



**TIMOTHY J. ABEEL** | EDITOR  
[tabeel@rawle.com](mailto:tabeel@rawle.com)

**Commercial Motor Vehicle Section:**

*PARTNERS*

- Timothy J. Abeel
- Cynthia M. Certo
- Delia A. Clark
- Jon M. Dumont
- Robert A. Fitch
- Nigel A. Greene
- Gary N. Stewart

*OF COUNSEL*

- James R. Callan
- Diane B. Carvell
- Dawn L. Jennings

**PHILADELPHIA**

(215) 575-4200

**NEW YORK**

(212) 323-7070

**NEW JERSEY**

(856) 596-4800

**HARRISBURG**

(717) 234-7700

**DELAWARE**

(302) 778-1200

**PITTSBURGH**

(412) 261-5700

[www.rawle.com](http://www.rawle.com)

## PENNSYLVANIA / NEW JERSEY / DELAWARE

### Dual Liability For Shippers And Motor Carriers



**Gary N. Stewart**

Plaintiff was traveling on an interstate highway in Harrisburg, Pennsylvania. Unbeknownst to him, heading in the opposite direction was a step deck trailer with a backhoe that had been loaded above the legal height of 13 feet, 6 inches.



**Brian A. McCall**

As they both approached an overpass, the top of the backhoe boom or dipper arm struck the underside of the overpass. The backhoe snapped the securing chains and spun up and over the concrete median, landing on the plaintiff's SUV. Plaintiff died instantly.

Prior to the accident, the truck driver and motor carrier were asked to pick up a "legal load" at a nearby used farm equipment dealer (the shipper). The common business understanding of a "legal load" is that it required no permits or variances to be driven on the highway. In other words, the load or backhoe was capable of being transported on public roads and was within the legal height, length, and width. It was with this knowledge that the truck driver arrived and watched employees of the shipper load it.

Unfortunately, the backhoe had been sitting unattended for months in the shipper's lot and was inoperable. Employees for the shipper attempted to "jump start" it, but had no success. They then got a front arm loader and pushed the backhoe onto the step deck trailer. While one of the shipper's employees pushed the backhoe, another steered it into position. After it was on the trailer, the shipper's employees asked the truck driver how he wanted the backhoe positioned. He told them to place both buckets flat on the trailer deck so that he could secure them with chains. The shipper's employees lowered the buckets as the driver "directed" or "instructed," then hopped down off the trailer.

No one bothered to actually measure the height of the load. The truck driver eyeballed it and believed the backhoe boom was below the legal limit. The shipper's employees said it

was the driver's responsibility even though later, they said that they repeatedly told the driver that it was too high. The truck driver then secured the backhoe and left on his fateful journey.

After the accident, the Pennsylvania State Police investigated and determined that the boom was almost 16 feet high, or two and a half feet over the legal limit. At the accident scene, the driver advised the investigating officer that he did not know that load was too high and he admitted that he did not measure it.

The State Police interviewed the shipper's owner and employees. They informed the investigating officer that they told the driver that the load looked too high and he should measure it. The driver emphatically denied that he was ever told to measure the load. He also stated that if he knew the load was too high, he would have never left the shipper's facility.

A lawsuit was commenced by the estate of the decedent. The decedent was earning over \$100,000 per year and was only in his mid-thirties. Obviously, the exposure was high. The trucker and carrier admitted fault and paid their respective policy limits.

The loader continued to deny all responsibility for the accident, blaming the driver as solely responsible for the load and failing to measure it. The shipper argued that a shipper has no duty to the plaintiff in the loading process.

The law applicable to Pennsylvania, New Jersey and Delaware as decided by the United States Third Circuit Court of Appeals is:

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.** *Spence v. ESAB Group, Inc.*, 623 F.3d 212, 222 (3d Cir. 2010)

Much like the carrier and its driver, the shipper must comply with the same reasonable person standard in fulfilling its duty to the motoring public. As noted in *Spence*, shippers are not exempt from the general duty the law imposes on all persons who undertake to perform a particular service to not expose others to risks of injury which are reasonably foreseeable. The shipper or loader cannot refuse to see or ignore and blame the truck driver because a duty arises when one engages in conduct which foreseeably creates an unreasonable risk of harm to others. Although individuals are not required to guard against every risk they conceive to be possible, they are under a legal duty to prevent hazards which they can forecast as possible.

At trial, plaintiff's counsel argued that even though the driver admitted his role in the accident, the law recognizes a **shared responsibility** to ensure that the cargo is loaded safely. Plaintiff argued that the shipper failed to fulfill its duty to plaintiff in performing the task it undertook to load the backhoe. Evidence showed that the shipper failed to obtain any manufacturer's manual that listed the "loader's responsibilities."

The investigating trooper was able to obtain it with a simple phone call. The manual contained detailed instructions on how to safely load the backhoe, including

the shipper's obligation to lower the height of the backhoe boom and measure the overall height of the backhoe before transporting. Plaintiff's counsel also noted for the jury the fact that the shipper's employees were not trained and they did not know the legal height limit in Pennsylvania although they routinely loaded equipment that might exceed it.

