Transportation Tort Liability Travels Up the Supply Chain

Daniel C. Sullivan & Matthew P. Barrette*

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I. Introduction

"In the last analysis, this is a case in which the law may simply have to catch up with an obligation that Robinson has voluntarily assumed, presumably in response to the demands of the market." This pithy and portentous observation by United States District Judge J. Frederick Motz in the seminal case *Schramm v. Foster*,[1] fairly states the present exposures facing parties (i.e. shippers, brokers, and third party logistics companies)

* Mr. Sullivan is a principal in the law firm of Sullivan Hincks & Conway in Oak Brook, Illinois. Mr. Barrette is an associate with the same firm who collaborated with Mr. Sullivan on this article.

1. Schramm v. Foster, 341 F. Supp. 2d 536 (D. Md. 2004). *See also* Schramm v. Foster, 2004 U.S. Dist. LEXIS 16990 (D. Md. 2004).

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as they establish a new and evolving economic presence in the supply chain. In short, how does a company that provides logistics services in self-defined contract relationships properly apprehend tort liability that occurs downstream or upstream in the supply chain?

II. Historical Treatment of Tort Liability

Historically, there is a paucity of case law in the transportation arena dealing with tort liability that extends beyond those parties immediate to the event proximately causing a plaintiff's injury. Traditionally, where a motor carrier's driver, operating a tractor-trailer combination, injured a pedestrian or the occupants of an automobile, only the motor carrier and the driver were sued.[2]

Under previous practice, the liability extended no further than the time honored precedents dealing with master-servant relationships. These precedents evolved into the concept identified as *respondeat superior* that extended liability beyond the driver causing injury only to the carrier employer under a duty of *vicarious* liability. In short, an economic relationship of an employer deriving an economic benefit from an employee allowed a determination that the employer controlled the employee and because of this, there was a responsibility for the actions of the employee.[3] An obvious concomitant economic consideration for even suing the employer was to reach the worth of the employer. Stated crudely, the employer usually has deeper pockets than the employee and the award of money is the objective manifestation of justice for the injured party at law.

In the context of interstate motor carrier transportation of property, the Interstate Commerce Act, passed pursuant to the Commerce Clause of the United States Constitution,[4] essentially preempted judicial imagination by state court judges and state regulatory bodies, thus limiting the extension of a duty sounding in tort to the immediate actor and the employer.[5] Prior to deregulation, the ability to jump beyond the immediate

2. This is so well settled that Judge Motz had little difficulty resolving that issue by summary judgment in the separate opinion contained in *Schramm*, 2004 U.S. Dist LEXIS 16990.

3. *Cf.* Burlington Indus, Inc. v. Ellereth, 524 U.S. 742 (1998).

4. U.S. Const. art. I, § 8, cl. 3.

5. The Interstate Commerce Act (ICA) was passed in 1887 and led to a huge body of case law that pre-empts action contrary to, or infringing upon, the ICA and regulations of administrative agencies implementing the ICA. *Cf.* 49 U.S.C. §§ 10501-10502, 14501 (2005); Adams Express Co. v. Croninger, 226 U.S. 491 (1913); I.C.C. v. Tex., 499 U.S. 450 (1987). *But see* R. Mayer of Atlanta, Inc. v. City of Atlanta, 158 F.3d 538 (11th Cir. 1998), *overruled by* City of Columbus v. Ours Garage & Wrecker Serv., 536 U.S. 424 (2002) (Supreme Court overruled decision striking down municipal ordinance regulating towing companies which was passed pursuant to the safety regulation exception to federal preemption under 49 U.S.C. § 14501(c)(1)).

master and servant relationship was limited to regulatory-based efforts such as those manifested by the placard liability cases.

These placard liability cases arose out of the regulations of a federal administrative agency that allowed a motor carrier to use "independent contractor" owners of their own vehicles.[6] However, any motor carrier using independent contractor/owner operators must operate the owner-operator's vehicles pursuant to the safety regulations and identify them as the motor carrier's vehicles.[7] This identification of the vehicle as that of the motor carrier led to repeated instances of litigation that sought recovery from motor carriers when an independent contractor/owner operator failed to remove the placard and an act injuring another party sounding in tort occurred.[8] Federal Regulations imposed a duty on the part of the motor carrier to remove the placard when the independent contractor left the motor carrier's service. In these cases, the injured party could sue the motor carrier seeking recourse against the motor carrier's assets and insurance[9] on the basis that the motor carrier was still acting as the master as a matter of law. But, as imaginative as the plaintiffs' bar might have been, there was the essential relationship of master-servant between the driver causing the injury and the party once removed (generally the motor carrier) before the law would impose a duty on the master resulting in liability and money damages.

This discussion of master and servant applies the same principles when the terms principal and agent are used. Under these principles, a duty may be imposed upon a non-actor for the actions of the actor where the non-actor was the "principal" of the agent.[10] Historically, the case

6. *See* the Truth-In-Leasing Regulations, 49 C.F.R. § 376 (2007). This area can be developed by recourse to a plethora of case law. Whether an owner operator/independent contractor is really independent represents an issue fascinating the Internal Revenue Service, the labor law bar, every state court system, and every economic relationship where a liability is sought to be extended beyond the independent contractor to another entity.

7. *See* 49 C.F.R. §376.11 (2007) for the placard obligation and 49 C.F.R. §390.21 (2007) for the placarding requirements.

