



MondayMonday

Welcome to Shangri-La

September 30, 2013

Something strange happens in America with stunning regularity. It's a transformation that befalls us all, no matter how we got here or where we came from. We suddenly become Americans. This means, in a very real sense, that we adopt as ours a complex and unique culture all its own; a culture that sees no problem with Jacob Gershowitz becoming George Gershwin.

It was George Gershwin's birthday last week and we marvel at the process which encourages a Russian Jewish immigrant from Snedicker Street in Brooklyn to write a song like "Swanee". What magic does a country have to conjure up to allow a Gershwin to write "Porgy and Bess"? Is it something in the water?

The fascinating thing is that Gershwin didn't just mimic being black in South Carolina any more than Irving Berlin (Isidore Beilin) mimicked being gentile during Christmas in Connecticut in "White Christmas". Instead, they identified with those seemingly foreign experiences and extracted what was American about them. "American" is what Gershwin was and "American" is what he wrote about. That's why he had no



compunction about weaving Jewish melodies together with black spirituals and ragtime to produce "Porgy and Bess." For Gershwin, it was all part of the American experience. "Rhapsody in Blue," "An American in Paris" , "Strike Up the Band" and even "Fascinating Rhythm", it was all the same: American. "[T]rue music," said Gershwin, "must reflect the thought and aspirations of the people and time. My people are Americans. My time is today."

We think it is fair to say that plaintiff's lawyers in this state should, once and for all, get *Trupia v. Lake George Central School District*, 14 N.Y.3d 392 (2010), out of their heads. It doesn't exist. It is the Shangri-La of plaintiff's personal injury law, fictional and unattainable. Assumption of risk lives; it is real and it affects the young and the old equally.

Submitted for your approval then is *Shivers v. Elwood Union Free School District*, 2013 NY Slip Op 05995 (2d Dep't 9/25/13). Dawn Shivers was a woman of the world; a 17 year-old high school senior on Long Island. She, as

is obvious from the opinion, was well-experienced in a relay race called "the human railroad." During a "Competition Night" at the high school, Dawn engaged in this relay race. It involved each team member laying down on the gym floor, stretching her hands over her head; the second team member straddling the first and then laying down prone in front of the first participant; who then grabs and holds onto the feet of the second participant. This is then repeated until all the members of the team return to the starting point. When the student behind Dawn "dove down too early," she hit Dawn's head, driving it into the floor and deviating Dawn's septum.

Negligent supervision, stupidity and the vagaries of being 17 aside, *Trupia* saves the school's wallet, but not Dawn's nose. After all, the court says quoting *Trupia*, this "human railroad" activity is athletic and "possess[es] enormous social value." Dawn should have known better. After all, she had participated in the "human railroad" as a *sophomore* (presumably at 15.) In other words, Dawn's injury was Dawn's fault . . . at 17 . . . in high school.

Are we not courageous New Yorkers? Only the timorous children are to be spared. *Volenti non fit injuria*, as the Great Cardozo would say. Otherwise, just stay at home.

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