



# MondayMonday

## A Security Guard Guards Who?

September 9, 2013

It happens again this year, as it has every year since then. Where were you when you heard? Did you know anyone who died? Will you ever forget? There are some events shared by those whose only affinity is being alive on a certain date. Like time travelers, they share only that moment; a certain locus on the timeline of human history whose coordinates define a happening which, while demanding persistent recollection, will nonetheless never allow any of them to occupy that space together again.

Yet, we try. As the years move on, the heat of the moment, so defined by fire and flame, cools. For such is memory, the only tool we have to look back in time. Whether recorded or recalled, memory is cold, unless of course, we kindle it with love. We loved those now gone, of course, but also loved the feeling of safety irretrievably lost on that day as well. It's not just having to endure the physical inquiry at an airport or being cautioned to say something if we see something. It's the sense that something once sacred has been violated; now dirty and foul and foreign.

In this week of 9/11, we note



the following: Terrorism never succeeds. It is the desperate cry of small men for whom victory is measured in days, not millennia. The world continues despite them and always will. We are Americans and we are, if nothing else, in love with the freedom of it. There's that word again: Love. It is now, as it was on that bright, blue day, the only sure antidote for madness.

It was a quiet week in the ADs and we so we review *Aiello v. Burns Intl. Sec Servs. Corp.*, 2013 NY Slip Op. 05767 (1st Dep't 9/3/13), an otherwise unremarkable case. Don't get us wrong, for the factual situation is surely compelling. Decedent was a retired NYPD Sergeant who was admitted to the psychiatric ER of the hospital. While waiting for a bed to open up, decedent escaped from the psych unit and was eventually shot and killed during an armed confrontation with police officers in front of his home. The estate brings this action against the hospital and the Burns security company hired by the hospital to guard the psychiatric unit. Supreme Court

simply dismissed the action against Burns, holding that it owed plaintiff no duty of care under its contract with the hospital. However, their contract, which says just that, never expressly stated Burn's duties. Does that make any difference in the analysis? Citing *Espinal*, plaintiff says that it does, for despite an express provision in the contract to the contrary, the security contract was one which did not limit itself to any specific duties. Without those duties, it was merely an "agreement to agree" and unenforceable, leaving the security company without its disclaimer.

The First Dep't disagrees and finds the contract specific enough to be enforceable. The specification of duties was "not an indispensable prerequisite to performance[.]" The parties envisioned a complex and flexible set of duties and that's what their course of conduct revealed.

But it doesn't answer the whole question as to whether or not Burns can be held liable, as the *Espinal* exceptions affirm. Of course, the rest of the court's analysis takes care of that. Justice Tom, concurring in Justice Renwick's opinion, would decide the question on causality, finding any negligence at the hospital too attenuated from the actions at decedent's home. What was Burns "guarding" then? Who cares? We only know it wasn't the patients.

©Jay L. T. Breakstone, 2013. *MondayMonday* is published by PARKER WAICHMAN LLP, a National Law Firm, offering appellate counsel to the profession, together with trial counsel and referral/co-counsel in cases involving significant damages. 1.800.LAW.INFO (800.529.4636) Contact [jbekastone@yourlawyer.com](mailto:jbekastone@yourlawyer.com). For the online version visit [www.monday-monday.yourlawyer.com](http://www.monday-monday.yourlawyer.com).