8. *Cf.* Kreider Truck Serv., Inc. v. Augustine, 394 N.E.2d 1179 (Ill. 1979); Cox v. Bond Transp., Inc., 249 A.2d 579 (N.J. 1968); Mellon Nat'l Bank & Trust Co. v. Sophie Lines, Inc., 289 F.2d 473 (3rd Cir. 1961); Rodriguez v. Ager, 705 F.2d 1229 (10th Cir. 1983). Compare these cases to the evolution of placard liability in Jackson v. O'Shields, 101 F.3d 1083 (5th Cir. 1996) and Graham v. Malone Freight Lines, Inc., 948 F. Supp. 1124 (D. Mass. 1996).

9. Motor carriers must maintain liability insurance as a statutory and regulatory requirement. *See* 49 U.S.C. §13906 (2005) and 49 C.F.R. § 387 (2005). This includes a mandatory prescribed endorsement that maintains coverage until removed with notice to the Federal Motor Carrier Safety Administration.

10. Of course the law of agency is broader than the law of master-servant. *See* Leadership Council for Metro Open Communities v. Red Carpet Contempo Realty, Inc., 1984 U.S. Dist. LEXIS 23736, *3 (N.D. Ill. 1984) (citing RESTATEMENT (SECOND) OF AGENCY § 2 (1958)). The authors believe the terms roughly synonymous when considering their use for cases sounding in tort. For example, an obligation or duty for the actions of an agent is assumed by the principal

law in transportation appears to apply the concept for finding a duty that arises in cases sounding in tort where there is a direct relationship; that is, the liability extends to a duty imposed upon an entity once removed from the actor causing the injury.

III. Deregulation and Its Influence

The statutory and regulatory foundations for this structure regarding tort liability have now been replaced by deregulation of the economic structure of surface transportation; particularly motor carrier transportation in the United States. Before 1979, the basic economic structure of transportation principally included shippers and carriers. This was the case for a number of historical reasons but almost all of them were grounded on the bedrock of a public utility type of regulation that had existed since 1887.

In 1979, the Interstate Commerce Commission unlocked several limitations on the actions and conduct of motor carrier brokers.[11] Motor carrier brokers were allowed to contract with motor carriers and motor carriers were allowed to become brokers.

In 1980, Congress substantially deregulated rail and motor transportation[12] which led to the deregulation of railroad intermodal service.[13] This deregulation was important as it allowed exempt freight forwarders of rail service (such as shippers' agents[14]), steamship lines and other entities to broaden the economic nature of their service offerings. In fact, over the next few years these shippers' agents and other exempt forwarders became known as Intermodal Marketing Companies (IMC) or Logistics Service Providers (LSP).

The congressional action in 1980 precipitated other statutes in 1982, 1986, 1993, and 1994 that temporarily deregulated freight forwarders,

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by the fact of the relationship if the agent is acting at least within the apparent scope of authority given by the principal. *See* Gilbert v. Sycamore Mun. Hosp., 622 N.E.2d 788 (Ill. 1993); Jackson Rapid Delivery Serv., Inc. v. Thomson Consumer Electronics, Inc., 210 F. Supp. 2d 949, 954 (N.D. Ill. 2001).

11. *Cf.* Dixie Midwest, Extension General Commodities, 132 M.C.C. 794 (I.C.C. 1982), where the Interstate Commerce Commission (I.C.C.) allowed motor carrier brokers to support carriers for contract authority where the broker had "working control" of the transportation. One can wonder if the I.C.C. had any idea that control of transportation by a broker could be found as a nexus for allegations of tort liability.

12. *See* Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified in scattered sections of 49 U.S.C.); Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (codified in scattered sections of 49 U.S.C.).

13. *See* 49 U.S.C.A. § 10502; Improvement of TOFC/COFC Regulation, 364 I.C.C. 731, *aff'd*, American Trucking Assns., Inc. v. I.C.C., 656 F.2d 1115 (5th Cir. 1981); *Ex parte* 230, Substituted Service-Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service), 322 I.C.C. 301, 304-305, 309-312 (1964).

14. *See* 49 U.S.C. § 10562 (repealed 1986) for definitions.

eliminated the filed rate doctrine for motor carriers of general property, and essentially deregulated intrastate commerce.[15] In 1995, Congress decided to eliminate the Interstate Commerce Commission altogether and opened the door to an economic environment that led to the *Schramm* decision.[16]

The essential aspect of the deregulated market is that participating entities can be and can engage in anything they can economically prove will work. A motor carrier can also be a motor carrier broker, run a warehouse, act as an IMC, develop and operate intellectual property to be utilized for supply chain management, and participate in every aspect of the diverse intermodal service offerings that exist. The point of this observation is that an entity participating in a supply chain will not have a presumed structure but only the structure shown by the unique facts that exist at the time of every event of injury that sounds in tort. In the deregulated environment, the resultant duties that arise with the injury depend upon the facts that plaintiff's counsel finds and believes can apply to an entity.

Therefore, the traditional structure or transportation role of service providers is disappearing or has disappeared. The transportation market between an asset-based direct transportation provider and the beneficial owner of goods who wants to sell them to an ultimate consumer is now very fluid. Intermediaries have generally interjected themselves into this historically simple economic relationship. The parties to each such comprehensive transportation transaction are no longer the consignor, carrier, and consignee where the economic relationships were defined by a single bill of lading. The market is now known as the supply chain and each movement in the supply chain can have a number of different actors functioning in different interlocking capacities depending upon perceived economic benefits that will accrue to each actor. This dynamic unsettles the body of law applicable to tort law in at least the domestic surface transportation area. Judge Motz's observation quoted at the beginning of this article appears well grounded.

