Opinion No. 54-5977

June 21, 1954

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. C. O. Erwin Chief Highway Engineer State Capitol Santa Fe, New Mexico. Attention: Mr. L. D. Wilson, Administrative Engineer

*{*435}* You have requested our opinion as to the legality of the State Highway Commission's requiring one who applies for an over weight or width permit pursuant to Section 68-605, N.M.S.A., 1941, to sign an application containing the following clause, to-wit:

"That the applicant assumes all liability for damages which may property, or any other damages occur to either public or private which may occur, by reason of the transportation of such vehicle or load upon a State Highway and shall hold the State Highway Commission of the State of New Mexico, free and harmless therefrom."

Although this clause does not specifically so state, we are of the opinion that its intent is not to require the applicant to assume any liability for any damage which it has not substantially contributed to by the operation of the vehicle under the permit. In such case we feel that it is within the discretion of the Commission to make this requirement. Should an accident occur which is not the result of the negligence of either the operation of the vehicle bearing the excessive load or width, or the negligence of the person injured, we believe it is the intent of this paragraph to require the permittee to assume the damages if it substantially contributed to the *{*436}* accident by the movement on the highway of the vehicle with the excessive load or width. In such case it might be said that the applicant is an insurer to this extent.

It is common practice to demand public liability insurance of operators of motor vehicles where a dangerous situation is indicated. The driver responsibility law and this requirement of public carriers (68-1344 and 68-1529(c)(1), N.M.S.A., 1941) are relevant examples. We note that Section 68-1529(c)(1) does not specifically limit the liability to negligent operation. We see no reason why the Highway Commission could not make such a requirement before issuing of the permits authorized by Section 68-605. Nor do we feel that the requirement is unreasonable even though it is interpreted as extending the common law liability, as long as the damage is the result of this unusual privilege granted the applicant. **Alexander v. Coward,** N.M. June 7, 1954 No. 5749.

We believe, however, that paragraph 2 could be more appropriately worded so as to express its intent. We suggest the inclusion therein of the statement that it applies only to such damages as are the result of the operation of the overloaded or over width vehicle on the highway or to which its operation substantially contributed. In this connection we note that paragraph 1 requires compliance with Chapter 196 of the 1933 Session Laws relating to identification and clearance lights. This chapter has since been

repealed and if the form now in use is reprinted, we suggest that this be also amended so as to read Chapter 139 of the Laws of 1953.

We trust this is the information you require.

By: John T. Watson

Spe. Assist. Atty. General