MondayMonday

One Rule Served Two Ways

November 16, 2015

Wednesday was Veteran's Day and the courts were closed. Even justice, of a sort, halts for a moment to remember. But there is no real justice, for if there were, we would have died in 1971.

The second draft lottery during the Vietnam War was held on July 1, 1970. We were to trade our treasured II-S student deferment for a I-A classification. Based on our birthday however, our number was 178 and only 125 men were called that year. Had we turned 18 the prior year, the first year of the lottery, our number would have been 14 and we would have left for war; had we been born a day later, our number would have been 89 and we would have gone to war too.

The randomness of this call to life or death has always troubled us. It reaches us in the dead of night; we have trouble returning to sleep.

Andrew Carnegie Strong III had the same birthday as we did. At Marshall High in Rochester (Class of '69), he was opinionated, self-assured and brilliant. His nose always in a book (even when he walked down the hall), Andrew hadn't yet learned to drive; he was just too busy reading. We had the same lottery number, the two of us, but Andrew enlisted to finance his education, something we didn't have to do.

No one knows what really happened, on June 1, 1971. Andrew grabbed a helicopter ride off the mountain at Nui Ba Dihn to straighten out his pay check at headquarters. The chopper crashed and he never came back. His best friend on the mountain, Jim from Ohio, recalls it was to be Andrew's first trip off that mountain since arriving in-country six weeks earlier and that Andrew was a good person.

Andrew Strong had four brothers and a sister who have never forgotten him. "I speak to you every day of my life," says his mother, asking "can you hear me, dear son?" We have no answers for such questions. It's the middle of the night, and we can't sleep.

If the opposite of randomness is habituality, then our discussion this morning of *Gucciardi v. New Chopsticks House,* 2015 NY Slip Op 08146 (2d Dep't 11/12/15) is right on point.

In the context of a slip on ice in a Chinese restaurant parking lot on Staten Island, Veronica Gucciari's predicament is scarcely earth-shattering. The tenacity of her lawyer, however, is worthy of discussion. Rather than dismiss the incident, Veronica's lawyer recognized, for whatever reason, that ice does not form by itself unless God puts water there first. Failing such divine intervention, it became obvious that the water was coming from elsewhere. So, between February and April of the following year (Veronica fell in December 2010), her attorney had an investigator surveil the property, only to discover an employee, on seven occasions, methodically wheeling a mop bucket out of the restaurant and dumping its watery contents into the parking lot. Veronica alleged that the ice was formed on the night of her injury when that water froze in the parking lot. Following discovery, defendants moved to preclude the videotaped bucket brigade and the investigator's testimony from trial. The motion was granted, a defendant's verdict secured and this appeal followed.

Conceding that a party is "permitted to introduce evidence of a habit or routine practice 'to allow the inference of its persistence and hence negligence on a particular occasion'", AD2 agrees with the trial court that there were an insufficient number of such instances to allow the inference here, *i.e.*, only 7 over six weeks, the first beginning more than two months after Veronica's fall.

Habit has been a bête noire in New York evidence for years and, most particularly in negligence cases. Dean Prince noted that Wigmore also feared that evidence of habit was too close for comfort to character evidence, the latter being inadmissible in civil cases. In *Halloran.*, 41 N.Y.2d 386, 392 (1977), cited by AD2 here, that rule was relaxed. "[T]he statement that evidence of habit or regular usage is never admissible to establish negligence is too broad[.]"

When is habit admissible? From what we can see, only when used by defendants to show habitually non-negligent behavior, as when charged with giving faulty informed consent warnings [*Rigie*, 148 A.D.2d 23 (2d Dep't 1989)] or improper anesthesia injections [*Rivera*, 8 N.Y.3d 627, 635 (2007)], two instances relied on in *Gucciardo.*

We'd love to stand corrected and, when we do, we'll let you know.