CITATION: Bourassa v. Temiskaming Shores (City), 2016 ONSC 1211
COURT FILE NO.: 5484/12
DATE: 20160218

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
ALLAN BOURASSA	)	Lorenzo Girones, for the Plaintiff
	)	
	)	
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
	)	
THE CITY OF TEMISKAMING SHORES	)	Charles A. Painter, for the Defendant
	)	
	)	
	)	
Defendant	)	
	)	
	)	
	)	**HEARD:** March 23, 24, August 17, 18, 19, November 12, 13 and December 7, 2015

DECISION ON MOTION

WILCOX, J.

INTRODUCTION

[1] This matter arises out of a motor vehicle accident that occurred on January 7, 2012. The Plaintiff commenced an action against Her Majesty the Queen in Right of the Province of Ontario and against the Corporation of the City of Temiskaming Shores (the City). Both defended. The action has been dismissed against the province. The action against the City remains ongoing.

[2] The Statement of Claim, as amended, alleges that, on or about January 7, 2012, "... the Plaintiff was travelling northbound on King Street, in the City of Temiskaming Shores, in the

Province of Ontario, when ... he lost control of his vehicle because of a lack of maintenance and repair of the roadway, resulting in the buildup of ice and snow on the road, crossed the centre line and collided with an oncoming motor vehicle.

[3] The Defendant City has brought a motion for summary judgment seeking the dismissal of the Plaintiff's action against it for failure to provide proper notice to it, in accordance with s. 44(10) of the *Municipal Act*, 2001, or, in the alternative, dismissing the Plaintiff's action in whole or in part, in respect of the allegations of "non-repair" of the highway consisting of "cracks, potholes, bumps, unevenness or depressions". A third head of relief was not pursued due to an amendment of the Statement of Claim subsequent to the date of the motion documents. For the reasons that follow, I dismiss the Plaintiff's action against the remaining defendant, the City of Temiskaming Shores.

PLAINTIFF'S POSITION

[4] The Plaintiff sought an order dismissing the defendant's motion for summary judgment. His position was:

a) That section 44(10) of the *Municipal Act* is of no force and effect;
b) That there is no legal requirement to give notice after 10 days (the "literal approach");
c) That the discoverability principle applies to the 10 day notice period under section 44(10) of the *Municipal Act*;
d) That the plaintiff had a reasonable excuse for the want of notice; and
e) That the defendant has not been prejudiced by the lack of notice.

LAW RE: SUMMARY JUDGMENT

[5] Motions for summary judgment are provided for by Rule 20 of the Rules of Civil Procedure. Rule 20.04 provides for the disposition of such motions as follows:

> DISPOSITION OF MOTION
>
> *General*
> 20.04 (1) [Revoked]
>
> (2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment. O. Reg. 284/01, s. 6; O. Reg. 438/08, s. 13(2).

Powers
(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

Oral Evidence (Mini-Trial)
(2.2) A judge may, for the purposes of exercising any of the powers set out in the subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation. O. Reg. 438/08, s. 13(3).

Only genuine issue is amount
(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

Only genuine issue is question of law
(4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

Only claim is for an accounting
(5) Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts.

[6] Rule 20 was substantially amended effective January 1, 2010. The former test of "no genuine issue for trial" was replaced with "no genuine issue requiring a trial". Judges hearing motions for summary judgment were given the power to weigh evidence, evaluate the credibility

of a deponent, and draw reasonable inferences from the evidence (the "enhanced powers") in determining whether there is a genuine issue requiring a trial.

[7] In the case known as *Combined Air Mechanical Services Inc. v. Flesch* 2011 O.N.C.A. 764 the Ontario Court of Appeal heard five separate appeals from summary judgment rulings. In view of controversy and uncertainty arising from the amendments, the court took the opportunity to provide guidance in the use of rule 20. Rather than commenting on the relative merits of the various approaches taken in the cases, the court explicitly stated that, " ... our decision marks a new departure and a fresh approach to the interpretation and application of the amended rule 20". (Paragraph 35). Therefore, previous cases must be used with caution.

[8] The Court of Appeal promulgated a "full appreciation" test. It was to be applied in deciding if the enhanced powers should be used to identify claims having no chance of success or to resolve all or part of any action. This full appreciation test was criticized by the Supreme Court of Canada in the case of *Hryniak v. Mauldin*, 2014 S.C.C. 7, as will be seen below.

[9] One of the five cases dealt with by the Court of Appeal in *Combined Air Mechanical v. Flesch, Hryniak v. Mauldin*, was appealed to and dealt with by the Supreme Court of Canada, as noted above. The Supreme Court agreed with the Court of Appeal's disposition of the case and dismissed the appeal, but differed on the interpretation of Rule 20.

