MondayMonday

27-a Plus 205-e Equals Liability

July 22. 2013

44 years ago this weekend, when there were great things alive in the world, a Saturn V rocket flung Armstrong, Aldrin and Collins into space and was then forgotten, forever to be overshadowed by a phonebook covered in tinfoil and made by Grumman on Long Island that landed on the Moon. On a trip into history from the Earth to the Moon, the huge Saturn V's rocket engines traveled only 38 miles. They then burned out, falling back to Earth, used and abandoned.

Until now. Amazon CEO Jeff Bezos has found Apollo 11's two F-1 rocket engines sitting calmly in 14,000 feet of water off the Florida coast, encrusted by marine life. In many ways, the Saturn V engines sit on a world as unexplored as the one that the tinfoil phonebooth now sits on 239,000 miles away. They are linked by ignorance. In the meantime, we all sit entranced by Facebook, playing Candy Crush, tweeting, getting Justin Bieber updates and waiting for the middle name of the Royal Baby.

The world doesn't exist in our pockets. Yes, we know that the average smartphone makes the computers on Apollo 11 look like an abacus. But the magic is larger

than life, not smaller. Thinking outside the box means redefining its dimensions as well. Columbus was not Leonardo; one looked without, the other within. We do not applaud Copernicus or Galileo today, but Steve Jobs. The time has come, we think, to turn the telescope back around, the right way and see things larger, rather than smaller. Mars is not an app, it's a planet, and it deserves the future.

As the dog days of summer approach, the output of the Appellate Divisions slowed to a trickle last week. However, we need not dip into the abyss of actions based on commercial paper to fill *MondayMonday* this week thanks to the Second Department's *Gammon v. City of New York,* Slip Op 05298 (July 17, 2013). Plaintiff police officer was injured while loading wooden police barriers onto a flatbed truck. Turning first to plaintiff's action for common law negligence, the court held that no matter how plebian, loading wooden police barriers was still police work and that the common law action was barred by a long line of cases, including the court's own *Carro v. City of New York*, 89 A.D.3d 1049, and the Court of Appeals' *Wadler v. City of New York*, 14 N.Y.3d 192. The closer question, however, was whether or not plaintiff's GML 205-e cause of action would survive.

And it would, said the court, even though the statute claimed violated was the non-descript Labor Law 27-a. Section 27-a(3)(a)(1) says that an employer shall furnish an employee with a workplace "free from recognized hazards" that might cause the employee's injury or death. In *Williams v. New York*, 2 N.Y.3d 352, a case with we have a certain familiarity, the Court of Appeals held that 27-a did not support a 205-e action where the injury resulted from a hazard unique to police work (there, an unsecured weapon.) However, where the injury was an ordinary occupational injury, 27-a could satisfy 205-e. In doing so, the Court of Appeals cited to the Second Department's decision in *Balsamo v. City of New York*, 287 A.D.2d 22, which the Appellate Division now follows here. Though 27-a does not provide a private right of action and contains only a general duty of care, that duty is clear enough for 205-e, especially in light of OSHA.

Our sadness here is for the police widows in *Williams*, a decision that made little sense when rendered and continues to do so even today.