In Transit

Transportation Loss Prevention & Security Association

Summer 2010

In This Issue...

These people are now saving money for their companies because they attended the 10th Annual Joint Conference of the TLP&SA and the TLC

See the article on page 3 for details

See Centerfold for Conference photos!

Transportation Loss Prevention and Security Association

155 Polifly Road
Hackensack, NJ 07601

201-343-5001
201-343-5181 FAX

William Bierman
Executive Director

wbierman@nakblaw.com
www.TLPSA.org

Transportation Loss Prevention & Security Association, Inc.

Danny Saviola
FIRST CHAIRMAN EMERITUS OF TLP&SA

William Bierman, Executive Director of the Transportation Loss Prevention & Security Association (TLP&SA), announced that Daniel Saviola, Corporate Security Manager, YRC Worldwide Inc. and long time Chairman of TLP&SA has accepted the position of Chairman Emeritus of the organization. Mr. Saviola, a well known security expert in the transportation field, served as Chairman of TLP&SA for many years. In recognition of his long and valued service the Board of Directors has named him its first Chairman Emeritus.

In his new position, Mr. Saviola will undertake strategic project planning to chart the direction of the Association into the 21st Century. Mr. Saviola will serve as the point person for the Board of Directors on important and sensitive issues especially in the security field. During his many years at YRC and its predecessor Roadway Express, he has developed significant relationships with law enforcement throughout the United States. TLP&SA is privileged to have Mr. Saviola in this critical position.

THE PRICE OF KNOWLEDGE – OUR JOINT CONFERENCE

By: William D. Bierman — EXECUTIVE DIRECTOR TLP&SA & Nowell Amoroso Klein Bierman, P.A.

"It's the economy stupid!" This catch phrase has dominated many political campaigns. It is no less true in the transportation industry. But there are many elements that make up the "economy" such as profit, loss, expenses, claims, financing, debt service, to mention just a few. Companies spend enormous amounts of time analyzing these issues in an effort to increase their bottom line.

Over the years this column has promoted education as a way to bolster the bottom line. The more knowledge one has as to items effecting productivity, the more likely one can address problems and augment cash flow.

Recently, TLP&SA in conjunction with TLC held its annual Conference in San Diego. This unique Conference made up of carriers and shippers provided education which could immediately save money for all who attended. One might say a small investment in knowledge yields big dividends in business.

It is hard to understand companies who do not realize the immediate benefit to be derived from attendance at a Conference such as ours. Could it be that management considers Conferences in general to be merely entertainment junkets? We certainly hope not. More than once I have heard attendees say that they work harder and longer at our conference than they do back in their offices. We have detailed sessions that run from 8 AM to 5 PM and day long optional seminars prior to the actual Conference. Just the advice given by our many industry and attorney presenters is worth the price of admission.

Our industry attendees will recall just a few of the highlights of this year's Conference. We started off with a highly informative and controversial program entitled "The Economic Situation – The Good, the Bad, & the Ugly" where industry experts from the Journal of Commerce; business and trade groups gave their candid opinions as to the present state of transportation and where we are heading. The audience was clearly informed, aroused, and impressed with our speakers. No one said they were bored.

Our luncheon speaker, Cameron Roberts, Esq., gave us an excellent recap of what is going on with the ATA litigation concerning the Clean Trucks Program at the Port of Los Angeles. His insight revealed all the underlying problems and the ramifications of any court determination. He explained in layman's terms what was at stake in this law suit.

Of course, no one was disappointed by our annual program entitled "Law of the Land vs. Law of the Jungle". This fast paced session made up of lawyers representing carriers and shippers always sets off sparks and this year was no exception. Comments such as, "Too bad we ran out of time – this should be longer", "Always great debate", and "Lots of good information – funny" summed up the crowd's response.

As if things could not get more exciting, our law and order Security presentations featured two of the nation's most interesting and successful personalities, Chuck Forsaith, Director of Corporate Security for Purdue Pharma Technologies and John Tabor, Director of Corporate Security, National Retail Systems. Each speaker held the audience spellbound for 90 minutes demonstrating their philosophy of preventing theft and catching bad guys. Everyone who was there came away with concrete ideas on stopping those who want to steal your goods.

Perhaps the emotional climax of our meeting was the luncheon presentation by Commodore Tim McCully, Captain US Navy (Retired) Military Sealift Command who made us all proud to be Americans. Commodore McCully was in charge of US Missions of Mercy as a result of the Tsunami & Earthquake Relief of 2005 and the Humanitarian Assistance of 2006 & 2008. He described in detail how our armed forces assisted those in desperate need and brought to bear all the aid and assistance a great nation has always stood ready to deliver to those countries that have been devastated by natural disasters. At the conclusion of Commodore McCully's presentation there was not a dry eye in the house. TLP&SA and TLC salutes Commodore McCully and all the men and women in our armed forces.

Add to all this, networking functions, individual workshops, and a chance to meet someone who may be involved with your claim and you have an unparalleled opportunity to gain the knowledge that will save your company money – immediately. It's the economy, stupid! When a company sends their employees to our Conference, the employees will bring back money, the price of knowledge.