[10] The Supreme Court stated that the process of adjudication must be "fair and just" and expanded on what that meant in terms of the accessibility of the justice system which is compromised by the cost and delay of dispute resolution processes, such as full trials, when these are disproportionate to the nature of the dispute and the interests involved. Summary judgment procedures, when used appropriately, were seen as enhancing access to justice.

[11] The court noted that motions for summary judgment "must be granted whenever there is no issue requiring a trial", but that the Court of Appeal had not explicitly focused on when there is a genuine issue requiring a trial (paragraphs 47-49). Therefore the Supreme Court stated at para. 49:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process

(1) allows the judge to make the necessary findings of fact,
(2) allows the judge to apply the law to the facts, and
(3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[12] Notably, the Supreme Court took issue with the Court of Appeal's formulation of its "full appreciation test", as follows:

> 56. While I agree that a motion judge must have an appreciation of the evidence necessary to make dispositive findings, such an appreciation is not only available at trial. Focusing on how much and what kind of evidence could be adduced at a trial, as opposed to whether a trial is "requir[ed]" as the Rule directs, is likely to lead to the bar being set too high. The interest of justice cannot be limited to the advantageous features of a conventional trial, and must account for proportionality, timeliness and affordability. Otherwise, the adjudication permitted with the new powers – and the purpose of the amendments – would be frustrated.
>
> 57. On a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is confident that she can fairly resolve the dispute. ...

[13] The Supreme Court went on to outline the roadmap/approach to a motion for summary judgment, as follows:

> 66. On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[14] P.M. Perell J. stated in *Miaskowski (Litigation Guardian of) v. Persaud*, 2015 ONSC 1654 at paragraph 62:

Hryniak v. Mauldin does not alter the principle that the court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial. The court is entitled to assume that the parties have respectively advanced their best case and that the record contains all the evidence that the parties will respectively present at trial: *Dawson v. Rexcraft Storage & Warehouse Inc.,* [1998] O.J. No. 3240 (C.A.); *Bluestone v. Enroute Restaurants Inc.* (1994), 18 O.R. (3d) 481 (Ont. C.A.); *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372 at para.11. The onus is on the moving party to show that there is no genuine issue requiring a trial, but the responding party must present its best case or risk losing: *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.); *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, (1996), 28 O.R. (3d) 423 (Gen. Div.), aff'd [1997] O.J. No. 3754 (C.A.).

THE *MUNICIPAL ACT*

[15] For reference, s. 44 of the *Municipal Act* reads as follows:

> Maintenance
>
> 44. (1) The municipality that has jurisdiction over a highway or bridge shall keep it in a state of repair that is reasonable in the circumstances, including the character and location of the highway or bridge. 2001, c. 25, s. 44 (1).
>
> Liability
>
> (2) A municipality that defaults in complying with subsection (1) is, subject to the *Negligence Act*, liable for all damages any person sustains because of the default. 2001, c. 25, s. 44 (2).
>
> ...
>
> Notice
>
> (10) No action shall be brought for the recovery of damages under subsection (2) unless, within 10 days after the occurrence of the injury, written notice of the claim and of the injury complained of has been served upon or sent by registered mail to,
>
> (a) the clerk of the municipality; or
>
> (b) if the claim is against two or more municipalities jointly responsible for the repair of the highway or bridge, the clerk of each of the municipalities. 2001, c. 25, s. 44 (10).
>
> ...

Same

(12) Failure to give notice or insufficiency of the notice is not a bar to the action if a judge finds that there is reasonable excuse for the want or the insufficiency of the notice and that the municipality is not prejudiced in its defence. 2002, c. 24, Sched. B, s. 42.

TIME LINE

[16] The following list of important dates will help in understanding the matter:

- January 7, 2012, the motor vehicle accident occured.

- January 12, 2012, the Plaintiff was in hospital and gave a statement to an insurance adjuster.

- January 14, 2012, the Plaintiff was discharged from hospital.

- January 25, 2012, Girones Lawyers was first contacted by Vicky Bourassa on behalf of her husband, the Plaintiff, and given information about the accident and injuries, including that the road conditions were very poor on the accident date.

- January 27, 2012 the Plaintiff was sent authorizations by the Girones firm for obtaining items such as the police report and medical records.

- February 1, 2012 – the Plaintiff signed an application for accident benefits which is stamped "Received February 2, 2012, Intact Insurance Thunder Bay".

