

Shipper Liability for Injuries to Drivers: SPENCE V. THE ESAB GROUP, INC.



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A shipper that provides direction and involvement in the loading can be held liable for injury to a driver for his injury caused by the loading pursuant to *Spence v. The ESAB Group, Inc.*¹ While viewed as an expansion of shipper liability, it limits the exposure to certain situations.

Facts

The plaintiff, a commercial driver, sued the shipper of the load he was carrying for bodily injury suffered when his unit rolled over while negotiating a curve. Plaintiff claimed that the rollover was caused by the shift of the load due to improper loading performed by the shipper.

The accident occurred shortly after departing with a load of welding supplies manufactured by the shipper. The shipper had boxed and palletized the product.

With the driver present in the trailer, the shipper then loaded the pallets. The driver secured the load by using "load stars," small metal cleats placed on the trailer floor to secure the pallets load on them.

The shipper provided the load stars. In response to the driver's initial qualms about this method, the shipper assured him that it had not had any problems with this method of

securement. While believing that the load should be blocked and braced, the driver acceded to the shipper's directions, believing that they knew better as to the shipping of their products.

This was fifth load that the driver transported in this manner for the shipper. While the driver had used a load lock on the four prior occasions, he did not do so on this trip.

District Court Proceedings

Plaintiff brought this action in the United States District Court for the Middle District of Pennsylvania. He asserted claims of negligence, gross negligence, and negligence per se. The negligence per se count was dismissed upon the shipper's motion.

In response to the shipper's motion for summary judgment, the driver amended the complaint, resulting in counts alleging negligence, negligent failure to warn, breach of assumed duty, fraudulent/negligent misrepresentation, and gross negligence. The District Court subsequently granted the shipper's amended motion for summary judgment as to all five counts.

The District Court held that Pennsylvania law did not impose a duty on the shipper under the circumstances. In this regard, it found persuasive the FMCSA Regulations imposing an obligation upon the carrier to ensure proper securement.²

The District Court held that the driver failed to show that the shipper owed him a duty or that it breached any duty.

Third Circuit Decision

The Third Circuit Court of Appeals reversed the District Court's decision.

The Appellate Court began its analysis by reviewing the elements of negligence. It then focused on the question of duty.

The Court noted that Pennsylvania had adopted a number of the provisions of the Restatement (Second) of Torts relating to the factors considered when determining the presence or absence of a duty. Among these is Section 323, which states as follows:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.³

It ruled that Pennsylvania cases applying this provision were consistent with the facts of this case.

The driver did not argue that the shipper's liability was exclusive. While he recognized that he had a duty insofar as securement, he argued that the shipper's provision of the load stars and reassurance as to the

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methodology gave rise to a duty on its behalf.

The driver relied upon the Pennsylvania Supreme Court's holding in *Kunkle v. Continental Transportation Lines, Inc.*⁴ in which a tractor trailer, loaded by the shipper, rolled. The Supreme Court affirmed the jury's verdict, holding that the shipper's employees who loaded the trailer were responsible to see that their loading did not create a dangerous situation.

The Court of Appeals interpreted *Kunkle* not to impose a special duty on the shipper based upon a relationship or status. However, the Court found that a shipper was not, by virtue of its role, exempt from the duty imposed upon all who undertake to perform services that may expose others to injury.

The Court found that situation to have arisen in the case before it. It stated as follows:

Although it was Spence who physically secured the load with the load stars and closed and locked the truck, ESAB nonetheless significantly involved itself in the securing of the load. In other words, ESAB went beyond the task of merely loading the product on the trailer. It was, after all, ESAB that supplied load stars as the securement device.⁵

The shipper was not absolved by loading dock signage stating that the drivers were responsible to secure the load. This was rebutted by the driver's initial complaints about the load star methodology, testimony that it was the industry practice for the shipper to load and brace the cargo it loads, and evidence that this shipper had previously utilized this method.

The Court stated as follows:

In sum, there was evidence that ESAB selected the appropriate securement device, that Spence complained

to ESAB concerning the way the cargo was loaded and secured, that ESAB in response stated that it never had a problem with any of its loads, and that Spence relied upon this assurance in using only load stars to prevent lateral movement of the cargo.⁶

It held that it was ultimately for the jury to decide if the shipper undertook to assure the stability of the cargo and, if so, whether it exercised reasonable care in doing so.

The carrier and its driver are not absolved of responsibility even if a duty is imposed upon the shipper. Authority from other jurisdictions recognizes that the carrier had primary responsibility insofar as securement, but not exclusive responsibility where assistance is provided by the shipper.

The Third Circuit concluded by summarizing its holding as follows:

Those who undertake the task of loading, securing, and hauling cargo on tractor-trailers have a duty to exercise due care to protect property and persons from the risk of harm. The primary duty to assure that a load does not shift in transit generally rests with the carrier and its driver... But where there is evidence that a shipper undertook to load and secure the cargo being transported by a third party carrier, the shipper also bears an obligation to exercise reasonable care.⁷

It held that as the shipper in this case had provided the method and reassurance to the skeptical driver, it was potentially liable for the breach of duty of care. As such, summary judgment was inappropriate as the resolution of these questions is within the province of the jury.

Impact

From a litigation perspective, this case reaffirms the primary responsibility of the carrier and its driver. However, a shipper is not absolved of responsibility purely by virtue of its status. If the shipper is involved in the loading and securement, it may give rise to a duty of care for determination by the jury.

The shipper will need to react to accidents given the potential exposure for bodily injury liability to the driver. They will need to prepare to react with immediacy upon any suggestion that loading was an issue.

Conversely, carriers have the potential for workers' compensation subrogation for accidents caused by improper loading. This potential should be included as an element of investigation of any accident.

Additionally, this case has implications in relation to the growing number of states prohibiting indemnification provisions in motor vehicle contracts. Prior to this legislation, shippers could protect themselves from exposure to carrier employees by including indemnification provisions in the contract.

With the indemnification provisions, an employer carrier could be liable for the injuries to its employee despite the protection of the workers' compensation defense. This would result in the employer carrier paying the third-party claim of its driver based upon the contractual indemnification, depriving it of the statutory protection afforded by workers' compensation statutes. The employer carrier would thus be paying both workers' compensation and third-party payments to its own driver as a result of contractual indemnification provisions.

The prohibition against indemnification provisions eliminates this "pass-back" to the employing carrier. Thus, any potential exposure created by the holding in *Spence*

s compounded by the elimination of the shipper's ability to seek indemnification.


Accordingly, the shipper would, under *Spence*, bear the burden of third-party exposure without the recourse of indemnification due to the statutory prohibition enacted in a majority of the states. This shift

in unindemnifiable risk increases the potential exposure to both the shipper and their insurers.

The ultimate result of the holding in *Spence* can be summarized as follows:

a. The driver, and the employer carrier, remain responsible for the security of the load;

b. The shipper can be liable if it is involved with the securement of the load;

c. Shippers, and their insurers, are potentially exposed to liability for which indemnification is statutorily precluded in a majority of states. 

Endnotes

1. 2010 U.S. App. LEXIS 21371 (2010).
2. 49 C.F.R. §§392.9(a) and (b); 393.100.
3. Restatement (Second) of Torts §323.
4. 372 Pa. 133, 92 A.2d 690 (Pa. 1952).
5. *Spence v. The ESAB Group, Inc.*, 2010 U.S. App. LEXIS 21371 (2010), p. 18.
6. *Id.*, p. 19.
7. *Id.* at 27.