

**THE TRUCK STOPS HERE:  
SHIPPER LIABILITY BASED ON ITS  
SELECTION OF CARRIER**

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Generally, principals are not liable for torts committed by their independent contractors. See Prosser & Keeton on the Law of Torts, § 71 (5<sup>th</sup> Edition 1984). However, an exception to this rule is when the principal engages an incompetent contractor. To prevail on this theory, a Plaintiff must show that the independent contractor was incompetent, that the incompetence led to the injury, and that the principal knew or should have known of the incompetence.

This principle was used fairly recently to find that a broker or a shipper could be liable to a Plaintiff after a fatal collision involving two tractor-trailers. In Jones v. C.H. Robinsons Worldwide, Inc., 558 F.Supp.2d 630 (W.D. VA., 2008), the Plaintiff sued the motor carrier broker for negligent hiring. Although the general rule in Jones is, as is discussed above, that a principal is not liable for the negligence of its independent contractor, the Court found that a claim for negligent hiring of an independent contractor exists where the independent contractor is, in fact, incompetent, the injury results from the incompetence and that the principal knew or should have known about the independent contractor's incompetence.

In Jones, the Defendant argued that negligent hiring of an independent contractor should only apply in situations where the activity that the independent contractor is hired to perform involves ultra-hazardous activities. In rejecting this argument in favor of a less stringent standard that the activity need only be one that involves a risk of physical harm unless skillfully and carefully done, the Court noted that the Restatement (Second) of Torts, a treatise used as an authority in torts claims across the country, used the following example when addressing the topic of negligent hiring of an independent contractor:

A, a builder, employs B, a teamster, to haul material through the streets from a nearby railway station to the place where A is building a house. A knows that B's trucks are old and in bad condition and that B habitually employs inexperienced and inattentive drivers. C is run over by a truck carrying A's material and driven by one of B's employees. A is subject to liability to C if the accident is due either to the bad condition of the truck or the inexperience or inattention of the driver.

Jones at 641. In that example, the Court found that the facts do not support a finding that the activity is ultra-hazardous, and yet liability is imposed. The Federal District Court also cited other jurisdictions which had found that a shipper could be liable for negligent hiring of a carrier to haul its goods by relying on this section and example of the Restatement (Second) of Torts: Washington (L.B. Foster Co. v. Hurnblad, 418 F.2d 727 (9th Cir. 1969)), Oklahoma (Hudgens v. Cook Indus., Inc., 521 P.2d 813, 816 (Okla. 1973)), and New Jersey (Puckrein v. ATI Transport, Inc., 186 N.J. 563, 897 A.2d 1034 (N.J. 2006)). Based on these observations, the Federal Court concluded that operation of a tractor-trailer upon the public highway

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involves a risk of harm unless skillfully and carefully performed. Therefore, under the holding in Jones, if a shipper or broker hires an incompetent carrier and the shipper or broker knew *or should have known* that the carrier was incompetent, the shipper or broker can be liable to a third party of injury as a result of the carrier's incompetence.

Jones is very detailed about the steps that the broker or shipper can take and the resources available to it in finding that there was an issue of fact about whether the broker could be liable under a theory of negligent hiring. Among other things, the Court noted that the FMSCA maintains a public website which includes several different categories of safety information in determining that an issue of fact existed about whether the defendant knew or should have known about its carrier's competence or incompetence.

Quite recently, a Plaintiff in New Jersey survived a summary judgment using this theory of liability. In Chinn v. Mark Transportation, Inc., 2010 WL 374958 (N.J. Super. A.D. 2010), the plaintiff was injured when a tractor-trailer driver "blacked out" after having been on the road for 13 hours. The wholesaler/shipper used the driver's employer to deliver its fuel products. The driver and his employer stipulated to their liability. There was conflicting evidence about whether the driver was medically examined and certified as required by 49 C.F.R. §§ 391.11(a) and 391.45. In finding that the plaintiff could proceed against the shipper, the Court found that there was a duty to inquire about the employer's ability to legally travel, including its drivers' medical qualifications. Because there was a question of fact about whether the driver's "blacking out" was due to a medical condition which would have been discovered through a medical examination, summary judgment was not proper and the plaintiff was permitted to proceed against the shipper.

Although this theory of liability varies from jurisdiction (*See Illinois Bulk Carrier v. Jackson*, 908 N.E.2d 248 (Ind. 2009) and Alaubali v. Rite Aid Corporation, 320 Fed.Appx. 765 2009 WL 886889 (C.A. 9, Cal., 2009)), it is evident, based on the recent decisions in Jones and Chinn, that a shipper can be exposed to liability if it selects an incompetent carrier whose incompetence causes an injury, and it knew or should have known that the carrier was incompetent.

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