Wednesday, May 8, 2019

Mass. tort opinion journeys down coal hole of history

A narrow decision from the Massachusetts Supreme Judicial Court (SJC) today is important for keeping alive plaintiff personal injury claims based on road defect injuries, especially amid the trending privatization of public services. The opinion stops off in Boston history en route to its conclusion. The case is *Meyer v. Veolia Energy North America*, No. SJC-12606 (Mass. May 8, 2019).

Reversing summary judgment for defendant Veolia Energy North America, the SJC concluded that the statutory requirement of notice within 30 days to a potential defendant alleged to be responsible for road conditions giving rise to injury applies to the governmental defendants, but not to private-sector defendants.

Plaintiff Meyer was injured when on his bicycle, on Sudbury Street in Boston, he "struck a circular utility cover one foot or less in diameter that was misaligned with the road surface." He gave notice to the City of Boston of a potential tort claim within 30 days. But the city denied his claim on day 31, referring Meyer to private-sector Veolia as the party responsible for the utility cover. Upon purportedly late notice to Veolia under the statute, the lower court awarded summary judgment to the energy company. The SJC reversed, holding the statute inapplicable.

Sudbury Street, at Court Street, Boston, 1912. City of Boston Archives.

Most of the 32-page decision concerns statutory interpretation and is worth a read if that's your jam. A couple of points stood out for me, though, as a general observer of law American-style. The relevant Massachusetts statutes are found in General Laws chapter 84. The SJC observed that section 1 "reflects its origins in the preindustrial era." Indeed, the section states, "Highways and town ways, including railroad crossings ... shall be kept in repair at the expense of the town ... so that they may be reasonably safe and convenient for travelers, with their horses, teams, vehicles and carriages at all seasons."

The SJC traced interpretation of the relevant statutes to an 1883 opinion by Justice Holmes. Yes, that Justice Holmes, the Honorable Oliver Wendell Holmes, Jr., when he served on the Massachusetts high court. Explained today's SJC, Justice Holmes for the Court, in in Fisher v. Cushing, 134 Mass. 374 (1883) (electronic page 376 of this free ebook), had

> interpreted the road defect and notice statutes, and the meaning of the reference to "persons," in the course of reviewing the statutes' legislative and legal history. As a noted scholar of legal history and the author of *The Common Law* (1881), Justice

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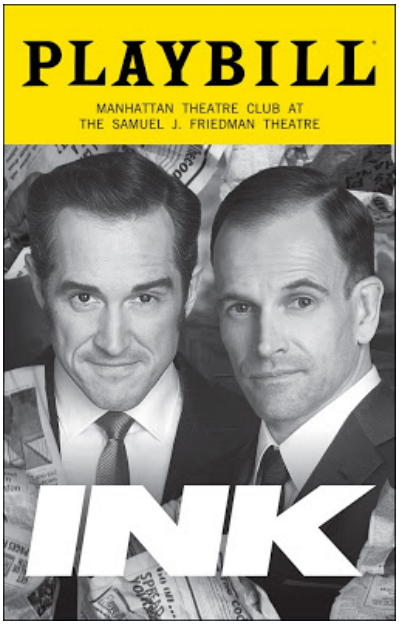

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> Holmes brought special knowledge and expertise to this interpretation. The defendant in *Fisher* was sued for negligently maintaining a coal hole on a Boston sidewalk.

Held the Court in *Fisher,* "The whole scope of that [statutory notice] scheme shows that it is directed to the general public duty [to keep the way in repair], and that it has no reference to the common law liability for a nuisance." Explained today's SJC,

> The court therefore held that the defendants could be sued in tort for the nuisance they created with their coal hole.
>
> The court also went on to explain the meaning of "persons": "The mention of 'persons' in the statute, alongside of counties and towns obliged to repair, is easily explained. The outline of our scheme was of ancient date and English origin. In England, while parishes were generally bound to repair highways and bridges, a person might be, *ratione tenurae*, or otherwise .... [W]e cannot say, and probably the Legislature of 1786 could not have said, that there were no cases in the Commonwealth where persons other than counties or towns were bound to keep highways in repair.... Even if there were not, it was a natural precaution to use the words.

Coal hole at Wakefield Town Hall in Great Britain, 2018. (Stephen Craven CC BY-SA-2.0.)

Footnotes elucidated, "A coal hole was an underground vault covered by a hatch with a cover where coal used for heating purposes was kept for easy access" (citing S.P. Adams, *Home Fires: How Americans Kept Warm in the Nineteenth Century* 105-106 (2014)). And "'*[r]atione tenurae*' is a Latin phrase meaning by reason of tenure," as in being an occupier of land (citing *Black's Law Dictionary* 1454 (10th ed. 2014)).

I'm assuming that when the Court wrote that the late, great Justice Holmes "brought special knowledge and expertise" to the case, that assertion was strictly a function of the preceding clause, "as a noted scholar of legal history and [common law]," and not, as my mind hastened to wonder, because Justice Holmes had some particular *tenura* with coal holes.

Posted by Richard Peltz-Steele at 12:40 PM

Labels: civil procedure, coal hole, government liability, Massachusetts, negligence, notice, personal injury, statute of limitations, statutory interpretation, Supreme Judicial Court

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