THE ENFORCER®

HIGH SECURITY LOCKING SOLUTIONS

ENFORCER®
ADJUSTABLE LOCK
Portable

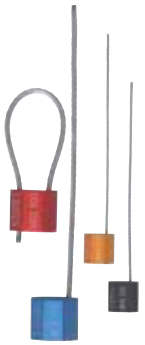
ENFORCER®
AIR CUFF® LOCK
Prevents truck theft
PATENTED

ENFORCER®
KING PIN LOCK
Prevents trailer theft

ENFORCER®
ROLL-UP DOOR LOCK
Locks automatically

SECURITY SEAL SOLUTIONS

KLICKER BOLT SEAL



CABLE SEAL

DOMINO METAL SEAL

SIMULOCK PLASTIC SEAL

Transport Security, Inc
820 S. Pine St. Waconia, MN 55387
Phone: 952-442-LOCK or 800-328-3442
enforcer@transportsecurity.com

Visit our web site and sign-up for our free cargo security monthly newsletter:
www.transportsecurity.com

Fireworks at the Supreme Court. Final Decision in the Regal–Beloit Case.

By: *Thomas Martin, Esq*. – Nowell Amoroso Klein Bierman, P.A. – Hackensack, NJ

How a shipment of fireworks set of another kind of fireworks at the United States Supreme Court.

In the recent 6 -3 opinion, *Kawasaki Kisen Kaisha, Ltd. v. Regal – Beloit Corp.*, *561 U.S. ____ (2010), ("Regal-Beloit") the United States Supreme Court made it clear that Courts in the United States will enforce the terms and conditions of a through Ocean Bill of Lading including those for foreign jurisdiction and venue.*

In Regal-Beloit, the owners of certain shipments of fireworks (and electric motors, motor parts and nail castings) shipped them from China (by ocean vessel) to California and then on to various points in the United States via rail, a derailment occurred in Oklahoma causing damage. The Ocean Bill was a through Bill of Lading containing a "Himalaya Clause" extending the Bill's defenses and limitations and jurisdiction and venue to the downstream carrier. Summary Judgment was granted to the defendant ocean and rail carrier to dismiss the cargo damage complaint from the United States District Court for the Central District of California because the Ocean Bill contained a jurisdiction and venue clause favoring Tokyo, Japan. The District Court granted summary judgment based upon the Ocean Bill and its "Himalaya Clause" extension to the downstream rail carrier. Regal –Beloit Corporation v. Kawasaki Kisen Kaisha, Ltd., 462 F.Supp.2d 1098 (C.D. Cal. 2006).

The United States Court of Appeals reversed - taking the position the Carmack Amendment to the Interstate Commerce Act applied to the inland leg of the transportation. Thus, the jurisdiction and venue provisions of the through Ocean Bill were inapplicable despite the through Ocean Bill and its "Himalaya Clause" extension of jurisdiction and venue.

The United States Supreme Court reversed the Ninth Circuit and enforced the jurisdiction and venue provisions in the through Ocean Bill and its "Himalaya Clause" extension to the downstream rail carrier. The Supreme Court called it a "practical" approach in consideration of "sophisticated cargo owners [who] made the decision to select the ocean carrier as a single company for their through transportation needs rather than contracting for rail services themselves." The Court also noted the terms of the through Bill made claims by shippers easier to resolve because one Bill of Lading applied and created an "efficient mode of international shipping."

Calling the Ninth Circuit's decision a "drastic sea change," a "disruption [which] would undermine international container-based transport," and an undermining of Carmack's purposes, the Supreme Court rejected the contention Carmack would apply. Applying Carmack, would "outlaw" through shipping contracts, would encourage the unwieldy practice of compelling a receiving carrier to open the container at the port to check for damage and would require multiple Bills of Lading – which may conflict with each other. This unnecessary complexity the Court felt was reason enough to reject the Ninth Circuit's ruling that Carmack applied.

The owners of the cargo made the commercial decision, as "sophisticated" shippers and "sensibly agreed" to litigate in Tokyo in the event of cargo damage. "Congress has decided to allow all parties engaged in international commerce to structure their contracts, to a large extent, as they see fit."

Overall, the majority took into consideration the practical implications of international and intermodal shipping and approached the case as one of enforcing contract terms agreed to between sophisticated business entities in the field of international shipping transactions. ***If Congress intended Carmack to apply to the inland leg of transportation on a through Ocean Bill, it could have so legislated.***

