
# MondayMonday

## Two Cases That Prove The Rule

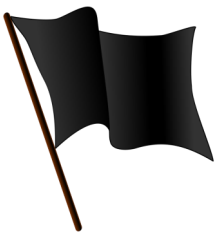
*February 15, 2016*

He made us better than we were before we knew him. Until we read his writing, we didn't realize just how alive the law could be. It wasn't static or the musings of old men (or women.) It was, instead, the very lifeblood of a civilized society. But, even more so, it was the stuff that ran through our veins too, just like his. Sure, most times we were convinced it ran in the opposite direction, however it always began from the same place, the heart. Not the head, because that would have been too easy for him. It was the heart.

Only the heart could have produced such passion. Only the heart could have made him care so much about what men (and only men) wrote in 1789. Only the heart could have produced words like "jiggery-pokery", phrases like "judicial Putsch", and lines like "Who ever thought that intimacy and spirituality (whatever that means) were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie."

There have been brilliant jurists on the Supreme Court before, there are now and there will be in the future. But how many will travel the country inspiring the fire of the law in the hearts of young law students? Not the scholarship it requires or the power it can wield, but the fire that makes it something worth giving your life to?

In one era, our predecessors considered John Marhall Harlan (Harlan I) "the great dissenter".



When we were in Flatbush Law, it was William O. Douglas. Today, they all stand humbled by the greatest dissenter of them all, the late Antonin Scalia. We shall miss him terribly and feel for the one who will stand in his shoes. That jurist, just like Justice Scalia, will sign his or her name in Justice Harlan's bible after taking the oath of office, secure in only one principle: To thine own self be true. To this, we add the Scalia Sacrament: Follow your heart.

Easy. A guy falls off a ladder doing some work, he calls you, you dash off a summons and complaint pleading Labor Law 240(1), do some deps and, voila, summary judgment. You try damages only or settle on the amount and head for the bank. On the way, you call your spouse, telling him or her to call the pool guy (who is your brother-in-law anyway) and make sure that your new Esther Williams tropical paradise has a 12-person hot tub. Hey, you say, we're in the money now.

Then you wake up, like plaintiffs' attorney did in *Lannon v. 356 West 44th Street Restaurant*, 2016 NY Slip Op 01129 (1st Dep't 2/16/16). Plaintiff was injured when he fell from the 2-story building he was working on. The problem, however, was the work he was doing. Plaintiff was installing flag holder brackets on the face of the building. When installed, each bracket would hold a flag. The brackets were installed as you might expect: You drill holes for each bracket, insert a plastic fastener into the face of the building and then screw the bracket in. Oh, and insert flag when required.

Notwithstanding patriotic protestations to the contrary, installing a flag bracket is not what Labor Law 240(1) envisions. Covered work under 240(1) means work which, after it's completed, results in "significant physical change" to the structure of the building, as the Court said in *Joblon*, 91 N.Y.2d 457 (1998). A flag bracket is "cosmetic and non-structural"; it is temporary. Here, the flags going into the brackets were used only "to enhance the exterior appearance of the building during the St. Patrick's Day celebration, after which they were removed[.]"

Before we get into a discussion of *permanent* flags and their brackets, *e.g.*, outside a school or police station, let's try something easier to save that backyard spa.

How about a classic trip and fall? Say your client can't identify what caused him to trip? Does that mean that your daughter now has to get married at White Castle?

Rest easy. The Second Department reminds us that it's the *defendant* who has the burden of proving that ignorance on an SJ motion, not you. The testimony of plaintiff and his wife that plaintiff tripped and fell on an "uneven condition" on the landing of defendant's staircase is enough to save the day in *Davis v. Sutton*, 2016 NY Slip Op 00923 (2d Dep't 2/10/16). Leonard's of Great Neck, here we come!

What's the rule? "That which is easy shall be hard; that which is hard shall be easy."