- February 2, 2012, the Plaintiff's family doctor provided a note to the Ministry of Transportation about postponing a medical test for his Class A licence due to his severe injury from the motor vehicle accident.

- February 24, 2012, the Plaintiff signed a transcript of his Jan. 12 statement to his insurer.

- March 8, 2012, the Plaintiff's surgeon, Dr. Ross Mantle wrote to his family doctor, Dr. McDermott indicating that the Plaintiff has ongoing mild to moderate pain with exertion, that he has not returned to work, that his incision is well healed, that his gait is normal and he has no hand, arm or leg numbness or weakness, and that the Plaintiff was advised to walk one hour per day.

- March 9, 2012, the Plaintiff signed a narcotic treatment contract.

- March 13, 2012, Girones Lawyers requested from the OPP the Motor Vehicle Accident Report.

- April 12, 2012, the top half of the Motor Vehicle Accident Report was faxed to the Girones firm from Conray-Dymond, which had employed the Plaintiff as a trucker at the time of the accident.

- May 14, 2012, the Plaintiff's physiotherapist reported that he had that day walked for approximately 1.5 hours and did not complain of any pain, just fatigue, and that he was progressing throughout his treatment plan, but had a long way to go.

- June 27, 2012, Girones Lawyers received Dr. McDermott's clinical notes and records regarding the Plaintiff's accident and surgery.

- Early October, 2012, Girones Lawyers received the Temiskaming Hospital records.

- October 23, 2012, the Plaintiff was examined by Dr. Harding. When that appointment was made is unknown. Dr. Harding's report is dated that same date.

- October 24, 2012, Girones Lawyers sent a draft Statement of Claim to the Plaintiff for his review.

- October 30, 2012, the Plaintiff attended the scene of the accident and took photos of the road.

- November 1, 2012, the Statement of Claim was sent by Girones Lawyers to be issued and served.

- November 6, 2012, the Statement of Claim was issued and it was served upon the City's clerk.

- January 3, 2013, the City's Statement of Defence was served on Girones Lawyers by regular letter mail sent Jan 3, 2013.

- June 28, 2013, examinations for discovery were held. For the first time, it was revealed to the City that something other than snow and ice was alleged to have caused the motor vehicle accident, that being the condition of the road's surface.

- Jan 7, 2014, was the two year limitation under the *Limitations Act* for serving the Statement of Claim.

NO NOTICE

[17] The Defendant submitted that it had no notice whatsoever of the accident as required by s. 44(10) of the *Municipal Act* and was completely unaware of it until it received service of the Statement of Claim. The Affidavit of Service of Burl Regan, process server, states that service on the City was effected on November 6, 2012 by leaving a copy of the Statement of Claim with the City's clerk.

[18] The Plaintiff's counsel does not dispute the fact that the Plaintiff failed to provide notice to the City within 10 days of the motor vehicle accident, or at all.

IS THE *MUNICIPAL ACT* S. 44(10) OF NO FORCE AND EFFECT?

[19] The Plaintiff submits that s. 44(10) of the *Municipal Act* is of no force and effect due to the effect of the *Limitations Act*. As this is a question of law, it may be decided under Rule 20.04(4). The argument is based on s. 4 which provides the basic limitation period, and on s. 19 which deals with the effect of limitations in other acts. These sections read as follows:

> *Basic Limitation Period*
>
> S. 4 - unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
>
> *Other Acts, etc.*
>
> S. 19(1) - A limitation period set out in or under another Act that applies to a claim to which this Act applies is of no effect unless,
>
> (a) the provision establishing it is listed in the Schedule to this Act;
>
> (b) or the provision establishing it,
>
> (i) is in existence on January 1, 2004, and
>
> (ii) incorporates by reference a provision listed in the Schedule to this act.
>
> *Act prevails*
>
> 2) Subsection (1) applies despite any other Act.
>
> *Interpretation*
>
> 3) The fact that a provision is listed in the Schedule shall not be construed as a statement that the limitation period established by the provision would otherwise apply to a claim as defined in this Act.
>
> *Same*
>
> 4) If there is a conflict between a limitation period established by a provision referred to in subsection (1) and one established by any other provision of this Act, the limitation period established by the provision referred to in subsection (1) prevails.
>
> ...

[20] Section 44(10) of the *Municipal Act* is not listed in the Schedule to section 19 of the *Limitations Act*, nor is it otherwise saved by it. Therefore, the plaintiff argues, subsection 44(10) is of no effect. No authority is cited for this proposition.

