

## Injured bicyclist can sue utility company for road defect

*SJC: 30-day notice isn't required for private entities*

By: Pat Murphy | May 16, 2019



The plaintiff claims the wheel of his bicycle got caught in a gap in the pavement formed by the misalignment of the above utility cover.

A bicyclist's negligence suit for injuries allegedly caused by a misaligned utility cover is not barred by his failure to provide statutory notice to the private power company responsible for the road defect, a unanimous Supreme Judicial Court has found.

Defendant Veolia Energy North America argued that the lawsuit was barred because the company did not receive notice of the claim within 30 days of the plaintiff's accident as called for under G.L.c. 84, §18.

In reversing summary judgment for the defendant, the SJC concluded that the 30-day notice requirement for claims brought

under the state's road defect statute, G.L.c. 84, §15, applies only to governmental and quasi-governmental entities.

"Sections 15 and 18 do not limit Veolia's common-law liability under tort law," Justice Scott L. Kafker wrote for the court. "Consequently, Veolia may be sued for its own negligence without providing thirty days' notice."

The 32-page decision is *Meyer v. Veolia Energy North America*, Lawyers Weekly No. 10-084-19. The full text of the ruling can be found [here](#).

### 'Fair amount of confusion'

The plaintiff is represented by Kevin J. Powers of Mansfield and Boston attorney Andrew M. Fischer.

Powers said that the case is important because the SJC recognized that while plaintiffs can readily determine after a road injury the government entity that is responsible, it is "orders of magnitude more difficult" to determine within 30 days every possible corporate or private tortfeasor that may have somehow played a part in causing the injury.

"It clarifies an area of the law where there had been a fair amount of confusion over the last few decades," Powers said.



Ruling clarifies area of law

Fischer added that the issue of whether the road defect statute applies to private entities had been muddled by Appeals Court decisions that had "misinterpreted" controlling SJC precedent over the years.

"When the statute was originally written, corporations weren't considered 'persons' [for legal purposes] as they are today," he said.

Martin J. Newhouse co-authored an amicus brief filed in support of the defendant on behalf of the New England Legal Foundation.

Newhouse wrote in a statement that his organization understood the concern underlying the SJC's decision that the interpretation of the statutes at issue as supported by the foundation would yield an "unfair" result. However, he said that NELF's interpretation was "well supported" by precedent concerning parties that perform a public service function.

"[W]e are concerned that by removing the protection of the statutory notice requirement, the decision may impact the incentives for a private corporation to agree to undertake maintenance of any portion of a public roadway," Newhouse wrote.



"This decision is going to be a relief for plaintiffs who either can't identify the person or party actually responsible or who first go to the city before realizing a private actor was in fact responsible."

— Matthew J. Holmes, Worcester

Matthew J. Holmes, a plaintiffs' attorney in Worcester, hailed the decision.

"The 30-day notice requirements are onerous for plaintiffs," Holmes said. "Even though the court spent a lot of time dwelling on the legislative history of the statutes, what it really came down to is the difficulty of identifying — never mind notifying — private parties within that 30-day time limit."

Holmes said there is a line of recent Appeals Court decisions broadly applying the notice requirement in road defect cases.

"Clearly, the SJC did not agree with those decisions," he said. "This decision is going to be a relief for plaintiffs who either can't identify the person or party actually responsible or who first go to the city before realizing a private actor was in fact responsible."

Boston attorney Christopher R. Howe, who represented Veolia, was unavailable for comment.

### **Incident on Sudbury Street**

The plaintiff alleged that he suffered injuries in a bicycle mishap that occurred on Sudbury Street in Boston on July 1, 2013. According to the plaintiff, he was thrown to the ground when the wheel of his bike got caught in a gap in the pavement formed by the misalignment of a circular utility cover.

The utility cover was stamped with the word "TRIGEN-BOSTON." Veolia Energy is the parent company of Trigen.

On July 18, the plaintiff's attorney sent notice of his claim by certified mail to various city officials. On Aug. 1 — 31 days after the accident — the attorney received a letter from a Boston claims officer disavowing the city's liability on the ground that, because of its proximity to the utility cover, the road defect fell within the responsibility of Veolia Energy.

