It will not come as news to anyone reading this publication that plaintiffs’ attorneys are suing property brokers and other third party logistics providers with increased frequency in an effort to recover damages resulting from highway accidents. While there are numerous theories of liability that are alleged in broker liability cases, the majority of cases typically fall into two camps. The first is what I will refer to vicarious liability cases where it is alleged one way or another that the broker is liable for the conduct of the underlying motor carrier (or the motor carrier’s driver); that is, it is argued that the broker is legally responsible for the motor carrier’s negligence. The second, and the theory that tends to command more headlines (especially in conjunction with the Compliance, Safety and Accountability (“CSA”) program being implemented by the Federal Motor Carrier Safety Administration (“FMCSA”)), is negligent selection wherein it is alleged that the broker was itself negligent in hiring an unsafe motor carrier.

This article focuses on vicarious liability cases, which have somewhat surprisingly been a source of significant exposure to brokers (particularly in Illinois) in the past couple of years, resulting in several multi-million dollar verdicts. As explained below, a recent case in Illinois provides a roadmap for limiting exposure in cases where it is alleged that a property broker should be liable for the conduct of the motor carrier that it hires. Typically, absent extenuating circumstances, under the law, one party is not liable for the conduct of another. There are certainly exceptions to this rule. For instance, employers are generally responsible for the actions of their employees taken in furtherance of their employment, and motor carriers are often said to be statutorily liable for the conduct of independent contractor drivers operating under the motor carrier’s operating authority. However, generally speaking, one entity or person is not liable for the conduct of another entity or person. To overcome that general rule, a plaintiff is typically required to show that the defendant exercised excessive control over the third-party whose conduct caused the accident, or that the defendants were otherwise some-how engaged in a “joint venture.” The difficulty associated with imputing motor carrier conduct to property brokers is likely one of the key reasons that the negligent selection cause of action has taken hold in recent years, simply put, it was easier for plaintiffs attorneys to argue that the broker was itself negligent for hiring an unsafe carrier than it was to argue that the broker should be liable for the conduct of the motor carrier.

Several recent cases in Illinois seem to have lowered the bar in imposing vicarious liability on both brokers and shippers for the conduct of motor carriers. While it is not the first Illinois case to find a broker vicariously liable for the actions of a motor carrier, the recent string of negative cases appears to have been triggered by the Sperl case wherein C.H. Robinson Worldwide, Inc. was found vicariously liable for the conduct of the underlying driver. The case resulted in a verdict of approximately $23 million. Since Sperl was decided (the appeal was decided in March of 2011), there have been at least two additional cases in Illinois (both unreported state trial court decisions) in which brokers were found vicariously liable for the conduct of the underlying motor carriers. Those two cases alone resulted in verdicts in excess of $35 million.

Given the timing of Sperl and the cases that quickly followed imposing liability on similar legal bases, it is not much of a stretch to think that the result in Sperl influenced the subsequent decisions. If true, that is unfortunate because Sperl involved unique facts that would not exist in most broker/motor carrier transactions. It was undisputed in Sperl that C.H. Robinson was licensed as a property broker and not a motor carrier at the time of the accident, and that C.H. Robinson did not employ drivers. The contract in place between C.H. Robinson and the underlying motor carrier established that the motor carrier was an independent contractor of C.H. Robinson and that the motor carrier was responsible for employing or retaining competent drivers to provide its services.

As for the unique facts of the case, it turns out that C.H. Robinson actually owned the cargo that was being carried by the motor carrier at the time of the accident. There was also evidence that the owner-operator driver in question had discretion of either obtaining loads itself through C.H. Robin-
son (in which case, the owner-operator was entitled to all the revenue related to the load), or could accept loads from the motor carrier, in which case, the carrier kept a percentage of the transportation charge. With respect to the shipment in question, the driver contacted C.H. Robinson directly. C.H. Robinson sent instructions to the motor carrier to have the driver call C.H. Robinson directly, and also sent “Driver Special Instructions” that imposed specific operational obligations on the driver and laid out monetary penalties for not complying. At trial, the owner-operator testified that C.H. Robinson dispatched her with respect to the shipment in question and that she was in constant contact with C.H. Robinson throughout her trip. The driver also testified that she could not have delivered the load on time, given the delivery schedule, without violating the hours of service regulations, and that, had she delivered the load in question, C.H. Robinson would have directly deposited payment into her personal bank account (rather than issuing payment to the motor carrier). On these facts, the jury found that C.H. Robinson was vicariously liable for the driver’s conduct and the appellate court affirmed that ruling.

While it is difficult to know the extent to which Sperl influenced the results in the subsequent Illinois vicarious liability cases against brokers, it is at least safe to assume that the result had something to do with how those cases were litigated. Fortunately, a recent case out of the Federal District Court of the Northern District of Illinois provides a roadmap for how to defend such cases in the future. In the case of Scheinman v. Martin’s Bulk Milk Service, Inc., both the shipper and the broker were sued for vicarious liability. The court expressly considered the evidence in favor of both the shipper and the broker (meaning that the court held prior to trial that neither the broker nor the shipper were vicariously liable for the conduct of the motor carrier).

In Scheinman, the facts were not perfect. For instance, the broker signed a contract wherein it was designated as the “Carrier” and it agreed to perform services as a “common carrier.” The agreement required the broker to provide qualified and licensed drivers in compliance with federal and state laws and regulations. Those representations notwithstanding, the court acknowledged that it was undisputed that the broker did in fact hire a motor carrier to perform the motor carrier operations in question.

In attacking the plaintiffs’ allegations of vicarious liability, the shipper and broker detailed dozens of issues including the following:

- The motor carrier owned the tractor and was responsible for giving the driver his assignments.
- The driver was paid by the motor carrier and received a W-2 from which the motor carrier deducted payroll tax.
- The motor carrier kept a driver qualification file and provided the driver an employee handbook.
- While the carrier generally directed drivers to take the shortest route, the specific route in question was left to the driver’s discretion.
- The driver signed the bill of lading in question on behalf of the actual carrier, not the broker.
- Neither the shipper nor broker directed the driver to use any particular route nor instructed the driver on how to operate his truck.
- The shipper did not require the driver to inspect or maintain his tractor or to use a designated place for cleaning, servicing or fueling the tractor.
- The shipper was not responsible for maintenance of the tractor.
- Neither the shipper nor broker paid the driver nor provide any benefits.
- Neither the shipper nor broker tracked the driver’s work hours or hours of service.
- Shipper personnel testified that the broker was entitled to hire third-party motor carriers to meet its obligations under the contract between the broker and shipper.
- The broker had no conversations with the driver regarding the load in question and did not discipline or fine the driver.

The court expressly considered the evidence in light of Sperl and, as to both the shipper and the broker, that “no reasonable jury” could find that either the shipper or broker exerted control over the driver with respect to the services at issue. As such, both the shipper and the broker were dismissed from the case on summary judgment.

Scheinman is a good example of a return to a more traditional reading of vicarious liability allegations where the plaintiff faces an uphill battle in arguing that defendant is liable for the conduct of a third party. Hopefully, it will mark a line in the sand and plaintiffs in future vicarious liability cases against brokers will be held to this higher standard. Regardless, the case provides a good roadmap for the types of evidence that can be used to defend and ultimately defeat vicarious liability claims.

Nathaniel Saylor can be reached at nsaylor@scopelitis.com or (317) 637-1777