Vicarious Liability is a Reality

Jury Verdict Upheld Against C.H. Robinson

Article courtesy of TIA (Transportation Intermediaries Association) September 28, 2011

On September 28, the Illinois Supreme Court denied a petition by C.H. Robinson to appeal the Illinois Court of Appeals decision upholding a jury verdict against Robinson for $23,000,000 for the death of two persons and the serious injury to a third on the highway, arising out of a motor vehicle accident where the carrier was hired by Robinson.

This case is now the law of the State of Illinois, but the decision will be cited as precedent to support claims of liability against brokers in catastrophic injury and death cases on the theory that the driver was the "agent" of the broker. Now, in order to establish liability, plaintiff's attorneys need to prove the broker exercised too much "control" over the driver, thus establishing an "agency" relationship and therefore vicarious liability.

The burden of proof for such a claim is easier than proving "negligent hiring" which requires, establishing duty, breach of duty, proximate cause and damages. (The case can be read in full by visiting www.google.com and searching for the term 'Sperl v C.H. Robinson'.)

Analysis of Sperl et.al. v. C.H. Robinson

The Logistics Journal *June 2011*
By Ronald H. Usem, Esq. Huffman, Usem, Saboe, Crawford& Greenberg, PA

In the State of Illinois District Court case, Sperl et.al. v. C.H. Robinson, Illinois Court of Appeals, Third Judicial District, Case No. 3-09-0830 which was decided on April 30, 2011, C.H. Robinson (CHR or Robinson) was subjected to a $23 million jury verdict for the death of two persons and the serious injury of one other person arising out of a motor vehicle accident involving a carrier being hired by Robinson. Robinson was found liable by the jury, because they determined that Robinson "controlled" the driver which made the Dragonfly Express driver Robinson's "agent" and vicariously liable under Illinois State law. The district court jury verdict was upheld in the Illinois Court of Appeals. (Underlining is writer's emphasis.) This case, like "Schramm" (Schrammv. Foster, 341 F. Supp. 2d 536 - Dist. Court, D. Maryland 2004), is likely to have far reaching effects beyond the borders of Illinois on the shipping and intermediary transportation industry. This case now adds an additional burden and dilemma to those firms by upholding broker liability based on facts which according to the jury constituted "control" of the driver by the broker. The end result is that even if a shipper, broker or 3PL did everything "right", it could still be held liable for asserting too much control over a driver.

In this case, C.H. Robinson, and the motor carrier, Dragonfly Express, entered into a standard Broker-Carrier Agreement. The Court of Appeals' opinion quoted the independent contractor clause contained in the contract only in part as follows:

"The parties understand and agree that the relationship of carrier to Robinson (CHR) hereunder is solely that of an independent contractor, and that carrier shall and does employ, retain or lease on its own behalf all persons' operating motor vehicles transporting commodities under this contract."

What the Court did not quote, which is part of the same paragraph and is the remainder of that sentence which reads as follows:

"...and such persons are not employees or agents of Robinson or its customers. It is further understood and agreed that all drivers of motor vehicles and persons employed in connection with the transportation of commodities under this contract are subject to the direction, control and supervision of the carrier and not of Robinson or its customers...."

The Court did not explain why this critical part of the contract language was ignored, and commented that the contract was only one factor among all others to be considered. Thus, the independent contractor contract language that had allowed CHR to avoid the liability of the carrier and driver in connection with this issue in the past was not enough in this case to help them.

At the heart of the Appellate Court's decision was the CHR "Load Confirmation Sheet" (LCS) which contained "Special Instructions." The LCS stated the following: "The driver must call Troy Pleasance for dispatch."

Under the subheading, Driver's Special Instructions, it listed the following requirements:

1) Driver must make check calls daily by no later than 10:00 a.m. CST daily, or $50 will be deducted from the rate.
2) Driver must verify package count and/or pallet count being loaded on the truck.
3) Driver may incur a fine of $500 for being a full day late without any proof of breakdown.
4) Driver may incur a fine of $250 for being late for an appointment time.
5) Driver must stay in constant communication with me (Pleasance) throughout the entire load.
6) Driver may incur a fine if he does not call for any of the following reasons:
   a) Waiting longer than two hours for product;
   b) (Blank).
7) Driver must call after each pick-up and verify that he has loaded.
8) Failure to notify fine: If driver has a 7:00 a.m. appointment for that day of delivery and has a problem that delays him to make on-time delivery and we do not receive a phone call until after or at the time of delivery appointment:
   a) The carrier will be fined $250;
   b) The carrier could also be responsible to cover the lost sales and cost to cover the customer product for that day.
9) Driver must pulp all products being loaded on the truck. If pulp temperature is plus or minus two degrees from the temperature on the dispatch sheet, driver must call their C.H. Robinson representative ASAP.
10) All drivers must check call the day before delivery no matter what day it is. If the driver is more than 700 miles out at or before 10:00 CST, driver must check call again at 4:00 p.m. Any driver 700 miles out after 10:00 a.m. CST, must check call again at 4:00 p.m. CST, and again at 10:00 p.m. CST the...before delivery.

"...Most importantly, the driver must stay in constant communication with the central product and/ or the night crew service."