Recent Court Cases

as analyzed by the Conference of Freight Counsel

William D. Bierman, Esq., Chairman • Marian Weilert Sauvey, Esq., Vice-Chairman

A. Carrier Liability

1. Regal-Beloit Corporation v. Kawasaki Kisen Kaisha Ltd., 557 F. 3d 985 (9th Cir. 2009)

In this case, the Ninth Circuit continued the efforts of the Second Circuit to dismantle the holding of the U.S. Supreme Court in *Norfolk Southern Railway Co. v. Kirby*. *Regal-Beloit* involved shipments moving from China to various points in the U.S. via the Port of Long Beach on through ocean bills of lading issued by the ocean carrier, K-Line. The ocean bills included a Tokyo forum selection clause. The shipments were damaged as a result of a train derailment in Oklahoma while being transported by defendant Union Pacific Railroad, which had been subcontracted by K-Line. The district court had dismissed the action on the basis of the forum selection clause. Plaintiffs appealed, contending the Carmack Amendment, rather than COGSA, applied and that the form selection clause was valid under Carmack because the parties had not contracted out of Carmack's restrictions. The Ninth Circuit agreed and reversed, holding, notwithstanding *Kirby*, that the railroad was not entitled to the protections of the ocean bill of lading as a subcontractor of K-Line, and under Ninth Circuit case law Carmack, not COGSA, governed the rail carrier's liability because the parties had not contracted out of Carmack's default provisions as required by 49 U.S.C. §§10709 or 10502. Adding insult to injury, the court rejected K-Line's argument that Carmack cannot apply to ocean carriers and their agents, via a convoluted interpretation of Carmack leading the court to conclude that K-Line had provided "continuous carriage or shipment…by railroad and water," as a result of which Carmack applied to K-Line and its agent.

2. Lamb v J.B. Hunt Transport Services, Inc., No. 07-7085 (10th Cir. 2009)

This case is a personal injury action file by dock workers at a Georgia Pacific plant in Oklahoma. J.B. Hunt's driver arrived at the location loaded with recyclable waste paper that had been picked up from Dallas, Texas. After the trailer had been unloaded, the dock workers who were cleaning the trailer became ill. A subsequent investigation determined that sodium PCP was present in the trailer. The investigation was unable to determine the source of the PCP. The district court granted summary judgment to J.B. Hunt based on failure of proof. The Tenth Circuit affirmed the court on the following basis:

1. Plaintiff's theory that the hazardous material was in the trailer before the waste paper was loaded failed because the testing of the waste paper showed no trace of the chemical, but this was not sufficient to show that the source of the hazardous material was in the trailer before the waste paper was loaded. Plaintiffs were unable to show that the trailer had not been cleaned prior to loading.

2. The Court also rejected the *res ipsa loquitor* argument because the trailer was not in the exclusive possession and control of the defendants.

3. KLLM, Inc. and KLLM Transport, Inc. v Watson Pharma, Inc. and Factory Mutual Insurance Co., United States District Court for the Southern District of Mississippi, Jackson Division, Civil Action No. 3:08cv12

KLLM filed a declaratory judgment action against Watson Pharma requesting the Federal District Court in the Southern District of Mississippi to determine its liabilities and duties pursuant to a transportation agreement entered into by KLLM and Watson relating to $1,900,000 worth of pharmaceutical products which was stolen during the course of transit.

KLLM filed a Motion for Partial Summary Judgment seeking to enforce the "release evaluation" provisions in the contract upon which its maximum liability would be $2.50 per pound per article or $100,000 per truckload, whichever is less.

Watson and its insurer, Factory Mutual, also filed a Motion for Partial Summary Judgment seeking a determination that the released evaluation provision in the parties' agreement could not be enforced under Carmack because KLLM could not meet the factors as set forth in the Hughes test. In addition, Watson and Factory also argued that the material deviation doctrine voided the limitations clause because KLLM breached specifically negotiated security standards for the shipment in question.

In granting KLLM's Motion for Partial Summary Judgment, the Court found that a valid contract existed between the parties incorporating KLLM's rules tariff that Watson was afforded a reasonable choice of levels of liability that Watson agreed to same, and that KLLM had issued a bill of lading contract for the shipment in question.

Further, the Court rejected Watson's material deviation argument holding that the majority of jurisdictions have held that the doctrine does not apply to Carmack cases. The Court determined that the parties to the contract would have no reason to anticipate the doctrine's application and thus the Court refused the "invitation to expand the law".

4. Big G Express, Inc. v. Leviton Manufacturing Company, Inc., 2009 U.S. Dist. LEXIS 20702 (M.D. Tenn. 2009) (Improper Loading.)

The plaintiff motor carrier, Big G Express, sued the defendant shipper, Leviton, for damage to Big G's tractor-trailer resulting from the shipper's alleged improper loading of nine pallets of insulated wire in Big G's trailer. A rate confirmation sheet for the shipment stated, 'DRIVER IS RESPONSIBLE TO MAKE SURE FREIGHT IS PROPERLY SECURED PRIOR TO LEAVING SHIPPER." Big G's driver did not participate in the loading, though he did observe the back reel after the loading process and it appeared to be secure. Nonetheless, during heavy but normal traffic, the 40,000 pound load thrust forward approximately 20 feet, breaking through securing restraints, breaching the front of the trailer and barreling into the sleeper berth of the cab, seriously damaging both tractor and trailer.

On the defendant's motion for summary judgment, the court recognized the leading cases of *United States v. Savage Truck Line* and *Franklin Stainless Corp. v. Marlo Transport Corp.* on shipper and carrier duties to properly load, and ruled Big G did not need expert testimony to support its argument that the load was inadequately secured and any defect in securement was latent. The court concluded that the facts and evidence were sufficient to permit the fact finder to infer negligence on the part of the defendant shipper and denied the defendant's motion for summary judgment. The court also noted that the "SL&C" notation on the bill of lading operated only to shift responsibility for negligent loading and securement "where the items being shipped were themselves damaged

in transport as a result of improper loading or securement," and concluded that the action sounded primarily in tort, not contract.

