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Carriers - Personal Injuries - Escalators and Elevators - Escaltors are Not Common Carriers in Illinois

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DISCUSSION OF RECENT DECISIONS

CARRIERS—PERSONAL INJURIES—ESCALATORS AND ELEVATORS—ESCALATORS ARE NOT COMMON CARRIERS IN ILLINOIS.—In the recent case of *Tolman v. Wieboldt Stores Inc.*, 38 Ill. 2d 510, 233 N.E.2d 33 (1968), the Illinois Supreme Court was called upon to decide whether or not the operator of an escalator was a common carrier.[1] The Supreme Court, by Justice Solfisburg, held that the operator of an escalator was not a common carrier and a passenger upon an escalator was no different from an ordinary business invitee.

On November 29, 1960, Mrs. Ida Tolman went shopping in Wieboldt's Department Store. As she was traveling from the basement to the first floor by means of an escalator, the heel of her shoe became wedged between the slats on the step. The spaces between the wooden slats were from three quarters of an inch to one inch wide and about an inch deep. Upon nearing the top of the escalator, Mrs. Tolman, realizing her shoe was stuck, gave her foot a violent jerk to loosen it. Unfortunately, she lost her balance and fell backward, sustaining severe injuries.

Mrs. Tolman brought suit in the Circuit Court of Cook County and recovered a $10,000 judgment, after a jury verdict in her favor. The defendant made several post trial motions, among which was a motion for a new trial on the basis of the admission of certain interrogations. The court denied all motions. The defendant then appealed to the Appellate Court for the First District, contending there was no evidence that the escalator was unsafe or that the defendant knew or should have known that it was unsafe. The Appellate Court reversed, holding that there was no notice to the store owner of a dangerous condition and thus the verdict should have been directed for the defendant.[2]

Mrs. Tolman appealed to the Supreme Court contending that the defendant was a common carrier and therefore must bear the burden of showing non-negligence once an injury has occurred. The Supreme Court reversed in part the Appellate Court, and remanded the case with instructions to grant the defendant's motion for a new trial. The Supreme Court although not agreeing that the plaintiff was on a common carrier held that she was owed a duty as a business invitee and further held that there was sufficient evidence to send the case to the jury and that the Appellate Court erred in entering judgment for the defendant. The court ordered a new trial, however, because the trial court allowed improper evidence in the form of interrogatories concerning other accidents which occurred on the escalator before Wieboldt's became owners of the building.

1 In *Heffernan v. Mandel Bros. Inc.*, 297 Ill. App. 272 17 N.E.2d 523 (1st Dist. 1938), and *Mader v. Mandel Bros. Inc.*, 314 Ill. App. 263, 41 N.E.2d 327 (1st Dist. 1942), the Appellate Court of the First District had held escalators to be common carriers.

2 Tolman v. Wieboldt Stores Inc., 73 Ill. App. 2d 320, 219 N.E.2d 560 (1st Dist. 1966).

A common carrier is one who as a regular business transports persons or property from place to place and holds himself out as engaged in such business.[3] Presumably because the common carrier has undertaken the great responsibility of transporting persons as a business, the courts require him to exercise the utmost caution, although he does not become the insurer of his passenger's safety.[4] As a practical matter the courts charge a common carrier with the highest degree of care because he alone is in control of the instrumentality and the passengers are completely dependent on him.[5] The procedural effect of being a common carrier is to shift the burden of proof to the common carrier once an injury occurs. The common carrier must bear the burden of proving non-negligence or else become liable for the injury.

Traditionally, common carriers have been thought to be operators of buses, trains, planes and the like. However, in Illinois an elevator has been held to be a common carrier for the reason that a passenger is in a conveyance over which he has no control, and the operator has undertaken the great responsibility to transport customers from floor to floor. The operators of such elevators, upon grounds of public policy, are required to exercise the highest degree of care and diligence.[6]

The main Illinois decision illustrative of the principle that escalators are like elevators and thus common carriers is *Heffernan v. Mandel Bros. Inc.*,[7] wherein the court reasoned that in both an escalator and elevator a passenger is powerless to control the mechanism and unable to exercise any care for his own protection. The rule that the operator of an elevator is a common carrier has been held to apply to an escalator for three main reasons: the similarity of an elevator and escalator in function;[8] the fact that in both conveyances the passenger is powerless to control his own fate;[9] and, on a purely public policy basis, looking to the fact that all persons regardless of age, experience, or infirmity were invited to use an escalator.[10] Therefore, for safety reasons, the owners and operators were held to be common carriers.

Other courts—Colorado,[11] Michigan,[12] and Massachusetts[13]—have dis-

3 13 C.J.S. *Carriers* § 530 (1939).