This indicates that any discussion of the possibility of an extension of the parameters of tort liability is necessarily prophetic in nature and therefore speculative. However, the *Schramm* case shows there is no

15. Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (codified in scattered sections of 49 U.S.C.); Surface Freight Forwarder Deregulation Act of 1986, Pub. L. No. 99-521, 100 Stat. 2993 (codified in sections of 49 U.S.C.); Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (codified in scattered sections of 49 U.S.C.); Trucking Industry Regulatory Reform Act of 1994, Pub. L. No. 103-311, 108 Stat. 1683 (codified in scattered sections of 49 U.S.C.); Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569 (codified in scattered sections of 49 U.S.C.).

16. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (codified in Subtitle IV of 49 U.S.C.).

speculation in a pronouncement that the plaintiffs' bar will seek to extend duties lying in tort to third party participants in the supply chain who are variously known as "Third Party Logistics" companies, IMC's, LSP's, brokers, shippers' agents, stack train operators, transportation intermediaries, or by other names, but including entities at least once removed from the actor or the direct master/principal of the actor causing the injury.[17]

IV. CURRENT SOURCES OF LIABILITY

In answering the basic question of how, or even if, tort liability can extend up and down the supply chain beyond the actor causing the injury, there must be at least a general appreciation of what a tort represents. Most generally, a tort is a wrong and a tortious act is a wrongful act.[18] In order to find a tort there must be a duty at law extending from the defendant to the plaintiff proximately causing a resulting injury that is distinct from nonperformance of a contract.[19] Stated differently, if the entire duty is imposed by contract then a violation of the duty (a breach) sounds solely in contract and it is not a tort.[20] A duty sounding in tort is premised upon a wrong and a resulting injury to the person, a person's property, or a person's reputation.[21]

In examining the scope of torts that apply to the supply chain there must be a determination of the scope of the duties. In this examination it is important to understand that the application of liability for violation of a duty does not depend upon the concept of privity.[22] However, in cer-

17. Henceforth referred to generically as 3PLs.

18. *See* Hayes v. Mass. Mut. Life Ins. Co., 18 N.E. 322 (Ill. 1888); Vanacek v. St. Louis Public Serv. Co., 358 S.W.2d 808 (Mo. 1962). *See also* Breslin v. Brainard, 2003 U.S. Dist. LEXIS 19609, *43 (E.D. Pa. 2003) (defining "act of tortious nature" contained in Civil RICO statute, 18 U.S.C. § 1962, as "an act that is independently wrongful"); Maguire v. Misomex N. Am., 1998 U.S. Dist. LEXIS 9687, *5 (N.D. Ill. 1998) (defining the term "wrongful acts" as inclusive of acts that are tortious).

19. *Cf.* U.S.v. Palmer, 128 U.S. 262 (1888); Moorman Mfg. Co. v. Nat'l Tank Co., 435 N.E.2d 443 (Ill. 1982); Sumpter v. Holland Realty, Inc., 93 P.3d 680 (Idaho 2004).

20. State *ex. rel.* Cummins Mo.Diesel Sales Corp. v. Eversole, 332 S.W.2d 53 (Ct. App. Mo. 1960). *See also* Kaloti Enters., Inc. v. Kellogg Sales Co., 699 N.W.2d 205 (Wis. 2005) (in situations involving fraud claims relating to misrepresentations about the quality of goods, the plaintiff is limited to contract remedies).

21. This right arises constitutionally. *See, e.g.*, Ill. CONST. art. I, § 12 ("Right to Remedy and Justice. Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely and promptly."); Ohio CONST. art. I, § 16 ("All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay").

22. Rozny v. Marnul, 250 N.E.2d 656 (Ill. 1969); Wright v. Creative Corp., 498 P.2d 1179 (Colo. Ct. App. 1972) ("concept of TORT DUTY therefore is not restricted by that of contractual PRIVITY").

tain limited cases, even if an obligation is assumed by contract, a duty may appear that gives rise to liability not because of the failure to perform a contract obligation but because of the breach of a duty imposed by law.[23]

The blurring of this dichotomy of contract and tort led to an interesting case recently tried by the authors to a jury in Kane County, Illinois.[24] The jury was presented with a breach of an oral contract by a stack train operator to a retail IMC.[25] Specifically, the breach alleged was of an oral covenant not to back solicit the customer of the IMC who was shipping large volumes of coil steel to the west coast.[26] These shipments of steel coil allowed the stack train operator to reposition large numbers of its parent company's twenty foot containers to the west coast for transportation by the parent company's steamships back to the far east.[27] The breach of the oral contract resulted in a limited award of $60,000 for a limited contract term contemplated by the oral contract.[28] However, the second count in this case sounded in tort based upon an unlawful interference with an expectancy.[29] On that count, grounded in duties not to use deception and not to back solicit, the jury awarded $665,000.[30] Besides establishing the scope of the tort by the underlying contract duties, this case extended liability up the supply chain to the steamship line, the parent company of the stack train operator, because of a determination that the stack train operator was the alter ego of the ocean carrier.[31]

This case raises issues that are concerning to the defense bar and a delight the plaintiffs' bar. This is especially the case where there are catastrophic damages and large well-funded 3PLs or other well-funded parties who are a part of the supply chain and involved with the tort. When the injury occurs, the plaintiff will attempt to find a nexus between the damage or injury and the duty imposed by law in order to extend the

23. Woodward v. Miller, 46 S.E. 847 (Ga. 1904); Peters v. Johnson, 41 S.E. 190 (W. Va. 1902); Lowery v. Kan. City, 85 S.W.2d 104 (Mo. 1935).