In upholding the jury's verdict, the Illinois Court of Appeals, citing Illinois law, stated the well-recognized proposition that the cardinal consideration s the *right to control the manner of work performance* regardless of whether the right is actually exercised. According to the Court, the other factors to consider are: 1) the right to discharge; 2) the method of payment; 3) the provision of necessary tools, materials and equipment; 4) whether taxes are deducted from the payment; and 5) level of skill required. According to this Court,

> "We find that the jury's decision was not against the manifest weight of the evidence. First, CHR controlled the manner of Henry's work performance. Henry testified that she contacted Pleasance and CHR and asked for a load. CHR required her to have a refrigerated trailer of specified length. Henry accepted a load of potatoes that CHR had purchased in Idaho for delivery to its warehouse in Bolingbrook. The LCS dictated special instructions concerning the load. Henry did not see a copy of the LCS for the load of potatoes; however, she testified that she was familiar with the LCS requirements based on previous deliveries she had made for CHR. The special instructions required her to pick up a load at a specified time, make daily check calls, and stay in constant communication with Pleasance and other CHR dispatchers. She was instructed to notify CHR if she had an accident. She was also required to continuously measure the temperature of the load during her trip. If the load did not register a certain temperature, the LCS required her to call CHR immediately. Henry testified that the schedule imposed by CHR dictated her method of delivery and created pressure on her as a driver to get to her destination. Henry stated that if she followed federal regulations, she would be late delivering her load to the Bolingbrook warehouse; Pleasance agreed with that assessment. These extensive requirements, coupled with Henry's fine-based compliance, directed Henry's conduct during the entire transportation process and support the finding that CHR had the right to control the manner in which Henry performed her job."

According to the Court,

> "Another factor of 'great significance' is the nature of the work performed in relation to the general business of the Defendant (citation). Here Henry's services are closely aligned with CHR's business. CHR is in the business of transportation logistics handing the means and methods of hauling freight for its customers. CHR's business necessarily requires the service of semi-tractor drivers. The nature of Henry's work is hauling freight for customers from one location to another. The work Henry performs is not unique; it is directly related to, if not the same as, general transportation business conducted by CHR. In this case, the second factor weighs in favor of an agency relationship."

The logic of this statement is left for the reader to ponder. If this line of reasoning was followed to its illogical conclusion, then all brokers would be subject to the same liability as motor carriers. Such a result would mean that state common law would "preempt" federal statutes and federal common law. Interestingly, no federal preempt argument appears to have been made by CHR. According to the Court, other factors *supporting* the jury's verdict were: CHR controlled the method of payment; Henry called Pleasance and requested a load; once Henry accepted the load, she was dispatched by Robinson, not Dragonfly; Robinson paid her directly by depositing the negotiated fee into her bank account; CHR provided the materials for delivery. How these "factors" constitute "control" over this manner in which the *driver* operated on the highway is a mystery which can only be understood in Robinson's position as a "deep pocket." The Court stated, "CHR Special Instructions included the potential for multiple fines and forced Henry to violate federal regulations in order to avoid them. These facts support the *inference* that CHR controlled the details of Henry's *operations, schedule and compensation*."

There is no analysis of the facts or law in this case which brings understanding or comprehension to the decision except that CHR was a "deep pocket." There is nothing in the opinion that suggests the slightest comprehension or understanding of the standard operating procedures common and necessary in the shipping industry for the delivery of freight, and in this instance, temperature-controlled freight. Load Transportation Intermediaries Association 7 The Logistics Journal confirmations for temperature-controlled shipments commonly include numerous shipper specifications even broader in scope than those found in this case, which are designed to protect the particular commodities of freight being transported from damage. The Court makes no distinction between "specifications" and "control."

We can only speculate on whether the result would have been different if the "Special Instructions" which related to fines were absent. Taken to its illogical extreme, this decision would seem to dictate that shipper, broker, or third-party logistics companies should never have direct communications with carrier's drivers, should never dispatch them, and should not convey shipper's transportation instructions and specifications to a driver! If that were true, time critical efficiencies now common in the $162-billion third-party logistics industry would be virtually destroyed.

If there are any "take aways" to learn from in this case for shippers, brokers, and other third-party logistics companies, it may be that the many "fines" listed in the LCS were extensive; requiring "constant communication" appears to be burdensome (and certainly not practical); and payment for services should go to the carrier entity and not the driver. Perhaps these elements should be avoided. However, taken singly or in combination, they do not necessarily equate to "control" or "agency" and, as the Court stated, all factors of the relationship are to be considered.

This case must be notable because of the intense joy it must bring or will bring to Plaintiff's attorneys who, instead of having to undertake the more difficult task of proving "negligence" (duty, breach of duty, proximate cause, and damages), need only prove the much more "fuzzy" and "squishy" elements of "control" in order to establish an agency relationship and, therefore, vicarious liability. That being said, perhaps the drama of this case is not finished. It has been appealed to the State Supreme Court, # 112218. Whether the case will be heard is discretionary with the court and that decision has not yet been made.

(NOTE to readers: Space limitations restrict more comprehensive discussion of this case. For more complete analysis see www.transportationatty. com and click on "News.")

Ronald H. Usem, Esq. Huffman, Usem, Saboe, Crawford & Greenberg, PA may be contacted at (763) 545-2720 or by e-mail at ron@usems.com