[21] The City argues that s. 44(10) of the *Municipal Act* is a notice provision, not a limitation and, therefore, is not rendered of no effect by the *Limitations Act* as the Plaintiff suggests. It relies on the case of *Bannon v. Thunder Bay (City)* (2000), 48 O.R. (3d) 1. There, the Ontario Court of Appeal dealt with the notice requirement in s. 284(5) of the *Municipal Act* 1990, which counsel in the present case agreed was the direct predecessor of s. 44(10) of the current *Municipal Act*, finding that it was not, strictly speaking, a limitation period.

[22] The City also points out that each of the sections listed in the *Limitations Act* s. 19 Schedule is a limitation period, not a notice period, even where, as in the *Libel and Slander Act*, both types of provisions are found. This, it argues, indicates that the legislature did not intend to void all the notice provisions by leaving them out of the s. 19 Schedule.

[23] I find the City's argument in this regard persuasive and reject the Plaintiff's argument that s. 44(10) of the *Municipal Act* is of no effect.

IS NOTICE REQUIRED AFTER 10 DAYS?

[24] The Plaintiff also submitted that there is no legal requirement to provide a municipality with notice after 10 days from the date of an injury. This is referred to as the "literal approach". This issue, too, may be determined under Rule 20.04(4) as it is a question of law.

[25] Under this approach, it is submitted, the court would look only at the 10 days following the injury and inquire whether the Plaintiff has a reasonable excuse for the failure to give notice within that time period. This is because the legislature chose 10 days as the amount of time within which a municipality could undertake a meaningful investigation of the scene, after which the opportunity for a meaningful investigation is compromised and thus not needed to satisfy the purposes of the notice. A consideration of the Plaintiff's conduct after the 10 day period has expired is therefore irrelevant to the legislative purpose of providing a municipality with an opportunity to investigate the scene. The issue then becomes whether the municipality has been

prejudiced. An examination of the facts after the 10 day period is to see whether the municipality has suffered prejudice.

[26] However, the Plaintiff also submits that the longer the municipality is without notice, the more prejudice there might be to it and, therefore, it is admittedly wise to provide notice even after the 10 days to minimize any alleged prejudice.

[27] The purpose of the notice provisions was set out in *Schoeni et al v. King et al* [1943] O.J. No. 468 at para. 21:

> Notice within the prescribed time gives to a municipal corporation an opportunity to investigate the source of the accident, the place where it happened and the circumstances under which it happened. The greater the lapse of time between the happening of the occurrence and the investigation, the less is the opportunity of the servants of the corporation to investigate, and there may come a time when all opportunity to investigate is lost. ...

[28] It would appear to me, having seen no authority to the contrary, and as a matter of common sense, that the 10 day period in the *Municipal Act* s. 44(10) is more or less arbitrary. Prejudice to a defendant municipality might arise within the 10 days, or not arise until long after, depending on the circumstances. I think it is unlikely that any prejudice will suddenly become substantially worse from day 10 to day 11, but it could become worse over time. If notice is not given within the 10 days, or at all, the purpose of the notice provision might be thwarted.

[29] I find no support in the law, even in the cases cited by the Plaintiff, that supports his interpretation of these provisions. Where they address the point at all, it is to the contrary.

[30] While s. 44(10) imposes a bar on bringing an action unless notice is provided within 10 days of the injury, s. 44(12) provides some relief from that strict provision. This relief involves a consideration of whether there is a reasonable excuse for the want or insufficiency of notice, as well as prejudice to the municipality's defence.

[31] In *Crinson v. Toronto (City)* [2010] O.J. No. 216, a case in which the Plaintiff had been injured on February 4, 2004, the Ontario Court of Appeal said with respect to the interpretation of the *Municipal Act* s. 44(12): "The question to be addressed is whether in all the

circumstances of the case, it was reasonable for the Appellant not to give notice until June 30, 2004". (Para. 23).

[32] In *Argue v. Tay* (Township) [2012] O.J. No. 3776, a decision in the Superior Court of Justice, the court followed *Crinson* and stated at paragraph 45 that, in that case, "... the applicable test is whether in all the circumstances of the case, it was reasonable for (the Plaintiff) not to give notice until ... approximately two years after the accident".

[33] In *Delahaye v. City of Toronto* [2011] ONCS 5031, Lauwers J. for the S.C.J. noted at para. 37 that "(s)ome summary judgment cases have left open the amount of delay (in providing notice to a municipality) that is acceptable: in *Blair*, the delay was six weeks; in *Cena*, ten weeks; in *Fremeau*, 11 weeks; and in *Crinson*, the delay was 17 weeks." He went on at para. 41 to say, "(t)hat said, however, the absence of prejudice to the city (to take the Plaintiff's case at its best) does not permit the court either to dispense with the notice, or to elongate it to two years, being the ordinary limitations period under the *Limitations Act* 2002."

