



MondayMonday

Three Of A Kind Wins?

January 25, 2016

Enter the beautiful Amal Clooney, a barrister of international proportion and just-so-happens-to-be wife of Rosemary's nephew, George. There is nothing ordinary about Mrs. Clooney. She is the product of educated and financially secure parents who raised her in London. She's worked at Sullivan & Cromwell, The Hague and the UN; she has advised kings (Bahrain), countries (Armenia) and imprisoned prime ministers (The Maldives). She speaks three languages, was married in Venice and now owns a house on an island in the middle of the River Thames. The only thing she's never done is work as an Assistant District Attorney in Brooklyn, and there's the rub.

When interviewed last week, Ms. Clooney (the "highly regarded international civil rights lawyer"), cautioned that if other lawyers could not handle the excitement of her own life, they could "prosecute traffic violations" instead. This elegant, accomplished and privileged woman could not explain her own worth without denigrating the work of other attorneys.

We see this all the time. We feel this in courtrooms. We are subjected to this at cocktail parties. We, who spend days and nights representing victims with far less front page majesty than Ms. Clooney's clients, are pond scum; something less to those who think they are something more. It's bad enough when young Dr. Kildare pull this crap at dinner, but from one of our own? At the end of the day, a real



day, we work harder, longer and change more lives in doing so than Ms. Clooney can ever imagine.

And that unexciting ADA you insulted in Brooklyn prosecuting traffic violations, fare beats, assaults, burglaries and homicides? Take it from us, Amal, she can kick your ass. She's a real lawyer and we, who spend everyday in the courtroom (not The Hague) respect her, even if you don't. By the way, she has Jimmy Choo's too. All that takes is money, not class.

My my my! What issue could possibly convince an appellate panel to write three concurring opinions, without a single dissent or majority opinion? That was our question when we ran across *Srikishun v. Edye*, NY Slip Op 00315 (1st Dep't 1/19/16). Justice Tom wrote for himself; Justice Kapnick wrote for herself and Justice Andrias; and Justice Saxe wrote for himself and Justice Manzanet-Daniels. Whassup?

Plaintiff donated a kidney to her father, only to have a foreign body (a "knot pusher tip") left behind inside her body when all was done. This required a second surgery, under general anesthesia, to remove it. Plaintiff's action against Defendants was for the injury of that second surgery. A Bronx jury found a departure under Question 1 of the verdict sheet, but not that this departure was a "substantial factor" in causing Plaintiff's injuries under Question 2. After the verdict was tak-

en, the trial judge advised counsel that the jury had sent out a note saying that despite their verdict, Plaintiff should get \$50K for having to undergo the second surgery. The judge told counsel that, without any input from them, he rejected the note and advised the jury that anything after the verdict was "surplusage".

Justice Tom? The verdict sheet was "unclear and confusing" since it never mentioned an award of damages for the second surgery. New trial. Justice Kapnick? The note written by the jury was written by the jury before the taking of the verdict, but only revealed to counsel after the verdict was taken. It was inconsistent with the answer to Question 2 and could have been remedied, had anyone known about it. New trial.

Justice Saxe, however, sees the Court's duty differently. Since one of the functions of appellate review is to provide "guidance to the trial bench", that's just what he and Justice Manzanet-Daniels do: They provide a "step-by-step template for the retrial of this somewhat unusual case" by including "suggested (not mandatory) questions" for the jury. "The PJI special verdict questions did not help here, and the lawyers were only of modest help in assisting the trial court in framing the special verdict sheet." Justice Saxe then goes on to examine the evidence and set out the questions to be included in the special verdict sheet upon the re-trial.

While you read those questions, recognize that each of these opinions ignored the elephant in the room: PJI's "substantial factor" instructions. No one knows what they mean, least of all a lay juror, and no judge has the courage to define them.

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