24. Hermann Assocs. Transp. Reps., Inc. v. Express Sys. Intermodal, Inc., No. 02 LK 327 (Ill. Dist. Ct. App. filed Jul. 15, 2004).

25. *Id.* at 2; Verdict Form – Count I: Breach of Contract. Hermann Assoc. Transp. Representatives, Inc. v. Express Sys. Intermodal, Inc., No. 02 L 327 (Ill. App. Ct. Jul. 15, 2004).

26. *Hermann Assoc. Transp. Representatives, Inc.*, at 1 & 3 (Ill. App. Ct. Jul. 15, 2004).

27. *Id.* at 3.

28. Verdict Form – Count I: Breach of Contract. Hermann Assoc. Transp. Representatives, Inc. v. Express Sys. Intermodal, Inc., No. 02 L 327.

29. *Id.; See generally* Chase v. Clinton County, 217 N.W. 565, 567 (Mich. 1928) (discussing the principle that "every contract is a common-law duty to perform the thing agreed to be done with care, skill, reasonable expediency, and faithfulness, and a negligent failure to observe any of these conditions is a tort").

30. Verdict Form. Hermann Assoc. Transp. Representatives, Inc. v. Express Sys. Intermodal, Inc., No. 02 L 327 (Ill. App. Ct. Jul. 15, 2004).

31. *Hermann*, at 1-2, 10-12 (Ill. App. Ct. Jul. 15, 2004).

liability to an entity with resources to accommodate the amount of damage that exists. With personal injuries, this nexus is usually the shipment. When damage occurs, the shipment being transported provides a large arcane body of law establishing the duties of the entities involved with the shipment. The body of law that ties the injury to the supply chain is the law peculiar to transportation. The scope of the duties that arise out of a shipment comprises duties attendant to the bailment of the goods that make up the shipment and the implied or actual contracts that exist in relationship to those bailment duties. Of course, historically the bailment duties on the transportation of a shipment are found in the bill of lading.[32] Where regulated freight is being shipped, this bill of lading is deemed issued even if the carrier involved with the shipment fails to issue it.[33]

When a carrier is transporting a shipment, that carrier assumes a number of duties at law. Some duties peculiar to transportation arise from common law. In this regard, note Lord Holt's delineation of common law liability in 1703 that is still essentially applicable:

> One that exercises a publick employment . . . and is to have a reward [such as a common carrier], is bound to answer for the goods at all events . . . The law charges this person entrusted to carry goods against all events but acts of God and of enemies of the King.[34]

Other directly applicable duties related to cases that lay in tort are grounded in statute or regulation. For example, the placard liability cases previously referenced[35] found their genesis in the leasing regulations of the former Interstate Commerce Commission. In addition, federal law imposes upon motor carriers the duty to maintain agents for service of process in and through each state in which they operate thus exposing them to litigation in unfavorable venues.[36] Motor carriers must maintain liability insurance subject to specific endorsements that continue the lia-

32. A bill of lading is a contract, a receipt and an evidence documenting title of the goods. C.A.R. Transp. Brokerage Co. v. Darden Restaurants, 213 F. 3d 474, 479 (9th Cir. 2000); Zen Cont'l Inc. v. Intercargo Ins. Co., 151 F. Supp. 2d 250, 252 (S.D.N.Y. 2001).

33. *See* 49 U.S.C. §§ 11706(a), 14706(a)(1) (2007).

34. Coggs v. Barnard, 92 Eng. Rep. 107, 112 (K.B. 1703) (negligent transportation of casks of brandy); *See also* Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1134 (1990).

35. *Leathers*, 499 U.S. 439; *American Express Co.*, 226 U.S. 491; *Jackson*, 101 F.3d 1083; *Graham*, 948 F. Supp. 1124.

36. 49 U.S.C. §§ 13303(a), 13304(a), and 14704(d)(1)-(2) (2007); 49 C.F.R. §§ 366.2, 366.4(a) (2007); *See* R.R. Donnelley & Sons Co. v. Jet Messenger Serv., Inc., No. 03 C 7823, 2003 U.S. Dist. LEXIS 25421, at *14 (N.D. Ill. May 24, 2003). In *R.R. Donnelley*, the authors overcame a motion to dismiss for lack of jurisdiction arguing that a New Jersey motor carrier consented to jurisdiction in the State of Illinois by appointing an agent for service of process on their BOC-3 submitted to the Federal Motor Carrier Safety Administration. *Id* at *1, 6-14.

bility insurance until cancelled with notice assuring plaintiff of a defendant with a minimum amount of prescribed insurance coverage.[37] Also, motor carriers must operate the equipment used for transporting a shipment whether that equipment is purchased or leased from an independent contractor who furnishes the driver or drivers.[38]