[34] Clearly, the failure to give a defendant municipality notice within 10 days of an injury is not an absolute bar to the bringing of an action against it. S-s. 44(12) of the *Municipal Act* provides relief from that. The cases show that the courts will "elongate" the notice period. The length of the delay in giving notice will be relevant to the consideration of both whether there is a reasonable excuse for and whether the municipality is prejudiced by the delay.

[35] Therefore, I find the "literal approach" suggested by the Plaintiff not to be well founded.

IS THERE A REASONABLE EXCUSE FOR THE WANT OF NOTICE AS REQUIRED BY *MUNICIPAL ACT* S. 44(12)?

[36] Under subsection 44(12) of the *Municipal Act*, to get relief of the failure to give or the insufficiency of notice, the court must find that there are both a reasonable excuse for the want or insufficiency of notice, and that the Municipality is not prejudiced in its defense.

[37] The Plaintiff has the burden of proving "reasonable excuse" for the want or the insufficiency of the notice. (*Argue v. Tay (Township)* [2012] O.J. No. 3776 para. 43)

[38] It was previously noted that the Plaintiff admitted that the notice was not given. Plaintiff's counsel also stated in court (in response to the Defendant's submissions) that he had not said that even the Statement of Claim was notice. The City denies receiving any notice of the motor vehicle accident from any source. The question then is when the Plaintiff ought to have given notice to the City.

[39] The City submitted that notice should have been given around January 25, 2012 when the Plaintiff first contacted Girones Lawyers, as the Plaintiff had the requisite knowledge then. In the alternative, notice should have been given by April 12, 2012 when the Plaintiff's counsel received the Motor Vehicle Accident Report which showed where the accident was and whose jurisdiction the road was in. In the further alternative, the City said, the Plaintiff ought to have given notice long before the Statement of Claim was issued.

[40] Furthermore, the City argued, if the November 6, 2012 Statement of Claim is considered to be notice, it failed to disclose what is allegedly wrong with the road and, therefore, is not proper notice. The City's position is that the earliest date as of which there was sufficient notice was June 28, 2013 when it was revealed to the City before examinations for discovery that the Plaintiff was alleging that deficiencies in the roadway other than the presence of snow and ice contributed to the motor vehicle accident, these being bumps, cracks and potholes. Following discoveries, Plaintiff's counsel prepared a draft Amended Statement of Claim to plead these new grounds, requested and obtained the City's consent to same, but then refused to proceed with the amendments or to formally abandon the new allegations.

ASIDE: WHAT WOULD NOTICE HAVE BEEN OF?

[41] An aside will assist in clarifying matters.

[42] It was noted at the start of these reasons that the Statement of Claim alleges in paragraph 5 that, on or about January 7, 2012, "...the Plaintiff was travelling northbound on King Street in the City of Temiskaming Shores, in the Province of Ontario, when all of a sudden and without warning he lost control of his vehicle because of a lack of maintenance and repair of the roadway, resulting in the buildup of ice and snow on the road, crossed the center line and collided with an oncoming motor vehicle". The Statement of Claim goes on to allege that the City has a statutory duty in subsections 41(1) and (2) of the *Municipal Act* to maintain the

roadway and that the accident was caused by the negligence of the defendants, consisting of a list of particulars in paragraph 11.

[43] Defense counsel indicated, however, that it was revealed on June 28, 2013, just prior to examinations for discovery that the plaintiff was alleging that deficiencies in the roadway other than a presence of ice and snow contributed to the motor vehicle accident, these being referred to as bumps, cracks and pot holes or surface irregularities. Following discovery, plaintiff's counsel prepared a draft amended Statement of Claim to plead these new grounds, requested and obtained the City's consent to same, but then refused to proceed with the amendments or to formally abandon the new allegations.

[44] Consequently, a great deal of effort has gone into dealing with the issue of the condition of the road's surface. In particular, it has been raised in the context of notice, when it was given, and when it should have been given. Obviously, the Statement of Claim containing its allegations with respect to ice and snow on the road came to the City's attention well before any allegations about surface irregularities did. However, from the time of the discoveries, the City was left with the understanding that, if the case went to trial, it would be dealing with a claim relating to the surface condition of the roadway, including allegations of potholes, cracks and bumps, in addition to snow and ice buildup. This explains the alternate relief that it requests in this motion.

