiff failed to establish the exclusivity element of the res ipsa loquitur charge for a grab handle in an elevator cab when the grab handle "was continuously available for use by the [] passengers." But see *Weeden v. Armor El. Co.*,[10] (plaintiff established exclusivity for elevator mechanism that is inaccessible to the general public).

Conclusion

Elevator accident litigation is complex. The cases are littered with liability minefields for the defense. That fact, coupled with the reality that plaintiff's injuries in elevator accident cases are generally substantial, renders cause for great concern for defense counsel. However, early interaction with investigators and experts, coupled with a thorough documentary analysis, can level the playing field and provide defense counsel with every reasonable opportunity to minimize the maintenance company's liability.

1. Fatal Fall Down Elevator Shaft, NEW YORK NEWSDAY.COM, Nov. 29, 2004.
2. Id.
3. "To Jump or Not to Jump? Elevator Accidents and Employment Expertise," The New York Law Journal, Feb. 4, 2000.
4. 75 NY2d 680, 555 NYS2d 669 (1990).
5. *Bonifacio v. 910-930 Southern Boulevard LLC*, 295 AD2d 86, 743 N.Y.S.2d 105 (1st Dept. 2002).
6. *Rogers v. Dorchester Associates*, 32 NY2d 553, at 561, 347 N.Y.S.2d 22, at 28 (1973).
7. Id., at 559.
8. *Kambat v. St. Francis Hospital*, 89 NY2d 489, at 494, 655 N.Y.S.2d 844 (1997).
9. 67 NY2d 219, at 228, 501 N.Y.S.2d 784, at 789 (1986).
10. 97 AD2d 197, 468 N.Y.S.2d 898 (2nd Dept. 1983).