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OUTSIDE COUNSEL

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# *To Jump or Not to Jump? Elevator Accidents and Employment Expertise*

The Court of Appeals decision last month in *Egan v. A.J. Construction Corp., et al.*[1] highlights a distinction in the treatment of elevator passengers who jump from a stalled elevator: specifically whether, for the purpose of determining superseding intervening cause in a negligence case, the plaintiff has specialized knowledge of the elevator by virtue of his employment.

In the typical case, plaintiff is a passenger in an elevator cab that has stalled between floors. After waiting a few minutes, and assuming no objective indication of danger confronts the passenger while he is in the elevator,[2] plaintiff encounters a quandary – to remain in the elevator until it is restarted, or jump to the next floor landing. Inevitably, injuries follow, either from impacting the next floor landing, or from falling down the elevator shaft when plaintiff misses the floor landing altogether.

In defending the matter for the landowner and/or elevator company, defense counsel asserts that plaintiff's conduct of jumping from the stalled elevator was so egregious that it broke any nexus between the defendant's alleged negligence in permitting the elevator to stall and plaintiff's injuries that were the actual and proximate result of the alleged negligence. In summarizing the superseding intervening cause theory, Professors Prosser and Keeton note that:

> the problem is one of whether the defendant is to be held liable for an injury to which the defendant has in fact made a substantial contribution, when it is brought about by a later cause of independent origin, for which the defendant is not responsible.[3]

A case law dichotomy has evolved with respect to the manner in which courts characterize the passenger who jumps from the elevator; the dichotomy is based upon whether plaintiff's employment at the time of the accident provided him with a heightened knowledge of the particulars of the elevator. If, through his employment, the passenger possesses this "heightened" knowledge, his actions are generally regarded as a superseding intervening act, thereby avoiding defendant's liability. In the alternative, if plaintiff was a random non-employee passenger, the courts generally hold that a question of fact exists for the jury to determine whether plaintiff was justified in departing from the stalled elevator.

## Employee Passengers

In *Egan*,[4] the Court of Appeals sustained the superseding intervening cause theory as a bar to the employee-plaintiff's recovery. There, shortly after 7:30 a.m., plaintiff, a carpenter working on the construction of an office building, entered a freight elevator that subsequently stalled six feet above the lobby. After waiting 10 to 15 minutes, another worker in the elevator manually opened the elevator's doors and jumped to the lobby floor. When plaintiff jumped, he sustained injuries upon impacting the lobby floor. The Court of Appeals, relying upon a 1911 precedent, *Jackson v. Greene*,[5] denied plaintiff's recovery, finding as a matter of law that plaintiff's jump from the stalled elevator was unforeseeable.

> Plaintiff, an experienced worker, was not threatened by injury while in the stalled elevator, which had come to a smooth stop and remained motionless, quiet and lit. … Thus, plaintiff's jump superseded defendants' conduct and terminated defendants' liability for his injuries [emphasis added].[6]

The *Egan* decision underscores the significance of the plaintiff's employment as an opportunity to become familiar with elevator-related risks. Similarly in *Antonik v. New York City Housing Authority*,[7] the First Department relied upon *Jackson* in dismissing plaintiff's suit when the building employee jumped from a stalled elevator and fell down the elevator shaft. In relying on *Jackson*, the *Antonik* court ruled that plaintiff was an "experienced worker" who would not have been injured had he waited for an engineer to restart the elevator.[8]

So, the Court of Appeals in *Egan* and *Jackson*, the First Department in *Antonik*, and another court,[9] conclude that employee-plaintiffs injured while departing from stalled elevator cabs take their chances, and cannot rely upon a negligence cause of action to recover for their injuries. But should the non-employee plaintiff avoid dismissal on summary judgment merely because such passenger did not have "specialized" knowledge of the

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elevator-related risks that building employees get by virtue of their employment?

## Lay Passenger Plaintiffs

In *Humbach v. Goldstein*,[10] after departing from a party at a friend's apartment on the fifth floor, plaintiff was seriously injured after the elevator in which he was a passenger stalled between the fifth and fourth floors. After waiting an uncertain amount of time,[11] plaintiff opened the elevator doors and fell down the elevator shaft when he jumped to, but missed, the fourth floor landing. In denying defendants' motion for summary judgment, the lower court ruled that the fact Mr. Humbach was a layperson, or non-building employee at the time of the accident, was the key factor in distinguishing the instant case from *Jackson* and *Antonik*.

It is interesting and, in this court's opinion, determinative that in each of the elevator cases relied upon by movant that the plaintiff was working as an employee at the time of the accident. The employee's work and the elevator were intertwined such that the plaintiff was aware of the foibles of the particular elevator. It was that knowledge which established, as a matter of law, that the plaintiff knew, or should have known that he was not in a dangerous situation, i.e. he was "entirely conversant with the whole situation, under no stress … of danger (citing Jackson) [emphasis added]."[12]

On appeal to the Second Department, the Appellate Division affirmed the denial of the defendants' motion for summary judgment, ruling that an issue of fact existed as to whether "plaintiff's conduct was a foreseeable consequence of an emergency situation created by the defendants' alleged negligence."[13]

Other Appellate Division similarly conclude similarly that a lay passenger's jump from a stalled elevator is an issue of fact as to whether the conduct constituted a superseding intervening cause;[14] but these cases are distinguishable since those plaintiffs/passengers were infants and accordingly, not held to the same standard as the reasonable adult.[15]

But is it necessary to be employed in a building to appreciate the risks inherent in departing from a stalled elevator cab? In reality, the carpenter in *Egan* who utilized the freight elevator likely did not have any greater knowledge of elevator propensities than does the average person who rides a passenger elevator everyday to and from work. Is it not within the proverbial reasonable person's experience and contemplation to appreciate the risks of height and gravity?

