

Transportation Broker Liability in the U.S.A. – Avoiding Nuclear Verdicts

Litigation | Litigation & Dispute Resolution | Nuclear Verdict | Transportation and Logistics | Trucking

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Canadian trucking companies and Canadian transportation brokers are always at risk for nuclear verdicts[1] for their operations when they go into the United States of America. Counsel for individuals injured involving commercial trucks have been targeting trucking companies and transportation brokers[2].

Recently there has been some relief in the courts for freight brokers who properly organize their business and contracts with the carriers they hire to move cargo so there is a clear demarcation between the broker and carrier relationship demonstrating independence.

In *Cornejo v. Dakota Lines Inc.*, 2023 IL App (1st) 220633, 229 N.E.3d 546, 471 (Ill. Dec. 795), the plaintiff's son was severely injured when he was struck by an 18-wheel tractor-trailer while standing on the shoulder of a highway. The plaintiff, Francine Cornejo, brought a negligence suit on behalf of her son against defendants Gordon Lewis ("Lewis"), the truck driver; his employer, the carrier Dakota Lines Inc. ("Dakota"); and Alliance Shippers Inc. ("Alliance"), the shipping broker that contracted with Dakota to transport automotive parts on behalf of Alliance's client, Fiat Alfa Romeo Chrysler. At trial, the jury found that Lewis, Dakota and Alliance were liable to the plaintiff and awarded the plaintiff a nuclear verdict of \$18,150,750. Alliance appealed the court's judgment alleging that, as a matter of law, Dakota was an independent contractor of Alliance and that neither Lewis nor Dakota were the agents of Alliance. The issue on appeal was whether a principal-agency relationship was established between the shipping broker Alliance and the carrier trucking company Dakota and its agent and driver Lewis. Dakota had admitted that Lewis was its agent at the time of the accident.

The Appeals Court noted the rule that a principal is vicariously liable for the conduct of its agent but not for the conduct of an independent contractor[3]. The difference is defined by the level of control over the manner of work performance. An agency is a consensual relationship in which a principal has the right to control an agent's conduct and an agent has the power to affect a principal's legal relations. The Court noted, "[a]n independent contractor relationship is one in which an independent contractor undertakes to produce a given result but, in the actual execution of the work, is not under the order or control of the person for whom he does the work." [4] Any labels given by the parties in a written agreement are not dispositive of employment status. The Court also noted that although a carrier-broker agreement, like the one between Dakota and Alliance, is a factor to consider, it does not, as a matter of law, determine an individual's or entity's agency status. Instead, the facts and circumstances of each case determine whether a person is an agent or an independent contractor. The cardinal consideration is whether that person retains the right to control the manner of doing the work. [5] Other factors that courts consider include: (1) the question of hiring, (2) the right to discharge, (3) the manner of direction of the servant, (4) the right to terminate the relationship, and (5) the character of the supervision of the work done.

The Court noted that when viewed in the light most favourable to the plaintiff, all the evidence so overwhelmingly favoured Alliance by showing, as a matter of law, that Lewis and Dakota were not agents of Alliance. The evidence showed that Alliance did not: pay Dakota's drivers nor withhold taxes from their pay; hire, train or fire the drivers; dispatch or speak to the drivers; control the drivers' routes or provide them with tools, equipment, or materials; or own the tractors or trailers the drivers used. It was undisputed that Dakota and Alliance adhered to the terms of their contractual agreement, which provided that Dakota had full control over its personnel and would perform services as an independent contractor. Moreover, Dakota and Alliance did not have an exclusive relationship; Dakota was free to haul freight for other brokers and was not Alliance's primary carrier. Dakota hired, trained, and fired its drivers; paid them; and withheld taxes from their paychecks.

The plaintiff contended that, nonetheless, various other facts demonstrated an agency relationship

- a. Dakota was required to maintain a minimum number of empty trailers at the Indiana site for potential jobs from Alliance;
- b. Dakota was required to add Alliance as an additional insured on Dakota's insurance and indemnify Alliance from any claims;
- c. Dakota was required to adhere to Alliance's requirements regarding seal integrity, freight bills, and cargo security;
- d. Alliance required Dakota to contact Alliance multiple times a day regarding pickup and delivery times;
- e. Dakota was required to notify Alliance immediately regarding issues like a crash or problem that prohibited Dakota from moving a load, and then Alliance would decide whether Dakota should send another driver to "rescue the load";
- f. Alliance could charge Dakota for damages if a delivery was late, damaged, or lost; and
- g. Alliance kept a scorecard of the timeliness of Dakota's deliveries. A decrease in Dakota's score could jeopardize future freight orders.

The Court found, however, that none of these facts show the degree of control over the work performed (here, hauling loads) that Illinois courts have required when finding that an agency relationship exists.

The Court noted that the evidence was undisputed that Dakota hired and paid Lewis. Only Dakota, and not Alliance, had the power to fire Lewis, and Alliance had no ability to fine him. Also, Lewis never communicated with Alliance; Dakota dispatched Lewis for his work. If Alliance was unsatisfied with Lewis, the most it could do was request that Dakota assign a different driver. There was no evidence that Alliance controlled the manner by which the load was hauled. There was no evidence that Lewis was trained using materials that said he was part of Alliance's fleet or otherwise associated with Alliance. He did not wear clothing or use equipment bearing Alliance's name or otherwise hold himself out as an employee of Alliance. The court also noted that while not dispositive, the fact that the Dakota-Alliance contract specified that Dakota was an independent contractor with sole responsibility for its employees could not be ignored. Alliance specified the result it wanted Dakota to accomplish, e.g., moving empty containers or shipping cargo. The court found this type of specifying to be different than dictating the manner in which the work of hauling the containers would be performed.

The Court reversed the trial decision.

The Court in this case provides a comprehensive review of broker liability law and how the industry works. The Court found that a broker can exercise various contractual and insurance-related rights without those assertions being found to be evidence of control or liability. The principal theme of the decision is that the broker's actions vis-à-vis the motor carrier should relate to the results of the shipping schematic and not the details of how that result is accomplished. The case also demonstrates that brokers must ensure that they have properly drafted contracts, avoid direct contact with the driver, and only exercise control over the result they want but not the manner in which the work is performed. A PDF version is available for download [here](#).

[1] A "nuclear verdict" is defined as a verdict in favour of a plaintiff with a damage award that surpasses \$10 million, but the term is also used to describe an outcome significantly larger than what anyone expects.

[2] Also referred to as shipping brokers, freight brokers and load brokers.

[3] Applying *Sperl v. C.H. Robinson Worldwide, Inc.*, 408 Ill. App. 3d 1051, 1057, 349 Ill.Dec. 269, 946 N.E.2d 463 (2011).

[4] *Ibid*.

[5] *Grinyov*, 2017 IL App (1st) 160193, ¶ 27, 411 Ill.Dec. 232, 72 N.E.3d 1238.

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