The result was that in *Schramm,* the court had no problem in finding the motor carrier liable for the violation of a duty not to injure the plaintiffs by hitting their pickup.[39] This result extends to the use of independent contractors by non-asset based motor carriers. The scope of the duty arises out of the shipment, not the mere transportation of the shipment. The duty extends to the motor carrier responsible for the shipment, not the independent contractor transporting the shipment for the motor carrier.[40] In fact, this focus on the underlying business and the concomitant duties imposed by the Truth-in-Leasing Regulations[41] has attracted the attention of regulators in various states and representatives of the independent contractors.[42]

With deregulation, the focus of the shipment as structuring the duties between a shipper and a carrier as the primary parties to the specific commercial relationship was fragmented. *Schramm* explains this change in detail.[43] 3PLs expanded their role in the market by booking, managing, and assuming other incidents of the control of shipments historically residing with carriers. They did this without assets that a carrier must maintain to provide transportation service. As they grew, they contracted services from motor carriers who, by reason of deregulation, could easily obtain authority and enter the market. The 3PLs assumed a major part of the role that many motor carriers formerly provided with independent contractor fleet operators.[44] However, to provide service on behalf of

37. 49 U.S.C. § 13906(a)(1) (2005); 49 C.F.R. § 387.7(a)-(b) (2007).

38. *See* 49 U.S.C. § 14102(a)(4) (2007); 49 C.F.R. § 376.12(c).

39. *Schramm*, 341 F. Supp. 2d at 552.

40. Prestige Casualty Co. v. Michigan Mut. Ins. Co., 99 F.3d 1340, 1352 (6th Cir. 1996); Price v. Westmoreland, 727 F.2d 494, 496-97 (5th Cir. 1984).

41. 49 U.S.C. § 14704. *See also* Rivas v. Rail Delivery Serv. Inc., 423 F.3d 1079, 1083 (9th Cir. 2005) (applying the Truth-in-Leasing regulations, 49 U.S.C. § 14704).

42. *See, e.g.,* Nunn v. C.C. Midwest, Inc., 151 S.W.3d 388, 391 (Mo. Ct. App. 2004); Ware v. Indus. Comm'n, 743 N.E. 2d 579, 580-83 (Ill. App. Ct. 2000).

43. *Schramm*, 341 F. Supp. 2d at 541-42, 547-51.

44. Brief of Transp. Intermediaries Ass'n as Amicus Curiae Supporting Affirmance in Part of the Decision Below at 3-4, Norfolk S. Ry. Co. v. Kirby, (No. 02-1028), 2004 WL 1216277 *rev'd* 543 U.S. 14 (2004). Historically, fleet operators owned more than one truck and leased two or more as a fleet to a motor carrier when authority to operate was difficult to obtain fleet operators, as well as individual operators who signed on with motor carriers who coordinated the operations under the franchise of the operating authorities secured from the I.C.C. and its counterparts at the state level. *See, e.g.,* Matt Gylnn, *Unique co-op saves area shippers money 150 local companies own nation's only freight cooperation,* BUFFALO NEWS, Nov. 19, 2006, at D1.

3PLs, the small fleet operators had to secure their own authority (easily obtainable after deregulation) and insurance, and had to maintain their own safety programs. The result is that the direct vendor of transportation to the shipper, in an increasing number of instances, is a 3PL while the duty to transport a shipment remains with the small fleet operator/motor carriers.[45] In other words, an integrated service on which a tort duty was based under regulation was split with deregulation.

With deregulation, the direct customer for many motor carriers is the 3PL which provides market coordination and controls the routing of a shipment. In some instances in the supply chain, the 3PL will pass the shipment to yet another 3PL, so that one 3PL books the shipment from the shipper and another 3PL books the carrier's service for the shipment. The authors have been involved in situations where as many as four intermediate 3PLs have been involved in the supply chain. This can get quite confusing when a motor carrier also acts as a 3PL broker on a shipment without the shipper's knowledge. What results is complex multiparty litigation that requires a search for which entity has what duty.[46]

When this fact situation is presented in the context of a serious injury, most often a personal injury, the injured party can be faced with major damages and no recourse for recovering significant amounts of those damages from the driver or motor carrier. For example, in *Schramm*, the motor carrier maintained the federally mandated $750,000 of liability insurance.[47] This was patently inadequate.

V. The Quest for Joint Tort Liability

The result is a quest to secure liability up and down the supply chain through various tort concepts that seek to hold additional entities liable for the natural, ordinary, and probable consequences of their wrongful actions.[48] The concepts that allow such actions include the concepts of joint tortfeasors, multiple tortfeasors, and imputed negligence. For purposes of this article, we have excluded consideration of comparative fault

45. Brief of Transp. Intermediaries Ass'n as Amicus Curiae Supporting Affirmance in Part of the Decision Below, *supra* note 44, at 3. This observation focuses on a truckload operation. There is a distinct difference in the motor carrier market segment known as less than truckload and parcel. *See* Charles L. Schultz, Keynote Presentation, *Intermodalism-The Past is Prologue*, 28 Transp. L.J. 393, 395 (2001).

46. New Orleans Lakal Envelope Co., Inc. v. Chicago Express, Inc., No. 99-2174, 1999 WL 1124788, at *1 (Dec. 7, 1999). While personal injuries were not involved, this case alleged various torts as well as Carmack liability under 49 U.S.C. § 14706. *Id.* This unpublished decision involved a shipper that sued a motor carrier for damages "caused by the late delivery of damaged machinery [shipper] plaintiff purchased from a third party." *Id.*

47. *Schramm*, 341 F. Supp. 2d at 541-42. *See* 49 U.S.C. § 13906(a)(1); 49 C.F.R. § 387.7(b)(1).

