MondayMonday

The Common Law of Evidence

July 13, 2015

Summertime. This past weekend was surely that. Hot; humid; sunny; sultry, you choose the adjective. Big dogs don't do well in the summer heat, so on Sunday, we sent the family off to the beach, while we stayed at home. Air conditioning, cool drinks, a 60" Samsung/flat screen/window-on-the-world, peace and quiet, even the new Daniel Silva novel, what could be bad?

All of it. It was too quiet. There was no noise, no yelling, no this-one-feeling-slighted or this-one-feeling-loved. We had become, somewhere along this hegira, a family man. Our life-sound was not that of one hand clapping on a mountaintop in Tibet, but the shout of "where's the bagel cutter?" in 60x100 on Long Island. Weekend lunch had changed from a smart little café in the newest, hippest neighborhood ("Grilled octopus? How yesterday.") to Boar's Head cold cuts on day old rolls on the backyard deck. Yet, on this past Sunday, with all the free time in the

world and no one to take it away from us, we stopped dead in our tracks, like a child's mechanical toy whose internal spring had sprung. Where was the poet, the writer, the raconteur, the fascinating and well-educated boulevardier who once lived in this body? Waiting for his family to return, so they could all go out for Chinese food; so happy that, when they did, he was so overwhelmed, he could barely speak.

We admit we are suckers for an evidence case. Perhaps it's living in a jurisdiction where evidence is still old-school, common law. No true evidence code for us. Instead, we New Yorkers have to actually read cases.

Elvis Taylor was driving along Gates Avenue in Brooklyn, following behind a paratransit vehicle operated by defendant. While stopped at a red light, defendant's vehicle, after attempting to make a right turn the wrong-way into a one-way street, suddenly backed up, striking Taylor's car. At least, that's the way Taylor saw it. Defendant claimed, instead, that Taylor's car simply rear-ended his while the paratransit vehicle was proceeding through the intersection.

At trial, the court allowed the admission of a police accident report into evidence, penned by an officer who did not see the accident occur. The report was based, instead, on what Taylor and defendant told the officer.

Nay, nay, says AD2 in *Taylor v. NYCTA*, 2015 NY Slip Op 05931 (2d Dep't 7/8/15). Without even citing its own *Johnson v. Lutz*, the Court reminds us that the accident report was nothing but inadmissible hearsay in written form; a compilation of information "not explicitly attributed to any witness[.]" How about the statement directly attributed to Taylor, to the effect that defendant had stopped at the intersection and attempted to make a right-turn the wrong-way into a one-way street? Is that hearsay too? Of course it is and, since "[t]his statement is consistent with plaintiff's [Taylor's] trial testimony . . . [it] is not admissible as a statement against interest."