HEAVY LIFTING AHEAD

By || **David L. Kwass**

Designed to elevate workers to significant heights more safely and efficiently than scaffolding and ladders, aerial lifts—which include boom lifts, scissor lifts, and vertical mast lifts—first began to appear in the 1970s. Existing industry standards for aerial lifts place certain responsibilities for equipment familiarization and training on aerial lift dealers.[1] But next month, new industry standards go into effect that purport to place exclusive responsibility for training, familiarization, equipment selection, and site inspection on the customer who rents the machine.[2] Although the stated goal of the new standards is to foster safe operation, they cite no statistics or safety engineering studies suggesting that these changes will enhance worker safety. Rather, the new standards serve no purpose other than limiting the liability of construction equipment dealers by shifting the burden entirely to customers when people are injured by or when operating aerial lifts.

A "dealer" owns aerial lift equipment that it has purchased from a manufacturer and rents it out to a customer. That customer generally is a contractor in the building trades. Once the contractor takes possession of a rented lift, it becomes a "user" under the standards and has responsibility for assuring that its authorized "operator" is qualified to operate the lift safely and that the work area is safe for aerial lift operation. The operator should be trained to operate the lift safely for the assigned task in that work environment.

Before 1999, American National Standards Institute (ANSI) industry standards required construction equipment dealers to provide training when delivering aerial lifts to job sites.[3] The standards' stated goal, which differs very little from that of the new standards, was to prevent "accidents" and promote safe machine operation.[4] ANSI's aerial lift standards for 1999 and 2006 contained a nuanced compromise between the responsibilities of dealers and their customers for aerial lift operator training. Under those standards, dealers at delivery had to provide only "familiarization," which was defined as providing information to a qualified person.[5]

Specifically, the dealer was required to review the control and safety functions of the lift and point out where the operator

New standards for aerial lift dealers seek to curtail their accountability when users are injured. Learn about these changes and the impact on cases.

and safety manuals were located within the lift itself.[6] Dealers also had to offer comprehensive operator training[7]—that is, to let the customer know that it could send its employees for a daylong certification training. Certification training typically includes instruction on how to inspect, maintain, and operate the machine safely, as well as how to recognize hazards in the work site environment.[8]

But the industry did not adhere to this standard, commonly dropping off equipment with a key at job sites before any workers arrived. Dealers routinely asked customers to sign delivery tickets acknowledging—in tiny print—that they were competent and qualified to operate the machinery safely and assumed all risk. Significantly, the 1999 and 2006 standards tracked the common law doctrine of negligent entrustment.

Under *The Restatement (Second) of Torts* §390, a supplier of chattel may be liable in the event of an injury when it delivers chattel to one it knows or should know is likely to use it in a manner posing unreasonable risk because of the user's inexperience.[9] The 1999 and 2006 standards addressed this by requiring dealers to provide familiarization on delivery to a qualified person—that is, a trained aerial lift operator.[10]

If the dealer must provide familiarization on delivery, and familiarization, by definition, can only be given to a trained operator, then the only way for a dealer to fulfill these requirements is to confirm that the user being familiarized has undergone certification training.[11] While the aerial lift industry and its experts have routinely denied this in litigation, safety engineers for aerial lift manufacturers have acknowledged in depositions the impropriety of delivering aerial lifts to people the dealer knew were untrained.

Another critical dealer responsibility under the 1999 and 2006 standards concerned helping to ensure that the customer had the right tool for the job. Under §5.1 of the ANSI A92.3, A92.5, and A92.6 standards, dealers were required to consider "all data available regarding the parameters of intended use and expected environment."[12] The dealer needed to ask what the customer intended to use the lift for and in what environment the customer would be operating the lift. For example, if a customer intended to rent a narrow-aisle-style scissor lift—designed to be operated only on poured concrete—for use on grass, the dealer would know to recommend a different lift instead.[13]

Cases also have been based on a negligent undertaking (assumption of duty) theory under §324A of the restatement.[14] When a rental company's salespeople admit that they routinely ask customers about the job for which they are renting equipment and recommend a particular model as well suited for the task, then the rental company has undertaken a duty to provide the right tool for the job. When its delivery driver is conscientious about familiarizing a customer on the control and safety functions of a lift, the rental company has undertaken a duty to teach the customer about control functions, safety devices, and the hazards against which they protect, in a careful and reasonable way.

The New Regime

The new aerial lift standards replace and supersede the 2006 standards for boom lifts, scissor lifts, and vertical mast lifts.[15] Rather than being organized according to machine, as in the 2006 version, the new standards are organized by the topics of design, safe use, and training—and they apply equally to all three types of aerial lifts.[16]

The new standards purport to eliminate three safety duties that aerial lift dealers have had since 1980. First, dealers now have no responsibility to consider the "intended use and expected environment" of their customers. The new standards eliminate §5.1 and replace it with a section that states that dealers' duties are restricted to maintaining, inspecting, and repairing equipment and providing operator training to workers when requested.[17]

Second, dealers have no responsibility to provide familiarization by reviewing the control and safety functions of the aerial lift during delivery or to affirmatively offer operator certification training. Instead, familiarization and training are required only if requested,[18] meaning that sole responsibility for providing familiarization and training now rests with the customer.[19] Third, dealers have no responsibility to deliver only to certified operators—so the machine can be delivered to anyone, regardless of training and experience.[20]

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Going Forward

Bringing a claim against lift dealers based on assumption of a duty under §324A of the restatement will become significantly harder. By excluding previously recognized dealer duties relating to equipment selection and training, the new standards undermine the argument that dealers have assumed duties under §324A. Even under the existing standards, dealers insisted that they have no duties with regard to equipment selection or delivering lifts to qualified operators only. The new standards appear designed to insulate dealers from any suggestion that they have duties to help customers choose the right equipment or to ensure the customer's operators are properly trained.