5. Georgia-Pacific, LLC v. Hornady Truck Line, Inc., 2009 WL 484629 (N.D.Miss.)

Georgia-Pacific entered into a contract Carriage Agreement with Hornady Trucking Lines wherein Hornady agreed to transport GP's trees. Hornady's driver was injured while unloading at GP's facility. The driver started suit against GP alleging GP was solely liable for his injuries. GP settled and then started suit against both Hornady and its insurance company for breach of contract and negligence.

Although the transportation agreement required Hornady to defend and indemnify, it expressly excepts circumstances in which GP is sued for their sole negligence as in the driver's suit. The court dismissed that part of GP's suit against Hornady.

The court also deals with allegations of failure to procure insurance and the concept of "certificate of insurance" versus "additional insured" provisions. While the court found that only Hornady had an obligation to seek insurance under the contract thereby letting the insurance company out, the court concluded Hornady did not owe GP a duty to defend the driver's suit as that suit only alleged GP's negligence.

6. RLI Ins. Corp. v. Triumph Transportation, et al., CA Superior Ct. Norwalk. VC 049632

This case involves the theft of cargo off of Triumph Transport's storage lot in Vernon, California. Owner/Operator Rafael Ayala delivered the container on a Friday and according to motor carrier Triumph Transport, was supposed to return Monday morning to carry the load to the consignee. Triumph Transport issued no bill of lading for the movement. There were two through bills of lading, one from the ocean carrier, and the other from a freight forwarder. The terms included COGSA package limit through delivery and a covenant not to sue subcontractors.

Ayala moved for summary judgment arguing that the state law claims were preempted by COGSA under the operative through bills of lading; alternatively, they were preempted by Carmack. He argued RLI was not permitted to sue him under the covenant not to sue in the bills of lading but in any event his damages would be limited to $500 per package. He argued that the 185 "pieces" specified on the bill of lading were not "packages" but if they were, his liability, if any, was limited to $92,500.00 (not the $199,000 claimed). He argued that since he delivered to Triumph's storage lot before the theft, his duties were extinguished by such carriage whether or not he was assigned to return Monday morning to make the final delivery. He also demonstrated why he could not be liable under any one of the several state law claims. Judge Sahagun granted summary judgment on the COGSA preemption defense, noting that Carmack would have to same effect. He found that Ayala had made delivery of the container prior to the theft which extinguished his duties. He didn't rule on the covenant not to sue or the package limit defenses except to incorrectly hold that he could not grant summary adjudication under California law on the package limit because such a ruling would not have disposed of an entire cause of action. A more fact intensive order was submitted but rejected because it was not a verbatim recitation of the judge's tentative ruling. The ultimate order reflects the judge's tentative ruling word for word. RLI has appealed from the judgment.

7. Taylor v. Allied Van Lines, 2009 WL 1148582 (D. Ariz.)

Shippers sued household goods carrier for alleged damage to their goods during interstate transit. The original Complaint alleged state law claims. Carrier filed a Motion to Dismiss based on Carmack preemption.

The Court dismissed the shippers' state law claims, finding Carmack preemption and granted shippers leave to amend their Compliant to allege a claim under Carmack--"to correct its deficiencies." Shippers then filed an Amended Complaint that added a claim under Carmack and re-pled the state law claims. Carrier filed a second Motion to Dismiss, again alleging Carmack preemption of the state law claims previously ruled on by the Court. Shippers argued that because the Amended Complaint contained new allegations that the carrier had failed to issue a bill of lading, the state law claims were no longer preempted by Carmack.

The Court disagreed, holding that whether or not a carrier issues a bill of lading prior to shipment affects limitation of liability only, but "does not affect whether the Carmack Amendment is the exclusive remedy for a plaintiff to advance claims against an interstate shipper."

8. Michel v. Doe, 2009 BCCA 225 (CanLII) Court of Appeal for British Columbia (Road Carriage)

The appellant (plaintiff) was walking along the shoulder of a highway when she was struck in the head and seriously injured by a rock that had come off of a loaded logging truck being driven by an unidentified driver. The appellant commenced an action in negligence against the unidentified driver, the owner of the logging truck, and others. The trial Judge dismissed the appellant's action against the truck related interests on the basis that the legal standard of 'balance of probabilities' had not been met by the appellant in proving negligence on the part of the trucker.

The trial Judge formulated the duty and standard of care from the case law. According to the trial judge, "*Truck loggers intending to travel along public roads, … must diligently perform a complete inspection of their vehicle and their load to identify and remove debris or any foreign matter that might foreseeably dislodge and pose a hazard to the person or property of any member of the public who might foreseeably be harmed by such debris falling from the vehicle load*".] Note: While the fact pattern is narrow (concerning the use of a logging truck) the legal principles cited in this case are broad in terms of the statement of the duty, and standard of care of trucking companies as concerns the potential escape of cargo generally. Accordingly this case is of broader importance than might be immediately apparent. It is also instructive as it revisits certain key issues in Canadian tort law and the law of evidence as to who legal burden of proof in cases turning on circumstantial evidence.