4 Prosser, Torts § 34 (3d ed. 1964).

5 The obligations, restrictions, and liabilities with which a common carrier of passengers is charged are based primarily upon considerations of public policy and arise by implication of law. 14 Am. Jur. 2d Carriers § 736 (1964).

6 Springer v. Ford, 189 Ill. 430, 59 N.E. 953 (1901).

7 297 Ill. App. 272, 17 N.E.2d 523 (1st Dist. 1938).

8 McBride v. May Department Stores Co., 124 Ohio St. 264, 178 N.E. 12 (1938), *aff'g*, 38 Ohio App. 420, 177 N.E. 733 (1937).

9 Heffernan v. Mandel Bros. Inc., 297 Ill. App. 272, 17 N.E.2d 523 (1st Dist. 1938); Petrie v. Kaufman & Baer Co., 29 Pa. 211, 139 Atl. 878 (1927).

10 Vandagriff v. J.C. Penney Co., 228 Cal. App. 2d 579, 39 Cal. Rpt. 671 (1964).

11 Nettrour v. J.C. Penney, 146 Colo. 150, 360 P.2d 964 (1961).

12 Fuller v. Wurzburg Dry Good Co., 192 Mich. 477, 158 N.W. 94 (1926).

13 Conway v. Boston Elevated Ry. Co., 255 Mass. 571, 152 N.E. 94 (1926).

agreed that an escalator is like an elevator. These courts feel that the designation of escalators as common carriers is not warranted in light of the control which an escalator passenger can exert over himself while being transported. The standard of care charged to escalator owners in these cases is reasonable and ordinary care commensurate with the particular circumstances or that required toward any ordinary business invitee.

Obviously, escalators and elevators do not fit the generally given definition of a common carrier. They do not, as a regular business, undertake for hire to carry all persons, who may apply for passage, or hold themselves out as engaged in such business.[14] Also, a contract express or implied is necessary to the creation of the relationship of a carrier and passenger.[15] The escalator like an elevator is merely furnished to enable persons to shop more easily. They may aid in profit, but are hardly common carriers in any sense of the definition. Those courts that hold them to be common carriers are not concerned with how well they fit the definition. They are mainly concerned with a conveyance which transports human beings in large quantities and the voluntary assumption of great responsibilites. Only then, for public policy reasons, have escalators and elevators been charged with the common carrier standard of care notwithstanding their lack of conformity with the common carrier definition.

The court in the *Tolman* case was directly opposed to the rule that an escalator is like an elevator, thus agreeing with the cases from other jurisdictions. The court examined the traditional common carriers and the relationship of passengers to the conveyance. They reasoned that a passenger on an escalator is not powerless to control himself while being transported, as he would be while a passenger on a train, bus, elevator, or airplane. It was felt since escalators differed in this essential factor from common carriers they should not be charged with the common carrier standard of care. Thus, in substitution for the common carrier standard the court adopted the rule that a passenger on an escalator is no different than any other customer in a store and entitled to only that care which any other business invitee would be entitled.[16]

The *Tolman* case implies that the results would be the same under either the business invitee or the common carrier standard since the business invitee standard requires that the owner must exercise reasonable care under the circumstances. Herein the owner is in charge of a potentially dangerous piece of equipment. Thus reasonable care would have to be a high degree of care to protect customers from being injured. This implication may lead one to believe that the chances of holding the owner liable have not lessened due to the application of the business invitee standard,

14 13 C.J.S. *Carriers* § 530 (1939).

15 14 Am. Jur. 2d *Carriers* § 736 (1964).

16 At this point the court cited *Geraghty v. Burr Oak Lanes*, 5 Ill. 2d 153, 125 N.E.2d 47 (1955), which sets out the standard of care for business invitees as being reasonable care under all the circumstances.

since in both situations the owner is required to exercise a high degree of care toward his customers. However, this conclusion is not valid. The same result may be reached in a case such as *Tolman*. The court felt that the evidence was sufficient to show that Wieboldt's, in allowing the old outmoded escalator with its wide-spaced wooden slats to be used by its customers, was negligent. But what will be the result when a passenger on an escalator is injured by some unexplainable, undiscoverable malfunction?

