



THE LANE LAW LETTER

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We hope that you find *The Lane Law Letter* both enjoyable and useful in keeping you updated on legal developments important to you.

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New Jersey Appellate Court Limits Loading and Unloading Coverage to \$15,000

Finally, an appellate court in New Jersey, in *Potenzzone v. Annin Flag v. Penn National* (decided October 13, 2006), has seen the logic of limiting “loading and unloading” coverage to the statutory minimum (\$15,000 in New Jersey) for a stranger to the policy, such as a warehouseman. In a typical case, a trucker is injured during a loading or unloading operation through the negligence of a warehouse or terminal, or its employees. The trucker sues the warehouseman for his injuries, and the warehouseman sues the trucker’s insurer for coverage. The warehouseman argues (correctly) that he and his employee were “using” the truck, because they were loading or unloading it, when the accident occurred. If the accident is proximately related to the loading or unloading process, then the warehouseman and his employee are additional insureds under the trucker’s insurance policy. That is a correct statement of the law. But, do they get coverage for the policy limit (as would be available to the named insured), or is the additional insured coverage limited to the statutory minimum amount of \$15,000?

The court in *Potenzzone* rules that the “loading/unloading” coverage for the additional insured is limited to \$15,000. This opinion very quietly changes decades of New Jersey case law holding that the additional insured is entitled to the full amount of the trucker’s policy limit.

The underlying argument for loading/unloading coverage is that all exclusions designed to negate such coverage are void as against public policy because the injured plaintiff may not realize full recovery. Yet, in

every reported case over nearly fifty years, the injured individual had settled his claim with the defendant (as in *Bellefronte v. General Motors* in 1977) or its general liability carrier (as in *Kennedy v. Jefferson Smurfit* in 1997). The settling entity – a self-insured corporation or a general liability insurer – the sues the trucker’s insurer, claiming that the defendant should be insured by the trucker’s insurer, on a primary basis, for the full policy limit. (In *Potenzzone*, Penn National and Atlantic Mutual [Annin Flag’s insurer] funded an \$850,000 settlement, and proceeded with the coverage litigation.)

That was the state of the law in New Jersey until *Potenzzone*. If the case is not overturned by the Supreme Court of New Jersey, *Potenzzone* will end decades of litigation, essentially between insurers, as to which insurer has the responsibility for insuring the tortfeasor. Even if the trucker’s insurer owes primary coverage, that coverage is limited to \$15,000. As the court noted, Annin Flag and its employee, Tran, had no reasonable expectation of coverage from the insurance carrier for the truck owner, and had their own insurance with Atlantic Mutual. They were “strangers to the indemnity contract between Apollo Flag and Penn National, and are at best incidental beneficiaries.”

Potenzzone brings New Jersey in line with most states on the issue of limitation of the loading/unloading coverage for a stranger to the policy. By contrast, New York allows the exclusion, by state regulation. Thus, there is a paucity of such litigation in that state. Now, there will be far less of it in New Jersey.

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Latin May Lose Its Place in the New Jersey Courts



A criminal appeal is the setting for a footnote by Supreme Court Associate Justice Robert Rivera-Soto, to discard the use of the Latin phrase *nunc pro tunc* (“now for then”) and to require the contemporary English phrase, “as within time.” The appellant sought to file a late notice of appeal, *nunc pro tunc* (relating back to the proper time) because his lawyer dropped the ball. The justices allowed the appeal, “as within time,” in *State v. Molina*, decided July 12, 2006.

Latin phrases have survived in the law for centuries because they describe points and rules better than any English phrase. *In rem* describes an action against an object, such as a bank account or a ship. *Res ipsa loqui-*

tur is just better than “the thing speaks for itself.” And our own favorite, *ipse dixit*, “asserted but not proved,” to describe a weak theory or expert opinion, just does not have the same punch in English. We prefer the *status quo*.

Justice Rivera-Soto was a very good practicing lawyer. He has the makings of a great justice. We just hope he will let us keep our Latin phrases.

Mr. Molina and his fellow appellants all pleaded guilty to their crimes and were sentenced to prison. Their appeals seek to reduce the sentences. If unsuccessful, might they then petition for a writ of . . . *habeas corpus*?

Res Ipsa Loquitur Can Support Summary Judgment – But Only In Exceptional Cases

New York still likes Latin!

“Res Ipsa” is a doctrine of proof of negligence. It allows a plaintiff to prove his case merely because an accident happened – such as when a building falls down with no apparent cause. “The thing speaks for itself.” The summary judgment rule allows a party to reach a judicial ruling in a case without having a trial – if the facts are undisputed and the law favors the moving party. But can a plaintiff use “res ipsa” to support a motion for summary judgment? If “the thing speaks for itself,” does that eliminate all issues of fact? The New York Court of Appeals said “Yes” recently, but only in the rarest of cases.

The Court of Appeals wrestled with this issue for the first time in 65 years, in *Morejon v. Rais Construction*, decided May 9, 2006. The setting is an alleged fatal construction accident. With too many issues of fact, the court held that this was not one of those rare cases allowing *res ipsa loquitur* to be used in a motion for summary judgment by plaintiff.

The court took the opportunity to discuss the history of the *res ipsa loquitur* doctrine,

first used in New York in the 1874 case of *Mullen v. St. John*, and its rare use in motions for summary judgment.

The doctrine permits an inference of liability simply from the happening of an injurious event. Three requirements apply: (1) the event must be of a kind which ordinarily does not occur in the absence of someone’s negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.

