MondayMonday

As Dean Prince Would Say . . . .

August 19, 2013

Last week saw the Attorney General of the United States, Eric Holder, arrive at the stunning conclusion that the federal sentencing guidelines and the concept of mandatory sentencing in criminal (read "drug") cases, doesn't work. The message is that it is "both ineffective and unsustainable." In others words, it's too damned expensive, both in dollars and lives.

We lived through this abortion of justice in our criminal defense days. The sentencing guidelines were a mandatory sentencing scheme that provided a simple solution to a hard question. What happens when you appoint the best judges you can find and they actually judge? That is, they do what they think is right, not what the mob wants, or the government wants or even what God wants, but what they think is right. Tie their hands, of course. Require them to act like some giant computer chess master, paying fealty to terms like "predictable outcomes" and "consistency."

Humans aren't predictable and they are oft-times inconsistent. That is both good and bad. Indeed, it's why we have multiple layers of courts, to soften the edges of

human foibles, whether they be of bench, bar or defendant.

So now, the epiphany has occurred and all is revealed. But at what cost? Law is not science and Occam's Razor has little place in the relationships of men. Instead, on the big, blue marble, easy answers to hard questions should always be suspect.

We were blessed at Flatbush Law to be taught evidence by a master, Dean Jerome Prince. Over the years, we have made countless arguments by intoning the magic words: "As Dean Prince would say . . . . " Dean Prince knew evidence so well that he could teach the course in two weeks if he wanted to. It took longer because he loved it so and we, jaded as we were, loved him because of that.

Enter *Gonzalez v. City of New York*, 2013 NY Slip Op 05614 (2d Dep't 8/14/13). How marvelous! An "excited utterance" case! Lucy Gonzalez slipped and fell in the vestibule of P.S. 132 in Brooklyn while it was raining and snowing outside.. While some of the "slippery and wet" portions of the vestibule floor were covered with mats, the area where she fell was not. A security guard who saw her on the floor exclaimed. "Oh my God, someone else fell." The defendant objected to that testimony on the grounds of hearsay and was overruled. The $1 million verdict survived post-verdict motions, but will it survive the Second Department?

Almost. The damages are affirmed, but the case will require a new trial on the issue of liability only. "[T]he guard's statement was not admissible as a present sense or an excited utterance." Why? "[B]ecause it is clear that the statement was not made as the security guard perceived the happening of the accident, and there was no evidence that corroborated his statement."

So we pull *Richardson on Evidence [Prince 10th ed.]* from the bookshelves. Chapter XIII; *Res Gestae*. We still can read our underlinings. New York excludes such declarations from bystanders as they are not part of the *res gestae*. However, where the statement is part of or a reflection of the transaction, it is admissible as that ["The bums killed Pa with a broomstick!" *Richardson, Section 285*]. The declarant must be a participant moved by the event, not a mere bystander, as the security guard here. So, plaintiff has to try again, but this time with a cool million in hand.