Date of Release: January 31, 1996

No. B934523
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	
EMMA ESTEPANIAN, by her Guardian Ad Litem, SABINA GHAZARIAN	**REASONS FOR JUDGMENT**
PLAINTIFF	**OF THE HONOURABLE**
AND:	**MR. JUSTICE LOWRY**
JO-ANNE BROWN and the DISTRICT OF WEST VANCOUVER	**(IN CHAMBERS)**
DEFENDANTS	

Counsel for the Plaintiff: Joseph E. Murphy

Counsel for the Defendant: Jo-Anne Brown — Marion E. Stickland

Counsel for the Defendant: District of West Vancouver — Eileen E. Vanderburgh

Heard at Vancouver, B.C.: January 26, 1996

1 The ***Municipal Act,*** R.S.B.C. 1979, c. 290, s. 755 provides that a municipality cannot be held liable for damages unless written notice of the time, place, and manner in which the damage was sustained is given to the municipal clerk within two months of the damage having been sustained, but no action is barred if there exists a reasonable excuse for the notice not having been given and the municipality is not prejudiced in its defence. The District of West Vancouver applies for a summary determination of whether any

reasonable excuse exists for the fact that notice about an accident on February 20, 1993, that is now the subject of the claim made against it in this action, was not given until June 30, 1993. The District is sued for injuries suffered by Emma Estepanian when she was struck by an automobile driven by Jo-Anne Brown.

The Circumstances

2 Ms. Estepanian is 60 years of age. Sadly, she was seriously injured when she stepped from behind a large bush on a median dividing a multi-lane thoroughfare she was walking across. She was in a coma for more than two months and, for present purposes, it suffices to say she has been permanently incapacitated.

3 Within a day or two of the accident, Ms. Estepanian's son-in-law, Aldo Garbilini, instructed a solicitor, Joel Werner, to investigate the accident. Mr. Werner obtained a police report but was then advised that another solicitor had been consulted and he took no further steps. The second solicitor was Brian Longpre.

4 Ms. Estepanian's daughter, Sabina Ghazarian, (who brings this action as guardian *ad litem*) says she consulted Mr. Longpre at the beginning of March for "advice concerning any claims [her] mother may have as a result of the subject accident". Mr. Longpre agreed to investigate the circumstances surrounding the accident and

provide an opinion letter which he did. Following some telephone discussions with Ms. Ghazarian, he wrote briefly on April 27, 1993, outlined the investigation he had undertaken, and advised that, in his view, there was no issue of liability. He said it appeared conclusive that Ms. Estepanian had walked into the left front side of Ms. Brown's car and was "pitched" onto the cement median. He told Ms. Ghazarian that her mother was limited to recovering Part VII no fault benefits from I.C.B.C. and that no legal services were required. He did advise that any action against Ms. Brown would have to be commenced within two years but he said absolutely nothing about making any claim against the District. He concluded by suggesting Ms. Ghazarian might wish to consult another solicitor and said he hoped things would work out the best they could.

5 In May Ms. Ghazarian did consult another solicitor. He gave notice to the District and then commenced this action against both the District and Ms. Brown. I am told the claim against Ms. Brown has been settled.

The Issue

6 The District maintains that where notice has not been given within the prescribed two months the onus rests on a plaintiff to establish: that there is a reasonable excuse and that the defence has not been prejudiced. The two are said to be separate and

distinct requirements: ***Schmidt v. Prince Rupert (City)*** (1960), 31 W.W.R. 278 at 279 (B.C.C.A.). The District maintains that prejudice cannot be negated because the site of the accident was substantially changed in May and June of 1993 but, on this application, it seeks only a determination of whether the onus of establishing a reasonable excuse is met. If it is determined that it is met, the District would then seek to put prejudice in issue at trial. For Ms. Estepanian it is contended that the issues of "reasonable excuse" and "prejudice" should be considered at the same time because it has been said the court will strive to find something, however slight, that will constitute a reasonable excuse where no prejudice exists: ***Angus v. Corporation of the District of Matsqui et al.*** (May 28, 1987), Vancouver No. B852493 (S.C.).

7 In my view, the determination the District seeks can properly be made in this case particularly if I assume for now, as I do, that the defence has not been prejudiced. Given the draconian result where no reasonable excuse can be established, I consider the court must always be particularly vigilant in its assessment of the circumstances when determining whether an action is barred because a required notice is given late.