Five days later, the plaintiff's attorney mailed a notice of claim to Veolia, alleging that the plaintiff had suffered injuries from "a defect in the roadway caused by a utility cover ... that had been improperly maintained."

In February 2015, the plaintiff filed a negligence action against Veolia in Suffolk Superior Court.

The defendant admitted that it owned the utility cover and was responsible for maintaining the surrounding pavement within a 30-inch radius. However, the utility moved for summary judgment on the ground that the suit was barred for failure to comply with the 30-day notice requirement of the state's road defect statute.

Judge Peter M. Lauriat granted the motion, concluding that G.L.c. 84, §15, provided the exclusive remedy for the plaintiff's claim against Veolia Energy, and, therefore, the utility was entitled to notice within 30 days from the date of injury pursuant to G.L.c. 84, §18.

After the plaintiff appealed, the SJC transferred the case from the Appeals Court on its own initiative.

### **Avoiding 'trap for the unwary'**



Chapter 84 governs obligations concerning the repair of “Ways and Bridges.” Under §1 of the chapter, “highways and town ways” shall be kept in repair “at the expense of the town in which they are situated.”

Section 15 imposes liability on a “county, city, town or person” obliged by law to repair a roadway when a road defect that causes injury could have been remedied by the responsible entity’s “reasonable care and diligence.”

In turn, §18 provides that a person injured by a road defect has 30 days to “give to the county, city, town or person by law obliged to keep said way in repair” notice of a claim, including “the time, place and cause of said injury.” If the responsible party refuses to pay the claim, the plaintiff has three years from the date of injury to bring an action in tort.

Looking at the text of the statutes at issue and their legislative history, Kafker wrote that the road defect statute (§15), like the notice statute (§18), is meant to apply to the public duty to maintain the roadway, not to a private entity responsible for a particular defect.

Veolia Energy argued the Legislature’s inclusion of the term “person” constituted “plain language” evincing an intent that the statutes apply equally to private and governmental entities.

The SJC rejected that argument.

“The statutes are directed at governmental liability for roadways and the defects thereon,” Kafker wrote. “Furthermore, where the Legislature included the word ‘persons,’ it did so for a very limited historical purpose: to include private parties once responsible for entire roadways.”

That interpretation was supported by a long line of precedent dating from the SJC’s decision in an 1883 case, *Fisher v. Cushing*, Kafker noted.

In *Fisher*, the court held that a property owner sued for negligently maintaining a “coal hole” in a sidewalk in violation of a Boston ordinance was not entitled to 30-days’ notice of the plaintiff’s nuisance claim.

“We emphasize today that the court in *Fisher* and the long line of authority discussed *supra* correctly interpreted the meaning of the road defect statute,” Kafker wrote. “In these decisions, the court recognized that this statute is directed at a public duty for maintaining the way, not at private actors causing particular defects in the way; the latter are subject to liability in tort.”

He finally pointed to sound practical reasons for the court’s conclusion, observing that §18’s requirement of providing notice within 30 days is a difficult time frame to meet.

“This notice requirement is reasonable so long as it applies only to those governmental or quasi governmental entities responsible for maintaining the way,” Kafker wrote. “An entirely different set of problems arises if notice must be given to private parties responsible for particular defects in the way.”

On the latter point, Kafker noted that identifying the governmental entity responsible for the roadway itself is “practicable” within 30 days.

“The alternative reading — that the notice statute instead requires notice to the private party responsible for the particular defect — would impose an unrealistic deadline and create a trap for the unwary,” Kafker wrote. “Identifying a private party responsible for a particular defect within that time frame is extremely difficult, especially without the full cooperation of the city, town, or other governmental or quasi governmental entity responsible for the way itself, which may have contracted the work causing the defect to many different entities.”

### **Meyer v. Veolia Energy North America**

**THE ISSUE:** Is a bicyclist’s negligence suit for injuries allegedly caused by a misaligned utility cover barred by his failure to provide statutory notice to the private power company responsible for the road defect?

**DECISION:** No (Supreme Judicial Court)



**LAWYERS:** Kevin J. Powers of Mansfield; Andrew M. Fischer and Andrew J. Brodie III, of Law Offices of Jeffrey S. Glassman, Boston (plaintiff)

Christopher R. Howe of Campbell, Campbell, Edwards & Conroy, Boston (defense)

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