Addressing the “dizzying array of formulations,” from mandatory inferences to permissive presumptions, the Court of Appeals in *Morejon* notes that *res ipsa loquitur* would be far less complicated if we ignore the mystique of the Latin phrase, and see that it is nothing more than a brand of circumstantial evidence. Viewed that way, a summary judgment issue can be approached by simply evaluating the circumstantial evidence and then deciding whether there is an issue of fact requiring a trial. It will be an exceptional case that permits summary judgment. This is not the exceptional case.

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New York and New Jersey Courts Limit Application of New York Law

Many motor vehicle accident cases involve a choice of state law, between that of New York, favoring plaintiffs, and New Jersey law which is more protective of defendants. Specifically, New York's laws regarding vicarious liability, comparative negligence, and joint-and-several liability are pro-plaintiff. Two appellate cases decided this year in New Jersey (*Kim v. Paccar Financial Corp.*) and New York (*King v. Car Rentals, Inc.*) both applied New Jersey law to equally complicated fact patterns.

In *Kim*, plaintiff was a passenger in a car that was struck, in New Jersey, by a truck owned by Paccar Financial, (a Washington corporation), leased to R&L Smith Trucking (a New York company), and driven by Tim Harvey (a New York resident). The truck was registered in New York, as required by the New York-based lease. Yet, the New Jersey court applied New Jersey law, which would not hold Paccar Financial vicariously liable. The court held that applying New York's Vehicle and Traffic Law Section 388 – the vicarious liability statute – to an accident occurring outside New York would aggravate “interests of interstate comity and the competing interests of states.”

In *King*, defendant Syed Ali leased a car from a New Jersey car rental agency, having just returned from New York to reside temporarily with his parents in New Jersey. He later moved back to New York. He drove to Connecticut to pick up the plaintiff, and the two then traveled to Canada for the week-end. While there, they were involved in a single-car accident, allegedly injuring the plaintiff, a New York domiciliary residing temporarily in Connecticut. The New York court concluded that Quebec's contacts were too limited for its laws to apply. The court applied New Jersey law because the car rental agency is a New Jersey company, and because Ali made a conscious decision to rent in New Jersey, where the vehicle was owned, registered, and insured.

Kim and *King* demonstrate an intent in both states to rein in the extended use of New York law in cases of accidents beyond its borders. The pre-emption of state vicarious liability laws in leasing situations by the 2005 federal Highway Act limits the range of choice-of-law issues but does not eliminate them. New York's rules on joint-and-several liability and comparative negligence, both favoring plaintiffs, are fertile ground for future battles.

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The NFL Beats Vigilant Insurance Co. – In Overtime

Maurice Clarett, a former Ohio State football player, was barred from the 2003 NFL draft because he did not meet eligibility requirements. He sued the NFL in federal court in New York claiming that the NFL's rules violated the Anti-Trust laws. He won in the district court, but the Second Circuit Court of Appeals reversed and ruled for the NFL. Clarett sought a writ of certiorari from the Supreme Court of the United States, which was denied.

All that lawyering cost the NFL a lot of money. The League sought coverage from Vigilant Insurance Co., its insurer. Vigilant sued in New York state court for a declaration that it owed no coverage. Like Clarett, Vigilant won in the lower court but lost on

appeal, in *National Football League v. Vigilant Ins. Co.* (Appellate Division, Nov. 14, 2006). Vigilant argued that the *Clarett* lawsuit alleged a “wrongful deprivation of a career,” one of 12 employment practices excluded from coverage.

The Appellate Division accepted the NFL's position, that the exclusion was not clear and unequivocal, and that it applied to actual employers – the football clubs – while the NFL merely sets the standards but employs no players. Vigilant failed to meet its burden of demonstrating that the interpretation by its insured, the NFL, was unreasonable. Vigilant will now be paying the NFL's legal costs in defending the *Clarett* lawsuit.





Products Liability: No Duty to Warn of the Danger of Sleeping in the Upper Bunk in College

Twenty-one year-old Donald Matthews, a college senior at Stockton State College, fell out of his newly installed six-foot high dormitory bunk while napping at noon-time on October 11, 1999. He sued the University Loft Company for making the bunk and failing to warn him that sleeping close to the edge could be hazardous. Nearly seven years later an appellate court reversed a lower court verdict in Donald's favor and declared what a reasonable person would find tangible: sleeping on an upper bunk, especially one without side rails, is *obviously* dangerous. No further warning is needed.

At trial, Donald testified that it never "crossed [his] mind" or "occurred to" him that he could fall, but if he had seen a warning, he would have been "aware of the hazard that was present" and slept closer to the wall. This is a *college senior!*

And, a consulting engineer (whatever that means, many engineers like to be consulting)

George Widas gave expert testimony that a warning was needed because "when you're conscious and awake then you can exercise caution and avoid the edge of the bed; when you're asleep you can't." Presumably Widas would have the college student read this warning *before* going to sleep. Every day? A trial judge let the case go to the jury, which returned a verdict for Donald of \$179,001.

The Appellate Division took it away, holding that the danger of falling from the loft bed was "open and obvious," and that obviousness "is an absolute defense." Surely Donald has by now recovered from his injuries and graduated from college, perhaps to become a consulting engineer. In any event, his saga is now immortalized in *Matthews v. University Loft Company*, 387 N.J.Super. 349, 903 A.2d 1120 (N.J.Super.A.D. Aug 15, 2006).

