



MondayMonday

Two For The Seesaw

August 14, 2017

Turn with us now to the thrilling days of yesteryear, when you were in law school and the law was taught to you, at least as an impressionable 1L, as a thing of beauty.

While it is certainly true that, as St. Thomas Aquinas said, human law has its limitations ["Human law cannot prohibit everything which the Natural law prohibits"], this is not to say that human law is free to allow, without consequence, what natural law finds dissonant with the order of things.

Our bodies, for the most part, come fully equipped. A good basic rule of natural law is that he who adds or subtracts something from them without reason or permission has probably done something wrong and "wrong" is what the law is supposed to correct.

If this be true, then explain to us last week's ruling by the 11th Circuit in *Cure v. Intuitive Surgical*, 2017 WL 3381848 (11th Cir. 8/7/17). Plaintiffs underwent heart surgery only to find that the surgical instruments manufactured and sold by defendants and used by plaintiffs' surgeons had a slight problem: They shed metal particles during surgery which then lodged in plaintiffs' brains.

Defendants argued "so what?" Plaintiffs had failed to plead any injury as a result of defendants' negligence. The Georgia district court agreed and dismissed their action. Here, the 11th Circuit concurs, despite the fact that plaintiffs submit that "the presence of metal shavings in their brain is a legally recognized injury in and of itself." No, the



Circuit Court says, following a mid-level Georgia appellate court, for the presence of a foreign object in the body is just like the presence of a toxic substance. No harm; no foul.

Now, in all fairness, plaintiffs did not explain, beyond the "naked assertion[s] devoid of further factual enhancement" what the presence of metal shavings in your brain actually does to you over time, but that's not our point this morning. The point is: They don't belong there. Someone put them there improperly and is now beyond the reach of the law. The innocent party, the plaintiff, now has to live a life waiting for the other shoe to drop or, at the very least, having a very difficult time getting through TSA at the airport.

So, is the law still a thing of beauty, or a hag? "[J]urisprudence has its reasonable man, its negligent man and * * * its moral man'. We cannot supply scientific definitions or require scientific tests in matters such as these, for law itself is by no means an exact science. 'They do better things with logarithms.'" Cardozo, *Paradoxes of Legal Science* at 37. In natural law, however, one plus one always equals two.

We can concede that there is often a fine line between clever lawyering and sharp practices; between being collegial and being a chump; between representing your client and giving way to the baser elements. Natural law says that cream floats to the top of the bottle, if you're lucky, that is.

While plaintiff was stopping at a red light, he was hit from behind by defendants' auto. After securing summary judgment on liability, the parties moved on to the damages trial where defendants' counsel attempted — in good faith, of course — to convince the trial court that it was perfectly okay on cross-examination to try to impeach plaintiff by asking him about his employment with plaintiff's attorney's law firm and whether he was referred to certain doctors by that firm for treatment of his injuries. The trial court had some problems with that line of questioning and precluded defendants' from inquiring along those lines.

Now, on appeal, the Second Department agrees: "Here, the Supreme Court providently exercised its discretion in precluding the defendants from questioning the injured plaintiff concerning his employment by the law firm which represented him in the action and his referral to doctors by the law firm, in an effort to establish their unsubstantiated and prejudicial claim that he was 'working the system'." *Sehgal v. www.nyairportsbus.com*, 2017 NY Slip Op 05990 (2d Dep't 8/2/17).

Much to defendants' chagrin, moreover, the system worked fine. The jury's award of \$150,000 for past/\$50,000 for future pain and suffering was affirmed, as were the amounts for future medical expenses (\$505,050) and loss of consortium (\$100,000).

So, what have we learned? The real beauty of the law can only be seen when it works right, which, unfortunately, is our job alone. We are the batteries that drive the law, natural or otherwise. Without the lawyer, law is merely a philosophy, while with us, it is a wondrous tool.