[45] Plaintiff's counsel submitted that the pleadings define the issues to be tried, the admissible evidence and the applicable law. He repeatedly stated that this case is about the accumulation of snow and ice on the road due to lack of maintenance. The allegations against the City, he said, are not about potholes, cracks or bumps in the road and there is nothing in the Statement of Claim about those nor relief sought because of them, he said. Furthermore, he stated that the time to object to any evidence of potholes, bumps or cracks in the road would be at trial. Then, it would be up to the trial judge to decide whether or not such evidence may be led.

[46] He objected to the making of an order on the motion for summary judgment dismissing the plaintiff's action with respect to potholes, cracks and the like as the defendant City requested in the alternative, on the grounds that there is no pleading before the court alleging that these

were a cause of the motor vehicle accident, and therefore no basis on which to grant summary judgment.

[47] Indeed, the Rules of Civil Procedure provide for the amendment of the pleadings at any stage of an action in order to secure it's just determination on its merits.

[48] In view of this, I find it would be inappropriate to grant the alternative relief requested if the case was proceeding. Doing so would fetter the discretion of the trial judge and potentially lead to an unjust result.

[49] On the other hand, it is now clear what we are dealing with for the purpose of considering notice, reasonable excuse and prejudice under the *Municipal Act*. The Plaintiff's counsel has made it clear that the case is based on the accumulation on the road of snow and ice due to lack of maintenance, not on allegations of bumps, cracks and potholes on the road surface.

DISCOVERABILITY

[50] Plaintiff's counsel invoked the principal of discoverability in relation to the 10 day notice period, submitting that, if there is an obligation to give notice beyond the 10 days, discoverability is applicable.

[51] The Principal of discoverability is found in statutory form in section 5 of the *Limitations Act* and has been found to be applicable to notice provisions such as that in subsection 44(10) of the *Municipal Act* in addition to the limitation periods.[1]

[52] Section 5 of the *Limitations Act* reads as follows:

> Discovery
> 5. (1) A claim is discovered on the earlier of,
> (a) the day on which the person with the claim first knew,
> (i) that the injury, loss or damage had occurred,
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
> (iii) that the act or omission was that of the person against whom the claim is made, and

[1] Blair v. Barrie (City), 2006 ONSC para. 7

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).

Presumption

5. (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. 2002, c. 24, Sched. B, s. 5 (2).

[53] Plaintiff's counsel argued that the discoverability principle acted to postpone the running of the 10 day notice period. The authority provided for this was the case of *Vaillancourt v. Montreal (City),* [1977] 2 S.C.R. 849 at 856-57. That case dealt with article 1088 of the *Charter* of the City of Montreal which stated to the effect that there is no right of action against the city for damages resulting from a slip and fall unless notice was given to the city within 15 days of the accident, unless the victim had a sufficient reason for not providing notice in time. The Supreme Court of Canada, at least arguably, held that the notice period did not begin to run until the date of discovery.

[54] This appears to be a novel point in the Ontario context. I do not see any case dealing with the *Ontario Municipal Act* where this approach has been discussed, let alone followed. Rather, the Ontario approach has been to consider discoverability with respect to whether delay in giving notice was reasonable where the 10 day notice was missed. I find the *Vaillancourt* case distinguishable. It dealt with Quebec legislation which was not worded the same as the *Ontario Municipal Act.* The latter provides relief from the consequences of lack of timely notice where there is both reasonable excuse for the lack of notice and no prejudice to the defendant Municipality. The Quebec legislation's provision for relief, as set out in the *Vaillancourt* case, is similar to the reasonable excuse provision alone, but says nothing of prejudice. I suspect that the Plaintiff's approach, using discoverability to delay the start of the 10 day notice period, would make no difference to the consideration of whether the delay was reasonable. However, if it is only prejudice arising after the expiry of 10 days that is to be considered, much prejudice could have risen by then that would be of no legal consequence, which would frustrate the apparent scheme of the *Act.* Therefore, if it is necessary to do so, I find the preferable approach to be to start the 10 day notice period when the injury occurs, to apply the principle of discoverability to

the issue of reasonable excuse, and to consider any prejudice arising after the 10 days expires. This, it seems to me, is consistent with the wording and apparent intent of the *Act*, and with the case law under it.

[55] It is also consistent with the purpose of such notice provisions, which was set out above.

[56] Various cases have applied a form of this discoverability analysis to the issue of reasonable excuse without refering explicitly to section 5 of the *Limitations Act* or the discoverability principle,[2] or with reference only to the discoverability principle[3].

[57] In *Crinson v. Toronto (City),* the Ontario Court of Appeal said in dealing with reasonable excuse in section 44(12) of the *Municipal Act*, "...the question to be addressed is whether in all the circumstances of the case, it was reasonable for the appellant not to give notice until (some date)".