48. *See, e.g.*, Rozny v. Marnul, 250 N.E.2d 656, 557-60 (Ill. 1969).

and the Uniform Comparative Fault Act as beyond the scope of an examination of the single issue of tort liability.[49]

Joint tort liability may be particularly suited to application up and down the supply chain. This is because the distribution of a shipment that previously moved under an integrated economic model under regulation has been broken down into several economically viable functions following deregulation. That is, deregulation sought market efficiencies by encouraging the unfettered operation of the transportation marketplace and has achieved this by splitting formerly integrated functions into separate distinct profit-generating operations.

Under regulation, a motor carrier had direct contact with a shipper under a statutorily-mandated holding out as a common carrier. That common carrier provided service pursuant to published tariffs offering service to all on a non-discriminatory basis. These offerings integrated a specific service on a "shipment" that included rules that a specific rate applied from the pickup of and receipt for the shipment to the delivery upon a standard bill of lading whose terms were uniformly prescribed. The functions surrounding the service, such as billing, payment, and resolution of claims, were similarly structured to support the bill of lading's terms and conditions applicable to a shipment.

With deregulation, entrepreneurs could buy and sell the intangible of transportation as a tradable function in and of itself. That is, a 3PL could buy and sell the intangible of service.[50] The result was a rapid expansion of intermediaries who deal in transportation but do not maintain the assets necessary for the provision of transportation. Essentially, 3PLs buy capacity from motor carriers and railroad intermodal operations and sell it to shippers. However, the carriers nonetheless still pick up shipments with the bill of lading contract or a receipt (if there is another type of contract) receipting for the shipment.[51] 3PLs as stack train operator intermediaries selling to other 3PLs sometimes contract capacity from the railroads or motor carriers, purchase drayage, or lease trailers and sell the resulting transportation to shippers as an integrated service billed on a single bill of lading.

Variations of this separation of previously structured and integrated functions have arisen and are still evolving. A noteworthy aspect of this

49. UNIF. COMPARATIVE FAULT ACT, § 1 (1977). *But see* 735 ILL. COMP. STAT. 5/2-1116 (2006), *invalidated by* Best v. Taylor Machine Works, 689 N.E.2d 1057 (Ill. 1997).

50. *Cf.* 49 U.S.C. §13102(2) (2005) (defines motor carrier broker that says a broker can act as a "principal" that can buy or sell "transportation").

51. *See* Federal Bills of Lading Act, 49 U.S.C. § 80102 (2005) (This act applies to carriers providing common carriage not contract carriage); 49 U.S.C. § 13102(4)(B) (2006) (But the bill of lading is a universal document still finding a ubiquitous use in the industry); 49 U.S.C. § 14101(b); *Cf.* 49 C.F.R. § 373.101 (2001) (requiring motor common carriers to issue a receipt to bill of lading); *Cf.* 49 C.F.R. §1035.1 (2001) (prescribing the terms for a rail bill of lading).

change in the supply chain landscape is the correlation between volume and rates; that is, as the 3PLs secure and arrange for the shipment of greater volumes, their bargaining position is enhanced. This has led to the growth of large, non-asset intermediaries in the supply chain such as C. H. Robinson Worldwide, Inc., as described in *Schramm*.[52]

As the supply chain extends internationally, the shift to a coordinator that can efficiently tie the supply chain together results in an intermodal coordination of a single shipment. Under this economic model, the shipper can use one entity to move a shipment through the entire supply chain, receive one invoice, deal with claims through that same entity and receive at least an indirect economic benefit derived by pooling the shipper's volume with other volumes to achieve cheaper overall transportation. This logistics model now exists and its use appears to be expanding. It is also the economic model in *Schramm* where the shipper looked only to the 3PL as the service provider for the entire service on the shipment.[53]

However, when liability arises (e.g. as a result of a catastrophic accident), the 3PL will typically deny tort responsibility or any legal duty to the injured party and seek to pin liability on the actual service provider, which is usually the motor carrier or the asset-based entity. The 3PL will contend the duty arising by the issuance of the bill of lading or receipt defines a distinct responsibility and the carrier is the sole repository of liability.[54]

The separation of the formerly integrated functions suggests that 3PLs must be careful to avoid possible resulting tort involvement. There is a natural desire by the 3PL to sell service to a shipper touting its "partnership" with its stable of carriers. In fact, the term partners, as in carrier partners and shipper partners, or the use of concepts styled as "partnerships" is common to transportation.

Such activity points to a potential future area where tort law may catch up with the transportation sector. This is true especially where there are small carriers with limited worth subject to the economic guidance of large economically viable intermediaries connected in the supply chain to the shipment that is involved with a catastrophic accident. A

52. *Schramm*, 2004 U.S. Dist. LEXIS 16990 at *2.

53. *Id.* at 3.

54. Note should be taken that each situation depends on the exact facts. For example, assume a contract between the 3PL and the motor carrier where the 3PL essentially assumes total control of the shipment and displaces the motor carrier in every material regard; Travelers Indem. Co. of Illinois v. Schneider Specialized Carriers, Inc., 04 Civ. 5307 (RJH), 2005 U.S. Dist. LEXIS 2029, at *13 (S.D.N.Y. Feb. 9, 2005) ("What a party labels itself and what a party is registered as [are] not controlling." "[W]hether a company is a broker or a carrier/freight forwarder is not determined by how it labels itself, but by how it holds itself out to the world and its relationship to the shipper" (internal citations omitted)).

primary area representing a possible exposure for 3PLs in the supply chain is the area of joint tort liability.