The central issue, as framed by the trial Judge, was whether a breach of the standard of care could be inferred from the evidence, that is, could the court conclude that a prudent inspection would probably have discovered the rock, as being a risk, and thereby infer that such an inspection was not done?

This called for a discussion on the old law school concept of "*res ipsa loquitur*" which has for sometime now had a foothold in Canadian evidence law but which has been diminished over time so as to be effectively extinct. The reasons for judgment capture the relevant history, and status, of this rule of evidence in Canada.

At trial the Judge found that the object that struck the appellant was probably a rock that must haven fallen off of the truck as opposed to being picked up from the road. The evidence was otherwise entirely circumstantial, if not speculative, as to the origin point of the rock from the truck and load combination. Owing to the lack of any incriminating evidence as to the 'detectability' of the rock on a pre-trip inspection, the trial judge ruled in favor of the defendants.

On appeal the appellant [plaintiff] argued that the trial Judge erred in not applying the proper legal test. That is, once the trial Judge determined that the rock had fallen off of the logging truck, he next ought to have considered whether the accident would have ordinarily occurred in the absence of negligence and, upon a negative answer to this question, a *prima facie* case of negligence against the respondents would have been established, then shifting the onus to the respondents to present evidence negating the appellant's evidence, failing which the appellant must succeed. In short, "rocks don't usually fall off of trucks if a complete due diligence inspection had been undertaken". There being no 'negating evidence' in this case the trial court should then have ruled in the plaintiff's favor. The appellant plaintiff was in effect here arguing the historical doctrine of '*res ipsa loquitor*'.

In reply, the respondents took issue with the appellant's argument that the facts found by the trial Judge established actionable negligence. Rather, the trial judge reached the correct conclusion that the circumstantial and direct evidence was insufficient to establish a *prima facie* case of negligence.

(continued on page 9)

Recovery:

The use of secure data-collection and sharing systems greatly increases the likelihood of recovery.

Deterrence:

CargoNet members can affix theft deterrence decals to their tractors, trailers, and premises to deter theft.

Analytics:

CargoNet collects an unparalleled volume of data on cargo theft, then employs advanced analytics.

For more information : Call 888-595-CNET (2638) or E Mail : info@cargonet.com

WWW.CARGONET.COM

The respondents maintained that the legal burden of proof rests with the appellant to prove her case and that the burden does not shift to the respondents to negate the inference of negligence until after a *prima facie* case of negligence has been established. The respondents argued that a *prima facie* case of negligence was not established since the trial Judge found the circumstantial evidence to be equally consistent with negligence and no negligence.

The appellate court accordingly reviewed the question of the burden of proof.

The court recited the decision of *Fontaine v. British Columbia* (Official Administrator) [1998] 1 S.C.R. 424 wherein the Supreme Court of Canada concluded that the "doctrine" of *res ipsa loquitur* in Canadian jurisprudence ought to be treated as "expired". Historically, for *res ipsa loquitur* to apply, the circumstances of the occurrence must permit an inference of negligence attributable to the defendant i.e. (1) the defendant having had sole management and control of the thing that inflicted the damage; and (2) the occurrence was such that it could not normally have happened without negligence. Should res ipsa loquitur apply, the strength or weakness of the resulting inference of the negligence would then depend on the factual circumstances of the case.

As stated by the Supreme Court of Canada, as in any negligence case, "*the plaintiff bears the burden of proving on a balance of probabilities that negligence on the part of the defendant caused the plaintiff's injuries. The invocation of res ipsa loquitur does not shift the burden of proof to the defendant. Rather, correctly understood, it means that circumstantial evidence constitutes reasonable evidence of negligence. If, at the conclusion of the case, it would be equally reasonable to infer negligence or no negligence, the plaintiff will lose since he or she bears the legal burden on this issue. Under this construction, the maxim is superfluous. It can be treated simply as a case of circumstantial evidence.*"

Should the trier of fact choose to draw an inference of negligence from the circumstances, that will then be a factor in the plaintiffs favour. Whether that will be sufficient for the plaintiff to succeed will depend on the strength of the inference drawn and any explanation offered by the defendant to negate that inference. If a defendant produces a reasonable explanation that is as consistent with no negligence as the *res ipsa loquitur* inference is with negligence this will effectively neutralize the inference of negligence and the plaintiff's case must fail. Thus, the strength of the explanation that the defendant must provide will vary in accordance with the strength of the inference sought to be drawn by the plaintiff.