The main difference between the business invitee standard and the common carrier standard lies in the burden of proof. Under the common carrier theory, the mere occurrence of an injury to one being transported by an escalator was sufficient to raise a prima facie case of negligence.[17] The establishing of the prima facie case causes the burden of proof to shift to the common carrier, and requires him to prove non-negligence. If the injury is caused by some unexplainable malfunction which the carrier himself cannot explain then he has not carried the burden and remains liable to the passenger. Under the business invitee standard the results are the opposite. The burden of proof always remains with the passenger and no prima facie case is raised with the mere occurrence of the accident. If the passenger cannot prove negligence he cannot recover. If the injury was caused by some unexplainable malfunction, it is unlikely that the defendant will be liable unless the plaintiff is successful under the doctrine of res ipsa loquitur. Res ipsa loquitur, however, does not cause the burden of proof to shift. It merely provides an inference of negligence from the fact that an injury occurred due to an instrumentality under the exclusive control of the defendant.[18]

If escalators are not considered common carriers and where active negligence cannot be shown the results will be typically in favor of the defendant. *Conway v. Boston Elevated Ry. Co.*[19] and *Fuller v. Wurzburg Dry Good Co.*[20] are two cases illustrating this result. Both cases are from jurisdictions in which the business invitee standard is used in regard to escalators.

In the *Conway* case, there was an unexplainable movement in the escalator hand rail which caused the plaintiff's hand to be caught. The court stated;

> While it is the duty of the defendant to exercise reasonable care under the circumstances to maintain and operate their escalators, an action based on negligence cannot be maintained unless it is proved affirmatively that the escalator is in defective condition due to the act or omission of the defendant.[21]

17 Christie v. Griggs, 2 Camp. 79, 170 Eng. Rpt. 1088 (1809); Galena and Chicago Union Ry. Co. v. Yarwood, 15 Ill. 468 (1854).
18 Prosser, Torts § 40 (3d ed. 1964).
19 255 Mass. 571, 152 N.E. 94 (1926).
20 192 Mich. 477, 158 N.W. 1026 (1916).
21 *Supra* note 19, at 571, 152 N.E. 94.

A similar conclusion was reached in the *Fuller* case where the plaintiff claimed she was thrown by a peculiar motion of the escalator. The court ruled that the mere showing of an injury was not enough to infer negligence. There must be an affirmative showing of negligence or circumstances from which it may be inferred. It is highly likely, if the language in *Tolman* is to be applied, the results of future cases will be much like those reached in the *Conway* and *Fuller* cases where no affirmative showing of negligence can be made.

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CONSTITUTIONAL LAW—PRIVILEGES OR IMMUNITIES AND CLASS LEGISLATION—WHETHER SECTION 29 OF THE LIMITATIONS ACT IS CONSTITUTIONAL.—In the recent case of *Skinner v. Anderson*, 38 Ill. 2d 455, 231 N.E.2d 588 (1967), the Supreme Court of Illinois was confronted with the problem of whether a 1963 act[1] of the legislature, which required that a suit arising out of a defective condition of an improvement to real estate be brought against the architect within four years after his performance, was constitutionally valid. The trial court found for the architect and the Illinois Supreme Court reversed and remanded, holding that the act was unconstitutional[2] as violative of Section 22 of Article IV[3] of the Illinois Constitution. The court stated

1 Ill. Rev. Stat. ch. 83, § 24F (1967), provides in its pertinent parts that an action to recover damages for an injury to property, real or personal, or for the injury to a person, or for bodily injury or wrongful death arising out of a defective and unsafe condition of an improvement to real estate,

> . . . [s]hall be brought against any person performing or finishing the design, planning, supervision of construction or construction of such improvement to real property, unless such cause of action shall have accrued within four years after the performance or furnishing of such services and construction . . . .

Three other states have enacted statutes of a similar nature. The statutes are Michigan Stat. Ann. 27A.5839 (1967), Nevada Rev. Stat. 11.205 (1957), and Baldwin's Ohio Rev. Code Ann., Title 2305.131 (1964). So far, the constitutionality of these statutes has not been contested.

2 The plaintiff appealed the trial court's decision on various grounds and the court said that Section 29 of the Limitations Act probably violated Section 13 of Article IV of the Illinois Constitution. Section 13 of Article IV states that every act shall have only one subject and that one subject has to be expressed in the title. If an act should contain any subject not expressed in the title, the act shall be void only as to that much not expressed in the title. Section 29 of the Limitations Act is entitled "An Act in regards to limitations," though the Section is not concerned with limitations in the ordinary sense. A statute of limitations normally governs the time within which a legal proceeding must be instituted after a cause of action occurs. Section 29 goes further than just limiting the time in which a suit may be brought; it also bars a cause of action before it occurs. The title of Section 29 does not mention that it bars a cause of action and thus under Section 13 of Article IV a subject not expressed in the title is void. The plaintiff had not argued this point and accordingly the court did not rule on it. What in fact is the effect of Section 29 is to possibly preclude an action before all elements of the tort become present. The damage may not occur until after the four year period.

3 Ill. Const. Act. IV, § 22, provides a list of subjects upon which there shall be no special legislation, none of which are relevant here. It then concludes with a general provision that "in all other cases where a general law may be applicable, no special law shall be enacted."