[58] In the recent case of *Seif v. Toronto (City),* 2015 ONCA 321 the Ontario Court of Appeal dealt with reasonable excuse and stated at paragraph 26 that the Crinson test applied.

[59] Plaintiff's counsel worked through section 5(1)(a) of the *Limitations Act* with respect to the discoverability principle, saying that the Plaintiff knew the matters in (i) but not those in (ii) through (iv). These, he said, could generally not be known in a case such as this until the action had been started, the Plaintiff had received the road authority's affidavit of documents, and examinations for discovery had been held. Only then could there be "discoverability of the necessary facts to know that you have a claim". Furthermore, with the police report saying that the Plaintiff was driving too fast for the road conditions and showing the collision being in the opposite lane, with the implication that the Plaintiff was at fault, counsel questioned what "lawyer in his right state of mind" would recommend in suing someone. Yet he did just that.

[60] In summary, Plaintiff's counsel submitted that there was no discoverability of the necessary facts to know whether there is a claim until examinations for discovery had been done, so that the 10 day notice period did not begin to run until then.

---

[2] Crinson v. Toronto (City), 2010 ONCA 44
[3] Mark v. Guelph (City), 2010 ONSC 6034 and Argue v. Tay (Township), [2012] O.J. No. 3776

[61] This intriguing, novel and detailed argument must surely fail. If the approach that Plaintiff's counsel advocates was to be followed, there would be undesirable consequences. For one, notice would never be required in such a case and the purpose of notice would be frustrated. Also, the provisions in the *Municipal Act* with respect to reasonable delay in giving notice, and prejudice, would be rendered redundant.

[62] Furthermore, the degree of knowledge required in order to require notice would be set too high. In *Johnson v. Studley*, [2014] O.J. No. 1232, OSCJ Perell J. stated:

> 59. The discoverability of a claim for relief involves the identification of the wrongdoer and also the discovery of his or her acts or omissions that constitute liability. It is not enough that the plaintiff has suffered a loss and has knowledge that someone might be responsible; the identity and culpable acts of the wrongdoer must be known or knowable with reasonable diligence.
>
> 60. However, the discovery of a claim does not depend upon the plaintiff knowing that his or her claim is likely to succeed; the limitation period runs from when the prospective plaintiff has or ought to have had, knowledge of a potential claim, and the later discovery of facts which change a borderline claim into a viable one does not give rise to the discoverability principle. The question is whether the prospective plaintiff knows enough facts to base a cause of action against the defendant, and, if so, then the claim has been discovered and the limitation period begins to run.
>
> 61. For the limitation period to begin to run, it is enough for the plaintiff to have *prima facie* grounds to infer that the defendant caused him or her harm, and certainty of a defendant's responsibility for the act or omission that caused or contributed to the loss is not a requirement.

[63] In *Longo v. McLaren Art Centre Inc.*, [2014] O.J. No. 3242, the Ontario Court of Appeal said at paragraph 44, "Certainty of a potential defendant's responsibility for an act or omission that caused or contributed to the loss is not a requirement. All that is required is that the plaintiff has *prima facie* grounds to infer that the acts or omissions were caused by the identified parties."

[64] Both of these cases dealt with limitations periods. It seems to me that the discoverability threshold for giving notice would be even lower than it would be for commencing an action within time, for several reasons. It is a simple and inexpensive process, involving serving a letter. There is no risk of triggering a motion for summary judgment as there would be if a Statement of Claim was brought too soon, before there had been an opportunity to investigate

and establish liability and damages to a sufficient degree. Also, there would be no risk of costs consequences in giving notice of a potential claim.

WHEN SHOULD NOTICE HAVE BEEN GIVEN?

[65] I am satisfied that there is no genuine issue for trial with respect to when notice should have been given, nor with respect to whether there is a reasonable excuse for the want of notice. The motor vehicle accident occurred on January 7, 2012. The Plaintiff suffered significant injuries. That the roadway was the responsibility of either the City or the Province was known or ascertainable. It was also known that the road was covered in snow and ice. The Plaintiff, through his wife, was in contact with Girones Lawyers by January 25, 2012. Even if the Plaintiff did not know of the notice requirement, his lawyers would and that knowledge would be imputed to the Plaintiff.[4] Therefore, notice should have been given within days of that contact. The arguments on behalf of the Plaintiff are legal arguments to the effect that there was no requirement to give notice, all of which had been rejected. No other excuse has been offered. Therefore, the Plaintiff has failed to meet the onus on him under subsection 44(12) of the *Municipal Act* to show a reasonable excuse for the want of notice.