Instead of addressing its own shortcomings in performing its job, the shipper denied any wrongdoing, claiming that they performed the job of loading the backhoe safely and they were just following the specific "instructions" of the truck driver. As such, if it was loaded incorrectly, it was because they were told to do so by the driver. The shipper argued that the load, once it was on the trailer, is the ultimate responsibility of the motor carrier.

The defense argued that the driver, of course, did not instruct the shipper to load the backhoe illegally. We also argued that the shipper has its own responsibility to do its job safely under the law regardless of the action or inaction on the part of the driver. We acknowledged fault, but noted that the motor carrier's failures alone did not cause the tragedy. Rather if the shipper did its job in a safe and reasonable manner and fulfilled its obligation under the law, the decedent would still be alive. We also asserted that the defendant shipper's obligation under the law is not dependent upon the motor carrier, but the shipper has its own legal duty. We emphasized that the shipper's absolute and indignant failure to accept any responsibility was simply an attempt to "pass the buck" and the jury should make the shipper take responsibility because they would not accept it.

After deliberations, the jury found the truck driver, who admitted responsibility, 65% at fault while the shipper was 35% at fault. However, even with the smaller amount of

negligence, the shipper was forced to pay a higher amount than the driver because of the shipper's policy limit and delay damages.

The result of this case demonstrates that the jury aptly applied a duty to each party and apportioned the duty according to the requirements of the law.

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### **Important Points For The Motor Carrier:**

**Know your limits.** While the Federal Motor Carrier Safety Regulations do not specifically require the driver to physically measure the height of the load with a tape measure, the regulations and most, if not all, state laws place responsibility on the driver for the cargo in or on the trailer. Whether or not you have any doubt, ensure "your" load is within legal limits. Do not presume that if it looks safe, it *is* safe, and do not take the word of the shipper.

**Know your load.** Ensure that your load is properly and legally braced, secured, and placed safely on your vehicle. Do not trust the shipper to do it. When the shipper's duty is complete, it is now your load. Ensure your load is safe and legal before you depart the facility and enter onto the highway.

**Know your shipper.** Make sure the shipper does its job. The shipper may want to "pass the buck," but they have a shared duty to motorists on the highway to ensure the cargo or equipment it loaded has been loaded safely and legally. Tell the shipper to fix something if you notice a potential problem or hazard with the load. Oversee the shipper's work and advise of any corrective measures are necessary. If in doubt, raise the issue, advise your dispatcher, but do not just drive away.

### **Important Points For The Shipper:**

**Know your job.** It may sound simple, but to load equipment correctly, safely, and legally, one should know how the equipment being loaded should properly be loaded. Consult manufacturer instructions or safety manuals if you are unsure. The Internet is a good source. Have trained employees, who are knowledgeable about the legal limits and the regulations, loading the equipment.

**Know the law.** Make sure your employees know the legal limits of a load and the law in the state or states where your business operates. One should not assume that the loaders know.

**Know your motor carrier.** Make sure the motor carrier does its job. Because it is a shared responsibility, do not pass the buck. While the shipper should know that its role ends after the equipment is loaded, you may also be responsible for any other responsibility you undertake. For every duty you undertake, do it safely. If the carrier takes obvious shortcuts in bracing, securing, or loading, point them out and direct that they be corrected.

### **Important Points For Both The Shipper and Motor Carrier:**

**Know that safety always comes first.** As the shipper or carrier, if you notice something that may be dangerous, address it with the other party.

If the shipper ignores you, take action. Refuse the load and call your employer to explain the situation so that corrective action and appropriate permits may be obtained if necessary. However, if it involves a simple fix on your end, do it to ensure the load falls within legal limits.

If the driver ignores you, take action. Prevent the driver from leaving and call the police. If it involves an illegal load that can be fixed on your end, do it—whether it involves either measuring the load or adjusting the load to ensure that it falls within legal limits.

If each party fulfills the obligations of their respective roles in a safe, reasonable, and legal manner, everyone benefits and a tragedy could be averted.

**Gary N. Stewart** is a partner in the Commercial Motor Vehicle Section in our Harrisburg office. Gary is admitted to practice in Pennsylvania, New Jersey, Massachusetts, Connecticut, Vermont and Rhode Island as well as before the U.S. District Courts for the Eastern, Middle and Western Districts of Pennsylvania, the District of New Jersey, the District of Massachusetts, the District of Rhode Island, the District of Connecticut and the U.S. Court of Appeals for the First and Third Circuits.

*Gary can be reached at (717) 234-7730; [gstewart@rawle.com](mailto:gstewart@rawle.com)*

**Brian A. McCall** is an associate in the Commercial Motor Vehicle Section in the Harrisburg office. Brian is admitted to practice in Pennsylvania as well as the U.S. District Court for the Eastern and Middle Districts of Pennsylvania and the U.S. Court of Appeals for the Third Circuit.

*Brian can be reached at (717) 234-1006; [bmccall@rawle.com](mailto:bmccall@rawle.com)*