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Revisiting Shipper/Carrier Liability to Third Parties for Injury Caused by Allegedly Improperly Loaded Freight

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Introduction and Summary

The possibility of a shipper being found liable to a third party who is injured by allegedly improperly loaded freight is an evolving one. Historically, the onus of responsibility, and liability, for loading freight has been with the carrier. Indeed, both case law and Federal Motor Carrier Safety Regulations set forth these duties by the carrier. However, recently, at least one federal district court has found that a shipper does owe a duty to third parties to properly inspect and secure freight, when that aspect is *its* responsibility (as opposed to the carrier's) with regard to that particular shipment. Even in that case though, the court did not find a breach of that duty by the shipper, nor did it find a causal link between any act or omission by the shipper, and the injury to the third party.

General Rule – Carrier Liability

Several cases have found carriers negligent for failing to properly secure cargo. These cases have found that responsibility for obviously improper loading rests upon the carrier. *See, e.g., General Electric Co. v. Moretz*, 270 F.2d 780 (4th Cir. 1959); *United States v. Savage Truck Line Inc.*, 209 F.2d 442, 445 (4th Cir. 1953) (principal fault lay with carrier; "The primary duty as to the safe loading of property is therefore upon the carrier.") The carrier's duty to discover the problem is limited to discovery of defects that are patent or apparent, under reasonable inspection. *See, e.g. American Foreign Ins. Ass'n. v. Seatrain Lines of Puerto Rico*, 689 F.2d 295, 300 (1st Cir. 1982); *Pierce v. Cub Cadet Corp.*, 875 F.2d 866, 867 (6th Cir. 1989) (only if and when a shipper assumes the responsibility for loading its property upon a motor vehicle, does it have a duty to exercise reasonable care to see that the load is properly secured); *Franklin Stainless Corp. v. Marlo Transport Corp.*, 748 F.2d 865, 868-869 (4th Cir. 1984) (stating that evidence showed the defect and manner of loading was not open and obvious because shipper's employee assured carrier's truck driver that shipper used standard loading method and that there would be no trouble with the load). *Blytheville Cotton Oil Co. v. Kurn*, 155 F.2d 467, 470 (6th Cir. 1946); *Symington v. Great Western Trucking Co.*, 668 F.Supp. 1278, 1282 (S.D. Iowa 1987) ("While responsibility for obviously and proper loading rests on the carrier, the shipper is liable for loading defects which are latent and concealed"); *Ebasco Servs., Inc. v. Pacific Intermountain Express Co.*, 398 F.Supp. 565, 568 (S.D.N.Y. 1975) (Although total height of vehicle load may be "observable" defect in that it may be apparent to the naked eye, it is not necessarily a patent defect in that the excess height may be not be readily apparent; shipper's employees' representation that excessive height load was of proper height raised genuine issue of material fact bearing on ultimate allocation of liability between shipper and carrier). Thus, carriers have a clear obligation to exercise due diligence in attending to visual packaging inadequacies. *See, e.g., Houlden & Co. v. S.S. Red Jacket*, 1977 A.M.C. 1382, 1389 (S.D.N.Y. 1997) (carrier personnel noted container damaged but failed to prevent loading).

The "Act of Shipper" Exception

However, if the shipper involves itself in the loading process, it may expose itself to liability, as *United States v. Savage Truck Lines, Inc.*, 209 F.2d 442, explained:

> The primary duty as to the safe loading of property is therefore upon the carrier. When the shipper assumes responsibility of loading, the general rule is that he

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> becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper.

Id. at 445. Savage then concluded that the "act of shipper exception" was inapplicable because it found that the defect in loading the steel coils that were involved was open and obvious to the trucker, and thus, the shipper had no liability.

Similarly, *Georgia Craft Co. v. Terminal Transport Co.*, 343 F.Supp. 1240 (E.D. Tenn. 1972), also cautioned that:

> The carrier's duty to inspect for the security of a cargo loaded by the shipper is not an absolute duty exonerating the shipper in every case from the shipper's own negligence in loading. Rather, the carrier has a duty to make a reasonable inspection and to observe and correct defects or insecurities in loading that are capable of being discovered in the course of a reasonable inspection.