[66] Even if there was a genuine issue requiring a trial with respect to whether the Plaintiff had a reasonable excuse for the want of notice, I am satisfied that the issue could be resolved with the use of the powers provided in Rule 20.04(2.1). It was submitted on behalf of the Plaintiff that Girones Lawyers was initially retained only with respect to accident benefits. The City disputes that. Even if that would excuse the firm from giving notice to the municipality, no retainer document has come to light. The evidence is that accident benefits were applied for and dealt with without problem, but not that Girones Lawyers had any involvement with them. Correspondence from the accident benefit insurer to the Plaintiff only began even to be copied to Girones Lawyers in late October, 2012.

[67] On the other hand, the memo of January 25, 2012 from Shannon (a staff member) "to Lorenzo" (Plaintiff's counsel, Lorenzo Girones) regarding a potential new client was based on a conversation with the Plaintiff's wife, Vicky Bourassa. It records, among other things, that the Plaintiff was in a motor vehicle accident on January 7, 2012, that road conditions were poor, that

[4] Durbin et al v. Monserat Investments Ltd., 20 O.R. (2d) 181 C.A.

the Plaintiff broke his back and suffered head trauma, and that he had been operated on and was back at home. Then, as can be seen in the time line above, the Plaintiff had suffered substantial injuries and Girones Lawyers appears to have begun taking steps to collect information to support a tort claim as early as Jan 27, 2012.

[68] Ms. Kelly, a lawyer with Girones Lawyers, stated at discoveries that Dr. Harding was the Plaintiff's expert on damages. Indeed, the Statement of Claim was issued shortly after Dr. Harding's report, which says it is response to Plaintiff's counsel's request for a medical legal assessment, but says nothing about accident benefits.

[69] There was no intervening event that would explain why the action was begun when it was, except for Dr. Harding's report. There were also substantial inconsistencies in the evidence as to what Girones Lawyers were doing, and why. Therefore, I find on the balance of probabilities that Girones Lawyers were contemplating bringing the action within days or weeks of being contacted on behalf of the Plaintiff. Indeed, it would be surprising if it were otherwise, given that firm is well known for its personal injury work.

[70] Therefore, at some point before the Statement of Claim was drafted, notice should have been given. I would place that point as early as within days of January 25, 2012. However, notice was never given, unless the Statement of Claim itself is considered to be notice. There has been an after the fact effort to justify this, as dealt with and rejected above. However, no reasonable excuse has been shown for the lack of notice.

PREJUDICE

[71] Having decided that there is no reasonable excuse for the want of notice, it is not strictly necessary for the purpose of disposing of this motion to deal with prejudice to the Municipality arising from that want of notice. However, in *Seif v. Toronto (City),* 2015 ONCA 21, where the trial judge had dismissed the Plaintiff's claim for lack of a reasonable excuse for delay in giving notice, the Court of Appeal said it would have been preferable if the trial judge had gone on to consider prejudice as well. Therefore, I will do so.

[72] The City, of course, alleges that it has been prejudiced by the lack of notice. In particular, it alleges that, before the City had an opportunity to inspect it, the Plaintiff's motor vehicle was

disposed of along with the information it might have revealed that could assist in the City's defense, and leaving its expert unable to re-construct the collision.

[73] For the Plaintiff, it was submitted that the City did not act to obtain or preserve evidence as early as it could have, that the necessary evidence is available from other sources, and that the evidence that might have been obtained from the motor vehicle is not necessarily determinative, and might not even be relevant. In addition, its expert disagreed with the Defendant's expert about whether the collision could be re-constructed.

[74] In the circumstances, I find that whether the City is prejudiced is a genuine issue requiring a trial. It is not, my opinion, one that can be resolved in a fair and just manner on a motion for summary judgment, even with the use of the expanded powers.

COSTS

[75] If costs are sought, the City has 30 days to serve and file written submissions, limited to three double-spaced pages, plus its bill of costs. The Plaintiff has 15 days after that to serve and file its response, also limited to three double-spaced pages, plus its bill of costs.

Justice J. A. S. Wilcox

Released: February 18, 2016

CITATION: Bourassa v. Temiskaming Shores (City), 2016 ONSC 1211
COURT FILE NO.: 5484/12
DATE: 20160218

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ALLAN BOURASSA

Plaintiff

- and -

THE CITY OF TEMISKAMING SHORES

Defendant

DECISION ON MOTION

Justice J. A. S. Wilcox

Released: February 18, 2016