MondayMonday

Two Dissents; Two Cases

July 29, 2013

A baby is born, any baby, and the world smiles. The reaction is elemental and almost reflexive for, if a baby isn't the ultimate image of hope, then what is? Ah, but a *royal* baby is a different thing entirely, for that is a baby that belongs to its subjects and, quite appropriately, they each rejoice and bathe themselves in a special joy as if they too were its parents.

We are only cousins to the birth of Prince George, but the party is certainly big enough to take us former colonials in as well. The Brits, these marvelous people who love us when no one else does; who have our backs in an increasingly treacherous world; and who find us as delightfully odd as we find them, are family. So what if one King George screwed up? The last one didn't and, after all, no family is perfect anyway.

And then there's Kate. Oh, there always that one third-cousin, by marriage or otherwise, that you can't take your eyes off of at the family wedding. And Harry, the uncle that every young prince should have; the uncle that will teach him how to belch on command, change the oil in the Land Rover, and pick up girls on the

beach (they do have beaches in England, don't they?) The Brits have their Royal Family for an eternity, while we only have a First Family for, at best, eight years. While we can live with that, at the end of the day, the latent Tory in us still marvels at Queen Elizabeth, who defines the term "matriarch" no matter what our fealty.

We can scarcely ignore the First Department last week, which produced not one, but two cases with justices dissenting. Moreover, the dissents were on such basic issues of premises liability that we take note of them here.

In *Fayolle v. East W. Manhattan Portfolio L.P.*, 2013 N.Y. Slip Op 05431 (July 23, 2013), Justice Feinman rejected the majority's non-suiting of a plaintiff on *Trincere* grounds who had tripped on a sidewalk expansion joint. After all, Justice Feinman asked, how can property owners in the City "ignore the law regarding construction and maintenance of their abutting sidewalks without consequence[?]." Plaintiff's expert on the motion for summary judgment confirmed that during a reconstruction, the sidewalk expansion joint had been created with statutory defects (which caused plaintiff's fall) in violation of the City's Administrative Code and DOT regulations. How can "statutory defects" ever be deemed "trivial?" Isn't there a question of fact for the jury somewhere there?

In *Gautier v. 941 Intervale Realty LLC*, 2013 NY Slip Op 05432 (July 23, 2013), Justice Andrias expressed some doubt (together with Justice Saxe) in dissent, as to the principle that a property owner who merely testifies as to cleaning procedures, without ever offering testimony that they were followed on the day of the accident, fails to sustain its burden as a proponent of summary judgment.

Plaintiff alleged that he slipped and fell on partially dried and sticky urine on the interior steps of defendant's building. The best defendant could muster in its SJ motion was "proof that [the] 'stairs were routinely cleaned on a daily basis'." The majority felt that this was not quite germane to the question of lack of notice of the defect.

Not Justice Andrias, however. For him, plaintiff had failed to raise a triable issue of fact as to actual or constructive notice, for it had not shown that the condition existed for a long enough time. This sounds suspiciously like a burden-shifting analysis to us . . . and the majority.

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