When counseling clients and deciding whether to pursue a claim, you must consider three criteria, not all of which are specific to aerial lift cases.

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First, how badly injured was the client, and how will the client be as a witness? For example, was the client conscientious about operating the lift safely to the extent that he or she knew how to do so?

Second, was the client injured or killed by one of the major, long-recognized hazards of aerial lift operation: tip-over, electrical contact, or crush? Bringing claims beyond these recognized hazards is a litigation risk. Recognized hazards lend themselves to a stronger negligence claim regardless of the standards because the dealer can't claim it didn't know or shouldn't have known about that risk.

Finally, is there a theory of liability outside of a dealer's failure to familiarize on control functions and safety features? Unless the dealer rented the machine in a condition that was not "rental ready" or knew the equipment was inappropriate for the customer's application, think twice before pursuing a negligence claim against the dealer.

In the end, the best option is to argue under the restatement that a duty to the plaintiff exists and that the equipment was negligently entrusted pursuant to §390. Both arguments are supported by decades of industry literature recognizing dealer responsibilities with regard to equipment selection and training.[21] By eliminating the requirement that delivery be made only to a qualified person, it is now clear that under the new standards, dealers may deliver equipment to anyone, regardless of competence.

This position, however, places the new standard on a collision course with the accepted common law of negligent entrustment. According to §390 of the restatement, it is unacceptable to provide a potentially hazardous piece of equipment to someone whom the provider knows, or through the exercise of reasonable care should know, lacks the competence to operate the equipment without significant risk to the operator or others. The industry's efforts to carve itself an exception to the common law should not be accepted. The new aerial lift standards must bend to the common law. Aerial lift equipment in the hands of untrained workers fits squarely in the category of a dangerous instrumentality given to one the provider should know is incompetent to operate it safely.

A Sliver of Silver Lining

The new standards do not bring all bad news, however. After decades of aerial lift industry denials about the unique danger of the operator entrapment hazard (when the operator is pinned with his or her torso pressed against the platform controls and his or her back against an overhead obstruction), the new standard expressly mandates active anti-entrapment devices.[22] It requires manufacturers to adopt designs that will prevent "sustained involuntary operation" and to ensure that the machine will not move in the direction the operator is being pinned.[23] Since anti-entrapment technology has been on the market since 2009, this is long overdue.

In litigation, corporate designees for boom lift manufacturers and industry experts have long claimed that operator entrapment is exceedingly rare and caused exclusively by operator error. The only explanation for this change in the new standard is the decades-long pressure applied by litigation against manufacturers and dealers for failing to incorporate this technology as standard equipment until recently.

The new aerial lift standards take a definite step backward in recognizing workers' rights to hold accountable construction equipment dealers who turn a blind eye to safety. No statistics or safety engineering studies show or even suggest that the new standards will enhance worker safety. What's worse is the failure by the industry leaders who wrote the standards to require the collection of data on injuries and near-misses. If the new standards are intended to increase worker safety, it would be an obvious step to require all stakeholders to report, track, and analyze this data to ensure the new regime is functioning adequately. Unfortunately, the dealer industry is motivated by limiting its liability, and it's up to plaintiff attorneys to continue fighting to protect workers.

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Notes

1. *See* Am. Nat'l Stands. Inst., American National Standard for Manually Propelled Elevating Aerial Platforms, ANSI/SAIA A92.3-2006 (revised Jan. 21, 2014); Am. Nat'l Stands. Inst., American National Standard—Boom-Supported Elevating Work Platforms, ANSI/SAIA A92.5-2006 (revised Jan. 21, 2014); Am. Nat'l Stands. Inst., American National Standard for Self-Propelled Elevating Work Platforms, ANSI/SAIA A92.6-2006, (revised Jan. 21, 2014).
2. *See* Am. Nat'l Stands. Inst., Design, Calculations, Safety Requirements and Test Methods for Mobile Elevating Work Platforms, ANSI/SAIA A92.20-2018 (Nov. 20, 2018); Am. Nat'l Stands. Inst., Safe Use of Mobile Elevating Work Platforms, ANSI/SAIA A92.22-2018 (Nov. 20, 2018); Am. Nat'l Stands. Inst., Training Requirements for the Use, Operation, Inspection, Testing and Maintenance of Mobile Elevating Work Platforms, ANSI/SAIA A92.24-2018 (Nov. 20, 2018).
3. *See, e.g.*, Am. Nat'l Stands. Inst., American National Standard for Self-Propelled Elevating Work Platforms, ANSI/SIA A92.6-1999 (July 1, 1999), at §§5.7–5.8.
4. *Compare* ANSI/SIA A92.6-1999 at §1.2 *with* ANSI/SAIA A92.22-2018 at §1.2.
5. *See, e.g.*, ANSI/SAIA A92.6-2006, at §3, §5.8 (§3 defines "[f]amiliarization" as "[p]roviding information regarding the control functions and safety devices for the aerial platform(s) to a qualified person" and "[q]ualified person" as "[o]ne who, by