Accordingly, the simple issue in cases of circumstantial evidence, and the question of liability becomes whether, after weighing the whole of the direct and circumstantial evidence, the plaintiff has established a *prima facie* case of negligence against the defendant, and that inference has not been negated by the defendant's evidence. The legal burden of proof remains on the plaintiff throughout. Noting that the trial Judge found that he was unable to determine where the rock had probably been located in the load, the possibilities of non-negligence (a prudent indiligent inspection in which the rock never the less eluded the detection) and of negligence (no inspection or a negligent one) were equally consistent with the available evidence. The appellant not having established a *prima facie* case of negligence which caused the accident, the case then never reached a point where the defendant respondent was required to produce "evidence to the contrary". On the evidence the appellant court was unable to say that the trial Judge was "plainly wrong" in the conclusion reached as to the uncertain source of the rock and therefore, there being no substitution of findings of fact, on the basis of the aforementioned legal principles the appeal was unsuccessful

B. Limitation Period & Notice

9. The Oriental Insurance Co., Ltd. v. Bax Global, Inc. and Korean Air Lines Co., Ltd., 2009 WL 229668 (N.D. Ill).

Plaintiff, The Oriental Insurance Co., Ltd., insured a shipment by Orchid of 955 boxes of Cefazolin injection from India to Chicago, pursuant to a contract between Orchid and BAX, who acted as an indirect air carrier. BAX entered into a contract with Defendant, KAL, to transport the cargo. The cargo arrived in Chicago on September 1, 2006, and was released by KAL to BAX on the following day. BAX's agent made a notation, "Five boxes wet," on the Notification of Transfer. On September 3, 2006, BAX submitted a Preliminary Notice of Loss or Damage to KAL (the "subrogation letter") regarding the cargo. On September 11, 2006, the ultimate consignee rejected the delivery of the cargo and the entire cargo was destroyed as a total loss. Oriental sued alleging claims under Warsaw Convention, as well as state law claims. The state law claims were dismissed as preempted and the decision focused on the notice issue under the Warsaw Convention. Oriental argued that the subrogation letter was sufficient notice to KAL, relying on the case of *Mashinenfarkik Kern, A.G. v. Northwest Airlines, Inc.*, 562 F. Supp. 232 (N.D. Ill. 1983), which held that Article 26(2) of the Warsaw Convention did not require written notice because the airline had actual notice of possible damage in that case. Here the district court disagreed with Kern and found that the Warsaw Convention does require written notice. The second issue was as to the adequacy of the notice. The court found that the subrogation letter did not specify the nature or amount of the damages or even whether the claim for loss or for damage and, therefore, was insufficient to satisfy the notice requirements of the Warsaw Convention. Therefore, the court granted KAL's Motion to Dismiss the claim under the Warsaw Convention.

C. Limitation of Liability

10. Hutchinson v. British Airways, 2009 U.S. Dist. LEXIS 28881 (E.D.N.Y. 2009)

Plaintiff's brought a class action against British Airways seeking to defeat its limitation of liability for loss and damaged baggage. Plaintiff's allege that: (1) BA's baggage loss rate (although 2.8%) is 60% higher than the industry average and twice that of the worst U.S. airline; (2) BA had a backlog of 40,333 lost bags in March, 2007: (3) BA's baggage handling system was operating at 25% above capacity in April, 2007; (4) BA routinely leaves baggage in the rain; (5) BA prematurely auctions lost baggage and (6) BA conceals information from the passengers concerning the increased risks to baggage. BA moved to dismiss the complaint for failure to state a claim.

International air carrier liability is governed by the Montreal Convention which replaced the Warsaw Convention in 2003. Montreal Article 22(5) voids the carrier's limitation of liability if the plaintiff can prove baggage loss or damage was caused by the carrier "recklessly and with knowledge that damage would probably result." The Court rejected BA's argument that the plaintiffs must show BA knew that particular baggage would likely be mishandled. The Court denied BA's dismissal motion, reasoning that the plaintiffs should be permitted to develop evidence that (1) BA was responsible for an extreme departure from standard of ordinary care and (2) BA generally operated its baggage handling system in a reckless pattern with subjective awareness of the degree of risk to passenger property.

– ALERT – ALERT –

FMCSA changes

DEMISE OF THE BMC-32 ENDORSEMENT

Many insurance and transportation companies were in awe of the fact that the FMCSA decided to do away with mandatory financial responsibility for cargo insurance for many carriers, other than Household goods carriers and household goods freight forwarders – the BMC-32 endorsement is going away. The FMCSA has issued its final rule, effective March, 2011, that certain motor carriers operating in interstate commerce will no longer be required to have an endorsement in place in order to operate. The shipping industry was directed by the FMCSA to protect itself by insuring that the carriers with whom they do business are adequately insured. We do not yet know what effect the existing filings will have, and whether insurers will or will not be required to cancel all filings and remove the endorsement from existing policies. We will keep you alerted as we learn more about this development.

Our 2010 Exp

Marc Staple of **CR England** chats with Marcus Hickey, CCP of **Forward Air & CCPAC**. mhickey@forwardair.com

Brian Fritz demonstrates the **AutoGate** to the audience. brian@autogate.com

Richard Lang of **ABF** chats with Lori Youngberg. Lori.youngberg@freight-claimaudit.com and Deirde James Deirde.james@freightclaimaudit.com of **Freight Claim Audit**.

Brian Kiel of **Nestle USA** meets with John Mayorek of **ConAir/USAID**. John_Mayorek@Conair.com

Sal Marino explains **Cargo Nets** system to an attendee. smarino@cargonet.com

Tim Gardner of **ITW/GaleWrap** tgardner@galewrap.com talks with Keith Baker of KB Trans & Nadia Martin of **Blakeman Trans**.