In their treatise on Torts, Professors Prosser and Keeton describe the types of occurrences that are within the experience of all reasonable individuals:

> It seems clear, however, that there are certain things which every adult with a minimum of intelligence must necessarily have learned: the law of gravity … A person must know in addition a few elementary facts about himself: the amount of space he occupies, the principles of balance and leverage as applied to his own body, the effects of his weight, and, to the extent that it is reasonable to demand it of him, the limits of his own strength, as well as some elementary principles of health.

But beyond this, it seems clear that any individual who has led a normal existence will have learned much more: … the danger involved with explosives, in flammable liquids, electricity, moving machinery … and many other risks of life. Such an individual will not be excused when the individual denies knowledge of the risks.[16]

From this text, it is reasonably clear that those individuals who have gained majority possess sufficient life experience to appreciate height-related risks. Certainly, height related risks are as appreciable as the risks associated with explosives or electricity. Knowledge of these dangers is not correlated with the specialized exposure gained from building-related employment, but is within the reasonable person's contemplation and experience.

Indeed, the courts have long dismissed suits for injuries sustained at the hands of a common instrumentality. For example, in *O'Connor v. 1751 Broadway, Inc.*,[17] the Second Department dismissed plaintiff's negligence cause of action against building owners when plaintiff was injured while attempting to escape from being locked between two doors. When the lock on the front door of a commercial building failed, plaintiff, in an attempt to reach a transom, stood on a rack and grabbed a standpipe. Citing *Jackson*, the Appellate Division ruled that there was no connection between the failure of the lock on the front door and plaintiff's injuries. The *O'Connor* case is important since the Second Department cites the *Jackson* principles in a non-employee situation, when plaintiff had no particular knowledge of the harm-related instrumentality, in this case the door. Other cases are supportive.*18*

## Conclusion

Despite the case law distinction, the average person is aware of the height-related risks associated with elevators. In this day and age, it is difficult to imagine the advantage that Mr. Egan, as a carpenter, had over Mr. Humbach, a non-building employee, in evaluating the risk of departing from the stalled elevator cab. Both plaintiff and defense counsel should be wary of the knowledge of "specialized" risks that may be imputed to a plaintiff by virtue of his employment. Cases exist on both ends of the spectrum that may be relied upon by counsel to establish a heightened standard of responsibility, despite the fact that the employment-related instrument may be one of common experience.

1. 1999 N.Y. Lexis 3923 (Ct. App. 1999).
2. See, e.g., Mas v. Two Bridges Associates, et al., 75 N.Y.2d 680, 554 N.E. 1257, 555 N.Y.S.2d 669 (Ct. App. 1990).
3. Prosser and Keeton on Torts, 5th Ed., § 44, at 301.
4. Supra, note 1.
5. 201 N.Y. 76, 93 N.E. 1107 (Ct. App. 1911).
6. 1999 N.Y. Lexis 3923, at 3-4.
7. 235 A.D.2d 248, 652 N.Y.S.2d 33 (1st Dep't 1997).
8. Id.
9. See Chowdhury v. Economy Elevator, et al., New York County Supreme Court, Index No. 107338/94.
10. 255 A.D.2d 420, 686 N.Y.S.2d 54 (2d Dep't 1998).
11. The Humbach court found that it was "not clear how long the plaintiff waited for help before he pried open the elevator door." Id., at 421, 56. This uncertainty is the likely result of conflicting deposition testimony contained within the record on appeal. Although plaintiff testified that he waited fifteen minutes, another passenger in the same elevator testified that plaintiff waited at most two minutes, before opening the elevator doors.
12. Humbach v. Goldstein, et al., Westchester Supreme Court, Index No. 4781/93.
13. Supra, note 10, at 421, 56.
14. Lopez v. N.Y.C.H.A., 159 A.D.2d 236, 552 N.Y.S.2d 216 (1st Dep't 1990); Bowen v. N.Y.C.H.A., 210 A.D.2d 278, 620 N.Y.S.2d 290 (2d Dep't 1994).
15. It is black letter law that children are held to a lesser standard than adults. "Children … obviously cannot, in all instances, be held to the same standard as adults, because they often cannot in fact meet it, nor are they generally expected to." Prosser and Keeton on Torts, 5th Ed., § 32, at 179.
16. Prosser and Keeton on Torts, 5th Ed., § 32, at 183-84.
17. 1 A.D.2d 836, 148 N.Y.S.2d 494 (2d Dep't 1956).
18. See Mack v. City of New York, 98 A.D.2d 468, 470 N.Y.S.2d 664 (2d Dep't 1984); Guida v. 154 West 14th Street Co., Inc. 13 A.D.2d 695, 23 N.Y.S.2d (2d Dep't 1961) aff'd 11 N.Y. 2d 731 (1962); Richards v. N.Y., New Haven & Hartford R.R. Co., 250 F.2d 609 (2d Cir. 1957).