



# MondayMonday

## When Being Right Doesn't Matter

March 24, 2014

We returned to the scene of the crime last week, dear old Flatbush Law. Accompanied by The Heir to the Throne, we attended a law school-sponsored lecture at the Brooklyn Academy of Music featuring none other than the Emperor of Originalism himself, Mr. Justice Scalia.

Now in our day, U.S. Supreme Court Justices did not appear at Flatbush Law, nor did they speak with the candor Justice Scalia did, in any venue, for that matter. But this bench is very different. Is all this celebrity good for the Court? We would say so.

Justice Scalia was as a general speaking to the troops; a lawyer's lawyer preaching the gospel to the emergent pupae. So what if it amounted to "first there was the Word; and the Word was the Constitution?"

Here was a lawyer who liked what he did. He was excited talking about the law to other lawyers. The material wasn't dry or old or moribund; it was alive. Justice Scalia, who is very smooth at this, was engaging, open and judicial, all at the same time. Whether we agreed with his reasoning or not, one couldn't help but be challenged by his man-



tra that something could be, all at once, constitutional, but stupid. That limitation on the Court's judicial power became the catchphrase for the evening. Judges were lawyers, not philosophers.

There were questions from the audience and some were good. The last question, however, was more of a statement. A student feared that three of Scalia's dissents had fostered hatred of the LGBT community. Without façade, Justice Scalia coldly denied that anybody could draw support for hating anyone from his dissents. The Justice left the stage saying "You're free to hate whoever you want." We don't know exactly what that means, or whether it should bother us.

Speaking of Flatbush Law, we open Dean Prince's Evidence class this morning with *Benavides v. City of New York*, 2014 NY Slip Op 01682 (1st Dep't 3/18/14). In a personal injury action against the City, the question is whether defendant, while being chased during a drug arrest, was pushed over a fence by a police officer or jumped of

his own accord. The jury thought the latter and the First Department now reviews a motion to set aside that verdict. The key evidentiary question is whether the trial court properly admitted that portion of plaintiff's medical records which refer to his injuries as being caused by his "jump" from a fence.

The records were improperly admitted. They were hearsay entries and were not germane to the treatment of plaintiff's injuries. Had they been, they could have been admitted under the business records exception to the hearsay rule. The best defendant's biomechanical expert could muster was that plaintiff's injuries were more consistent with a jump than a fall. So what? That is not the medical testimony that was need to breach the rule. What about admitting them as admissions, you say? That would have been fine too, had the statements been made by plaintiff. However, there was no proof that the statements came from plaintiff, even though the hospital record form has the source checked off as "Patient," the statement is written in the third person, *i.e.*, "he jumped off the fence."

So, all's well with the world? No. The court holds the error as harmless. How the accident occurred was already in evidence through other entries, properly admitted. Affirmed.

---

©Jay L. T. Breakstone, 2014. *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).