



# MondayMonday

## PFT In The AD Is Not EZ

October 3, 2016

We enter October scared, not of witches and hobgoblins, but for many of us, of an election without a viable choice of a government to take us out of this difficult decade and into the light of a new one. We suggested last week that Americans always believe in America. With that maxim comes this essential truth: It is hope that drives this experiment and without hope, its vitality is imperiled.

We've lived in scarier times, for sure, as in 1956. World War II was past history and so was the euphoria of victory. Instead, post-war America was set in the concrete of segregation, the Hydrogen Bomb and an enemy who was powerful, godless and bent on our destruction. Schools added shelter drills to their curricula. America was on edge.

Enter Sen. Kefauver from Tennessee, Gov. Stevenson from Illinois, and an idea: A Democratic primary debate on television. Up until then, television had only been the home of Milton Berle. For also-ran network, ABC, Monday night was a graveyard anyway, with none of its shows even breaking into the top 30. After all, how do you beat CBS's *Burns and Allen Show*, Arthur Godfrey's *Talent Scouts*, *I Love Lucy* and *December Bride*?

So, on May 21, 1956, instead of Lawrence Welk, viewers found Kefauver and Stevenson, sitting at a small desk with ABC's Gordon Howe, doing something we did not see last week at Hofstra University. They spoke well and they spoke in-



telligently to an audience they clearly felt was worthy of that respect; they identified the problems and explained why they were the best person to solve them; they spoke directly to each other without ever surrendering the high ground; they neither smirked, nor mocked, nor grimaced, nor raised their voices, for who would ever elect an American president who did that?

The Kefauver-Stevenson ticket (Kefauver really wanted Kennedy, but the party felt differently) was defeated — again — by Eisenhower in the general election. Stevenson would go on to serve as UN Ambassador under Kennedy and Johnson, while Kefauver will never be forgotten as the Southern Democrat who stood nearly alone in opposition to segregation. Well, perhaps, not nearly so alone, as the people of Tennessee re-elected him in 1960 with a stunning 72% of the vote.

No one dropped the bomb, we still grapple with race relations in this country and Russia is scarcely our biggest international problem. There was one casualty, however. Television. It would never be the same again.

We turn from the "vast wasteland" to more mundane matters, like earning a living. What do you with clients who come to you with a contract with a karate school that provides that their child will receive a 2nd degree black belt in a certain amount of time. All he need do is "achieve the requisite skills

and qualifications'." The client continues to pay for the lessons, but at the end of the period, the school doesn't deliver because the child doesn't finally qualify. There really is no fraud, unjust enrichment or General Business Law violations. The child just failed to meet the standards.

When in doubt, punt. Which, in the game we play, means PFT ("prima facie tort".) You remember, that cause of action no one could explain to you in law school? Well, in *Berland v. Chi*, 2016 NY Slip Op 06188 (2d Dep't 9/28/16), the Second Department does.

PFT is not "a "catch-all" alternative for every cause of action which cannot stand on its legs'," says the AD, but a cause of action "designed to provide a remedy for intentional and malicious actions that cause harm and which no traditional tort provides a remedy'." It requires the intentional (but not unlawful) infliction of harm that results in special damages which come about without any excuse or justification. In case you forgot, "special damages," the court reminds us, is "the loss of something having economic or pecuniary value."

Where does that get the Plaintiffs -Appellants in *Berland*? Nowhere. The AD affirms. The child's disappointment in not getting that black belt bespeaks emotional distress only, not special damages.

As to the GBL, plaintiff failed to show a deceptive act under the statute; there is no unjust enrichment when payments are made under a valid contract; and no fraudulent misrepresentation induced Plaintiffs into signing the original contract. Finally, without that black belt, self-help is no viable remedy either.

©Jay L. T. Breakstone, 2016. *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).