Jack DeMao shows Robert Auld of **LG Electronics** the benefits of **Electric Guard Dog**. jdemao@electricguarddog.com

ert Exhibitors

Rachel Noel of **Vascor** visits Dan Riley dan@ibuyz.com and Thad Burgess thad@ibuyz.com of **ibuyz Liquidation**.

Jason Rogers and Richard Lang of **ABF** check in with Matt McDonough of **Lo/Jack**. mmcdonough@sc-integrity.net

Dan Saviola of **YRCW** congratulates Dave Myers and **Recovery Management** myers@cargolargo.com for receiving the Certificate of Appreciation Award for contributions to the Joint Conferences of TLP & SA // TLC.

Stephanie Denton of CSX and David Degollado of **Mission Pharmacal** check with John Adams of **Regiscope**. Adamsj@regiscope.com

Ed Loughman welcomes Bill Fullerton of **MTI** to the TLP & SA.

Cindy Carey of **nvision Global** chats with Kathryn Moynihan of **Vascor**. kmoynihan@vascorltd.com

Tatiana Mesa of **Reily Foods** visits with Wes Dow, Chuck Johnson & Tina Jordan of **VFI**. tina@vfinspections.com

Jared Palmer (Advantage Freight), Bob Hochwarth (Volvo), Commodore Jerry Hamel USN, George Pezold (Exec. Dir. TLC), and Commodore Tim McCully, USN – retired.

Brian Keith of Nestle Co., Diane Smid of TLC, Keith Baker of KB Transport, and Nadia Martin of Blakeman Trans.

Dave Myers of Recovery Mgt.

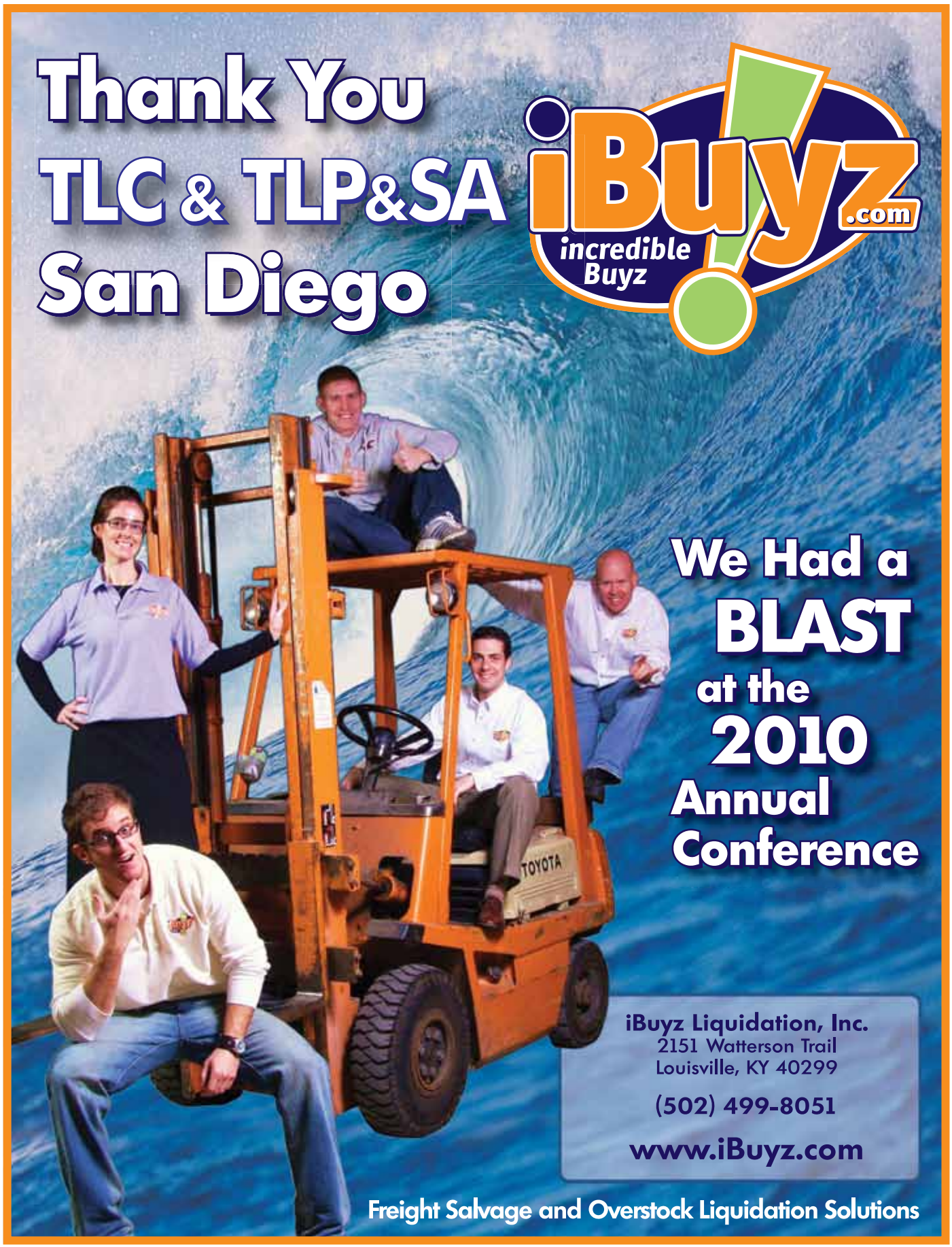
GROUP IN SESSION

Blair Wimbush of Norfolk Southern, Venyar Davis, Jeff Figurelli of York Risk and others enjoying the President's reception aboard the William D. Evans Riverboat