An example of this area of liability is contained in the unreported Madison County, Illinois case of *Trout v. Stewart*, involving C. H. Robinson Company, a large third party transportation company.[55] In that case, the court treated a small motor carrier as a partner with C. H. Robinson, a large intermediary, based upon the facts presented.[56] The control of the actual transportation of the supply chain by the intermediary led to a finding of a joint venture.[57] The court found control on the part of the 3PL among the following facts: controlled dispatch by the 3PL of a driver handling a particular shipment, the 3PL's allowing the carrier or driver authority to sign or otherwise act as a putative agent of the 3PL, the 3PL's management of freight in the supply chain with mandatory tracing requirements imposed upon the motor carrier, certain web page references to "shipper" and "carrier" partners, and other facts indicating a joint venture that were developed in discovery.[58]

A joint venture is generally deemed to be an association that carries out a single business enterprise for profit.[59] Joint ventures are usually governed by the same rules that apply to general partnerships, and there usually exists a mutual agency among the venturers for activities within the scope of the venture.[60] In a partnership, each partner is liable for the damages caused by the action or inaction of another partner.[61] Hence, the facts surrounding a 3PL involvement in a supply chain in any particular injury scenario can suggest joint tort liability.

This joint liability suggests an evolution of the law from a time when traditional functions were integrated into a particular economic relationship to a time where traditional functions are rearranged by imagination and the entrepreneurial spirit. This evolution presents an inherent tension in every 3PL business offering in the supply chain. On one hand, the 3PL generally desires to control the source of shipments by offering the shipper a complete logistics solution and by representing to the shipper the 3PL's accountability for service on the shipment. On the other hand,

55. *See* Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment Directed to C.H. Robinson Company at 1, Trout v. Stewart, 99-L-1062 (Madison Cty. Ill. 2002) as well as related cases in the same Illinois Circuit Court.

56. *See id.*

57. *See id.*

58. *See id.*

59. Johnson v. Pac. Intermountain Express Co., 662 S.W.2d 237, 242 n.6 (Mo. 1983); Terra Venture, Inc. v. JDN Real Estate - Overland Park, L.P., 340 F. Supp. 2d 1189, 1198 (D. Kan. 2004).

60. State *ex rel* McCrory v. Bland, 355 Mo. 706, 712 (Mo. 1946); *Johnson*, 662 S.W.2d at 241.

61. Wisconsin Cent. R.R. Co. v. Ross, 142 Ill. 9, 15 (Wisc. 1892); Wolfe v. Harms, 413 S.W.2d 204, 215 (Mo. 1967).

when something goes wrong and cargo damage, property damage, or personal injury occurs, the 3PL generally adopts the role of an innocent bystander claiming a lack of control, oversight, or accountability for the natural consequences of the asset-based carrier's course of conduct. Because injuries allowing recovery seem a certain event, the plaintiffs' bar will examine the facts surrounding each injury and try to apply traditional causes of action that sound in tort. The result is that supply chain participants have started developing (and will continue to develop) procedures and representations that anticipate claims of joint action or joint enterprise in conjunction with the asset-based service provider.

Of course, if the response of the courts is to broaden the scope of supply chain liability, there will be an economic response. An example of an earlier similar response to the expansion of tort liability was the regulatory requirement that motor carriers secure insurance to cover the actions of employee drivers and the requirement that owner operators provide financial security for the benefit of shippers.[62]

VI. The Bailment Relationship and Its Consequences

The application of the concept of imputed negligence up and down the supply chain is limited. Because the connection between parties in a supply chain often arises from the shipment,[63] the underlying relationship that ties together the supply chain is somewhat unique. The supply chain therefore rests upon bailment relationships between the various entities that are engaged in the shipment.

In every bailment, the bailor (who may not be the beneficial owner) entrusts the possession of distinct personal property to a bailee to perform a contracted service.[64] Each bailee has a direct obligation with regard to the personal property that begins with possession and ends with delivery to the bailor or to another at the direction of the bailor.[65] For two reasons, recognition of this relationship is critical for examining the limitations of imputed negligence in the supply chain.

The first reason is that the bailment on a shipment is specific and depends upon possession.[66] 3PLs generally do not assume direct posses-

62. *See* 49 C.F.R. § 387.7(a) (2001) (for motor carrier insurance and self insurance requirements).

63. Types of shipments that connect parties might include a movement of personal property in a single package, a consolidation of packages from a single origin to a single destination, or a consolidation and shipment of packages from multiple origins to multiple destinations.

64. Black's Law Dictionary 151 (8th ed. 2004).

65. *See* Geo. Weintraub & Sons, Inc. v. ETA Transp., Inc., 01 Civ. 6417 JSM, 2003 U.S. Dist. LEXIS 14851, at *10 (S.D.N.Y. 2003) (describing elements of bailment).

66. *Id.*; Chilewich Partners v. M.V. Alligator Fortune, 853 F. Supp. 744, 756 (S.D.N.Y. 1994).

sion of the shipment as a master or principal which would allow direct application of the principle of vicarious liability that depends upon a *respondeat superior* relationship. 3PLs are known generically as non-asset based entities that do not maintain the physical assets allowing the bailment.