Id. (emphasis added)

Shipper's Notice: Expands Carrier's Duty

Where the carrier is put on notice of a potential loading problem, the carrier's duty of inspection of the cargo and its loading expands to encompass the duty to discover even those defects that may be latent. *See Fluor Engin. & Const. v. Southern Pacific Transport*, 753 F.2d 444, 453 (5th Cir. 1985); *Masonite Corp. v. Norfolk & Western R. Co.*, 601 F.2d 724 (4th Cir. 1979). Consequently, it is in the shipper's best interests to alert the carrier to any potential loading problems.

"Shipper's Load and Count" Not Relevant

Inclusion of the terms "shipper's load, weight, count and seal" in a bill of lading, or words to the effect, operates only to shift the burden of proof in suits for lading damages. *American Foreign Ins. Ass'n.* 689 F.2d at 300; That language has no bearing on the carrier's duty of inspection.

Cargo Liability Principles Applicable to Third Party Injury Cases

Although the liability referred to in various of the cases herein is liability for damage to cargo and not liability to injured third parties, cases have concluded that if the carrier were not liable to the shipper for damage to the cargo because of the shipper's negligence, neither would it be liable to indemnify the shipper for the shipper's liability for negligent injury to a third party. *See Georgia Craft Co. v. Terminal Transport Co.*, 343 F.Supp. 1240 (E.D. Tenn. 1972). Thus, cargo liability principles would be applicable authority in third party injury cases.

A Shipper's Common Law Duty to Properly Load, But No Breach Thereof and No Causation

In *Reed v. Ace Doran Hauling & Rigging Co.* 1997 WL 1777840 (N.D. Ill. 1997) a plaintiff who had been injured when steel coils fell off a truck on the highway, brought a lawsuit against the shipper who had ostensibly played a role in loading the steel coils, Inland Steel. Specifically, the Plaintiff, Donald Reed, asserted that Inland had failed to adequately secure a steel coil, which struck Reed's vehicle, and failed to provide an adequate securement system to protect against shifting and falling cargo, as required under the Federal Motor Carrier Safety Regulations ("FMCSR"). Inland moved for summary judgment on the grounds that it had no duty to Reed. The court found that Inland owed no duty to comply with the FMCSR. *See also Pierce v. Cub Cadet Corp.*, 875 F.2d 866 (6th Cir. 1989) (same holding). Reed then contended that Inland owed him a *common law* duty, to ensure that the cargo was properly secured. The court agreed with Reed on this point, at least at the summary judgment stage of the case:

> [T]he Court finds that Inland owed [Reed] a common law duty to check the load and ensure that it was properly and safely secured.

Id. at 3. The court found that it was reasonably foreseeable that an accident could occur if the coil was not properly and safely secured. The court found that the injury could be serious, that the burden on Inland to check that the load was properly secured was minimal:

> It would not impose a large burden on [Inland] to educate employees on load securement and then have them inspect securement devices while they are checking load protection. Finally, while this burden might increase the cost of doing business, the expense is minimal since the employees already check the load and does not justify relieving the Defendant of this duty.

Id. at 4.

In ascertaining what constituted safe securement of the load, the court turned to the FMCSR's for guidance. The FMCSR's specify the minimal requirements for cargo securement and tie downs. The court relied upon these minimum standards as the threshold for determining what constitutes the proper and safe securement of cargo. (49 CFR §393.100):

> Thus, the Court concludes that, in the instant case, Inland had an obligation and duty to check that the driver had complied with the minimum securement requirements established in the FMCSR.

Id. at 6.

Inland asserted, however, that even if it had a duty to Reed, it could not have breached any duty to Reed, because there was no evidence that Inland was involved in the securement of the load. *Inland stated that under its standard practice, the loaders do not assist the drivers in securing the loads, thus leaving the driver solely responsible for load securement.* The court concluded that further factual issues needed to be developed on this point, and made no holding on it. The court then found that Reed could not prove any negligence on the part of Inland, since he could not determine what actually caused the accident after the truck left Inland's yard. The court concluded that the accident could have been the result of the negligence of the driver, road conditions, and/or various other factors of transit:

> In this instance, the alleged negligence occurred after Inland loaded the cargo

> onto the truck. However, ... Inland's control over the coil terminated as soon as it was loaded. At that point, the driver assumed sole responsibility for the coil. Along with sole responsibility, the driver also gained sole control over the coil because Inland's involvement with the load was complete at that point. Thus, Inland lost control over the instrumentality as soon as the crane released the coil onto the truck, and therefore, Inland did not have control over the coil at the time of the negligence when the driver secured it.