Bill Bierman, Exec. Dir. TLP & SA

Robert Voltmann of TIA, Michael Regan of Transact, Nikhil Sathe of Kelran, Bill Mongelluzzo (Assoc. Editor – Journal of Commerce), and William D. Bierman of Nowell Amoroso Klein Bierman.

Carol Wynstra (Snap-On Tools), Michael Brown (Avalon Risk), Steve Silverman (Inland Marine), and David Whatley (UTH Advisors).


Thank You
TLC & TLP&SA
San Diego
iBuyz.com
incredible Buyz
We Had a
BLAST
at the
2010
Annual
Conference
TOYOTA
iBuyz Liquidation, Inc.
2151 Watterson Trail
Louisville, KY 40299
(502) 499-8051
www.iBuyz.com
Freight Salvage and Overstock Liquidation Solutions

Our friend, Bruce Hocum, passed away July 4, 2010

Bruce was a solid citizen and family man. He was also a friend of TLP & SA. He could always be counted on to help the transportation industry and he contributed in many ways to our trade associations and their joint conferences. Bruce was a straight shooter in more ways than one. He will be missed by all who knew him. R.I.P. Bruce.

TLP&SA WELCOMES THE FOLLOWING NEW MEMBERS:

Stuart Salen – EmFinders, LLC – Berwyn, PA

Marshal Pitchford, Esq. – Roetzel & Andress – Akron, OH

WELCOME BACK:

Bill Fullerton – MTI Inspections – Las Vegas, NV
Anthony A. Agosta, Esq. – Clark Hill, PLC – Detroit, MI

Do you need someone who is

KNOWLEDGEABLE IN CLAIMS AND/OR TRANSPORTATION SECURITY?

Are you looking for a

POSITION WITH A CARRIER IN THE FIELD OF LOSS PREVENTION?

If you are a member of the TLP & SA let us know and we will try to help you find someone or find a job!

NO CHARGE!

VISIT OUR WEBSITE!

WWW.TLPSA.ORG

Turn up the sound on your speakers
You will find:

- **Bank of Experts**
- **Listings of our Officers and Staff**
- **Breaking Transportation News**
- **Member Roster**
- **Transportation Abbreviations**
- **Related web addresses**
- **All previous In Transit newsletters**
- ***Court Case Data Bank***

Check Out the Photo Gallery!

ADVERTISE
IN OUR NEWSLETTER!

ASK HOW! **732-350-3776** **ELOUGHMAN@TLPSA.ORG**

Anyone who wishes to advertise in our **In Transit** quarterly newsletter can do so by completing this form and sending it, along with a copy of your advertisement and your company check to: William D. Bierman, Esq., c/o TLP&SA, 155 Polifly Road, 3rd floor, Hackensack, NJ 07601.

Company Name: _____

Contact Name: _____

Company Address : _____

_____

_____

Telephone: ( ) _____

Fax: ( ) _____

E-mail: _____

AD RATES: $150.00 Business Card $250.00 Half page
$200.00 Quarter Page $350.00 Full page

+ CSC =

Dedicated to obtain the highest price available for your distressed, surplus or damaged merchandise. For more information or to request a quote call1-800-654-7629.

www.cscsalesnet.com

Certified with: FDA

TRANSPORTATION LOSS PREVENTION and SECURITY ASSOCIATION (TLP & SA)

APPLICATION FOR MEMBERSHIP

1. Name of Applicant: _____
   Last *Middle Initial* *First*

2. Affiliation: _____
   Indicate the company and position, or, if state or federal agency, the position held.

3. Other Information:

Office Address: _____

City: _____ State or Province: _____ Zip Code: _____

Office Telephone: (_____) _____ Office Fax: (_____) _____

E-mail: _____

I am involved in transportation through one or more of the following areas: (please check appropriate listing or listings).

____ Freight Claims ____ Labor/Human Resources ____ Rail ____ Logistics

____ Litigation ____ Motor Carrier ____ Maritime/Admiralty ____ Aviation

____ DOT/NTSB ____ Other _____
(please specify)

Please enclose payment with application form.

Transportation Loss Prevention and Security Association, Inc
c/o Nowell Amoroso Klein Bierman, P.A.
155 Polifly Road - 3rd Floor
Hackensack, New Jersey 07601

Please send completed application and payment to:

(732) 350-3776 (tel)
(201) 343-5181 (fax)
E-Mail: WBierman@NAKBlaw.com
Eloughman@TLPSA.org

William D. Bierman, Executive Director

Dues $450.00 per year per corporation

Your self-created password to our website _____

Date: _____ Signature of Applicant: _____