The second reason is that case law seems clear that at common law there can be no imputation of negligence by a bailee to a bailor.[67] This means common law disallows an effort by a member of plaintiffs' bar to fish upstream or downstream in the supply chain merely by reference to the logistics chain involved with a shipment. Of course, this proposition would seem subject to exceptions as is just about any pronouncement of the law.

Nevertheless, upstream or downstream duties might be imposed by contract or by regulation. For example, the shipment itself could be a dangerous instrumentality, like a hazardous material. In that situation, there are regulatory duties that rest upon offerors of hazardous materials.[68] A 3PL's involvement could conceivably include a duty regarding such a shipment. The regulations seem to indicate that a 3PL dealing with hazardous materials is an offeror if the 3PL buys and sells a shipment. Certainly, it is foreseeable that improperly shipping or even offering or arranging a shipment of hazardous materials could have catastrophic consequences. Such liability extending up and down the supply chain, however, would not depend on a duty arising out of the bailment but would arise out of knowledge of a dangerous instrumentality and negligence in relationship to the dangerous instrumentality.[69]

Of course, this is the premise in *Schramm* where the judge allowed the case to continue for negligent entrustment.[70] The case appears to hold that tractor-trailer combinations or Class 8 trucks are dangerous instrumentalities.[71] The resulting duty resting on the 3PL is that of selecting a carrier subject to vicarious liability who is considered safe by the Federal Motor Carrier Safety Administration, an agency charged at law with an obligation to make that determination.[72]

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67. RESTATEMENT (SECOND) OF TORTS § 489 (1965); White v. Saunders, 158 S.W.2d 393, 396 (1942); *See also* Smedsrud v. Brown, 303 Minn. 330, 332 (1975).

68. *See* 49 C.F.R. § 107.601(a),(c) (2002); 49 C.F.R. § 107.608(b) (2005).

69. *Cf.* 57A AM. JUR. 2D *Negligence* § 298 (2006); So. Cotton Oil Co. v. Anderson, 86 So. 629, 636 (Fla. 1920); *But see* Pullman, Inc. v. Johnson, 543 So.2d 231 (1987) ("The trailer portion of a tractor-trailer rig is not a dangerous instrumentality for the purpose of applying the vicarious liability enunciated in [So. Cotton Oil]").

70. *Schramm*, 2004 U.S. Dist. LEXIS 16990 at *13.

71. *Id.* at 3.

72. 49 C.F.R. § 1.4(l) (2006); 49 C.F.R. § 385.9(a) (2004).

VII. Subsumed Liability

Apart from these concepts, negligence appears imputable from motor carriers or other carriers to a 3PL only if the facts of the particular situation surrounding an injury can show that the 3PL has subsumed a position of an employer to a servant or a principal to an agent allowing a finding of vicarious liability based upon the principle of *respondeat superior.*[73] However, in finding that the 3PL is either the employer liable for his servant or a principal liable for his agent, the facts showing control are central to an argument of vicarious liability. The control that is involved in any such examination of the facts appears to arise out of the shipment being transported at the time of the injury.[74]

If the 3PL protects the 3PL's market by slipping over the line and assuming the actual control of a shipment as a carrier in every essential regard, application of traditional tort principles would then appear to impose a duty not to act negligently.[75] However, if the 3PL appreciates the tension between keeping shippers but avoids liability so as to enhance the non-asset based business model of avoiding all the costs and risks an asset-based carrier faces, then the 3PL enhances the possibility of avoiding catastrophic tort liability that most 3PLs have not contemplated.[76] But 3PLs must be ever mindful of the fact that the law seeks a remedy for injury. The real remedy is an actual recovery of money. The reality of *Schramm* is that such a remedy may only be possible from the large well-funded 3PLs as the deregulated market continues to evolve.

VIII. Conclusion

In the face of such a reality, the transportation marketplace should be aware that evolving case law will require action to accommodate increased risk exposure. If that adjustment extends the imputation of tort liability, then the business models and economic assumptions of 3PLs will

73. For a discussion of principal-agent law applied to a broker on a shipment transported by an independent contractor terminated by a carrier two months prior to the accident, *see* Tartaglione v. Shaw's Express, Inc., 790 F. Supp. 438, 441 (S.D.N.Y. 1992).

74. Of course, the 3PL could contract for dedicated service of a carrier and directly control a bobtail or a dead head where the equipment is empty. That fact would extend any consideration of whether the facts show a duty that sounds in tort.

75. CGU Int'l Ins. v. Keystone Lines Corp, No. C-02-3751 SC, 2004 U.S. Dist. LEXIS 8123, at *5 (N.D. Cal. 2004) ("The difference between a carrier and a broker is often blurry. The crucial distinction is whether the party legally binds itself to transport, in which case it is considered a carrier.") This case is also noteworthy for its discussion regarding the tort of negligent selection of a carrier. *See also* Chubb Group of Ins. Co. v. H.A Transp. Sys., Inc., 243 F. Supp. 2d 1064, 1067 (C.D. Cal. 2002) where the court analyzed a cause of action against a broker for negligent entrustment.

76. *Cf.* Hewlett-Packard Co. v. Bros. Trucking Enter., Inc., 373 F. Supp. 2d 1349, 1352 (S.D. Fla. 2005).

have to materially change. On one hand, this change may require innovative insurance developments. On the other hand, it may also facilitate the growth of 3PLs into even larger economic units that are the only units that can accommodate such risk and thereby further the centralization of control of the supply chain into the hands of fewer and fewer 3PL entities.