Id. at 7 (emphasis added). The court then found that there was no evidence that the coils were ever improperly secured, no evidence that they were secured in violation of the FMCSR's. Thus, there was no probative evidence that would enable a jury to reasonably conclude that the coil, more probably than not, dislodged from the truck as a result of Inland's failure to inspect the load securement, rather than as a result of any potential negligence on behalf of the truck driver which caused the truck to hit the median. The Court then granted Inland's motion for summary judgment on this point.

The moral of Reed then, seems to be that, if a shipper is involved in any way in the process of securing the load, whether it be actually loading the freight, or inspecting the freight once loaded to ascertain whether it is properly secured, then the shipper should conduct these duties in a nonnegligent fashion, and, ideally, in conformance with the FMCSR's. However, Reed also portends that, even if a court finds that a shipper had a duty to inspect the load, problems with proving both a breach of that duty by the shipper, and a causal link between any alleged breach by the shipper and the injury to the third party, will render difficult proving any liability as to the shipper in these instances.

Shipper Liability for Use of Improper Loading Materials

If a shipper used its own materials for load securement, and those materials are found to be deficient for load securement, the shipper may be found liable for, in essence, the negligent selection of these loading materials. As *Georgia Craft Co. v. Terminal Transport Co.*, 343 F.Supp. 1240 (E.D. Tenn. 1972) explained:

> [I]t is clear from the evidence that Georgia Craft Company [the shipper], in using corrugated paper cleats to secure the load from lateral movement, rather than wooden cleats, was guilty of negligence and that this negligence proximately caused the accident and the injury . . . "

Id.

The Federal Motor Carrier Safety Regulations

According to the FMCSR's, it is the driver's/carrier's responsibility to ensure that cargo is properly distributed and adequately secured. As 49 C.F.R. 392.9 explains:

392.9 Safe loading.

(a) General. No person shall drive a commercial motor vehicle and a motor carrier shall not require or permit a person to drive a commercial motor vehicle unless --

(1) The commercial motor vehicle's cargo is properly distributed and adequately secured as specified in 393.100-393.106 of this subchapter.

(2) The commercial motor vehicle's tailgate, tailboard, doors, tarpaulins, its spare tire and other equipment used in its operation, and the means of fastening the commercial motor vehicle's cargo are secured; and

(3) The commercial motor vehicle's cargo or any other object does not obscure the driver's view ahead or to the right or left sides, interfere with the free movement of his/her arms or legs, prevent his/her free and ready access to accessories required for emergencies, or prevent the free and ready exit of any person from the commercial motor vehicle's cab or driver's compartment.

(b) Drivers of trucks and truck tractors. Except as provided in paragraph (b)(4) of this section, the driver of a truck or truck tractor must—

(1) Assure himself/herself that the provisions of paragraph (a) of this section have been complied with before he/she drives that commercial motor vehicle;

(2) Examine the commercial motor vehicle's cargo and its load-securing devises within the first 25 miles after beginning a trib and cause any adjustments to be made to the cargo or load-securing devices (other than steel strapping) as may be necessary to maintain the security of the commercial motor vehicle's load; and

(3) Reexamine the commercial motor vehicle's cargo and its load-securing devices periodically during the course of transportation and cause any adjustments to be made to the cargo or load-securing devices (other than steel strapping) as may be necessary to maintain the security of the commercial motor vehicle's load. A periodic reexamination and any necessary adjustments must be made—

(i) When the driver makes a change of his/her duty status; or

(ii) After the commercial motor vehicle has been driven for 3 hours; or

(iii) After the commercial motor vehicle has been driven for 150 miles, whichever occurs first.

Id.

As noted, *Reed v. Doran* has found that the FMSCR's do not apply to shippers and do not create a duty by shippers to injured third parties. However, Reed also found that shippers may have a common law duty to ensure proper securement of the loads. Reed then paradoxically stated that when determining whether that common law duty had been breached by the shipper, the court would consult the FMSCR's.

Consequently, ideally, it is worthwhile for a shipper to have familiarity with the FMSCR's, particularly if it is actively involved in the loading or inspection process. *See*, 49 C.F.R. 392.9 and 49 C.F.R. 393.100.

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