8 The recent decision of the Court of Appeal in ***Teller v. Sunshine Coast (Regional Dist.)*** (1990), 43 B.C.L.R. (2d) 376 raises a caution about deciding one of the two issues summarily. There

(p. 381) the court observed that, if the only issue is "reasonable excuse", a summary disposition may be appropriate but where the true issue is "prejudice" a determination of whether the action is barred is better left to be made at trial after all of the evidence is tendered. But I do not read what the court said as precluding the determination I propose to make in the circumstances of this case.

9 It is contended for Ms. Estepanian that there are three reasons for the notice not having been filed within the time prescribed: she was herself incapacitated; her daughter who assumed responsibility for seeking advice and ultimately commencing the action did not know any notice was required; and, two months after the accident, there was no basis for notifying the District of the time, place, and manner in which Ms. Estepanian was injured. The legal advice received a week after the two months elapsed confined any claims that could be made to Part VII benefits. It is said that any one of the three reasons advanced constitutes a reasonable excuse.

10 As to the first, I do not consider Ms. Estepanian's incapacity to be particularly relevant to resolving the issue here because it is not the reason notice was not given. Her family assumed responsibility for seeking legal advice concerning any claims she might have very shortly after the accident and well within the notice period. Her daughter ultimately commenced the action on her

behalf despite her incapacity. Notice was not given within two months of the accident because Ms. Ghazarian was not advised that it ought to be given.

11 With respect to the second, the Court of Appeal decided in ***Teller*** (p. 388) that ignorance of the law is a factor to be taken into account thereby overruling contrary decisions of this court, but it was not decided that it was, by itself, the determining factor. It was only one of three factors considered in that case, and, in my view, the fact that Ms. Estepanian's family did not know of the notice requirement is no more than a factor which underlies what happened in this case.

12 To my mind, it is the third reason advanced that gives rise to the real question here. I would state the issue as follows: Does the fact that, after consultation with a solicitor, there was no knowledge of a notice requirement and no knowledge of any basis upon which a claim against the District might be made constitute a reasonable excuse?

Discussion

13 In my view, the question would have to be answered in the affirmative unless the solicitor's conduct can be said to be determinative.

14 I have been referred to two cases where the Court of Appeal has considered the conduct of a solicitor in the context of the burden a plaintiff bears in establishing a reasonable excuse. In the first, ***Schmidt*** (*supra*), the plaintiff had, within three weeks of the accident, consulted the solicitor who had ultimately issued the writ and prosecuted the action to trial. The suggestion was that the plaintiff was relying on the solicitor to advise her of the notice requirement. The solicitor gave no evidence and the court concluded that without such it could not say the failure to give the notice was attributable to him. A reasonable excuse had not been established, but it appears from the judgment the court may well have taken a different view had the solicitor testified that the fault lay with him.

15 However, in the second case, ***Horie v. Nelson*** (1986), 2 B.C.L.R. (2d) 107 aff'd (1987), 20 B.C.L.R. (2d) 1, one of two plaintiffs consulted a solicitor who prepared the required form of notice which he sent to them to be signed and returned to him for delivery to the municipality. The notice was signed. The plaintiffs said it had been returned to the solicitor. He had no record of having ever received it and it was not delivered to the municipality. It was held that it mattered not whether it was the plaintiffs or their solicitor who were at fault. The following statement made by the learned chambers judge (p. 112) was adopted

by the majority in the Court of Appeal (the first part by Wallace J.A. at p. 11 and the second by MacDonald J.A. at p. 8):

> The principle which I deduce from this and many other cases cited to me is simply this: that negligence, if it is an element in failing to serve the notice, is not a ground of excuse. I am driven further by the wording of the section of our statute to hold that the responsibility for delivering the notice is collective in that, if the notice is not delivered, it does not matter by whose hand the failure occurred. [Emphasis Added]

16 The facts of the present case are, of course, much different. But it appears to me that what was said in ***Horie*** is nonetheless applicable. The effect of negligence and the collective nature of the responsibility when a prospective plaintiff, or a person who has assumed responsibility for her, consults a solicitor for advice cannot be restricted to the mechanics of delivering a notice. In my view, they are considerations that must be applied more broadly in assessing the reasonableness of an excuse for a notice not having been given.

17 Mr. Longpre apparently did not advise on giving notice to the District of the time, place, and nature of Ms. Estepanian's injuries when he was consulted about claims arising out of the accident that occurred on a roadway in the municipality. If his not doing so was attributable to negligence on his part, negligence was an element in the failure to give the notice required. The difficulty is that the evidence does not disclose why he did not

advise on notice. He has sworn no affidavit and has had no part in this application.

18 It is at least possible Mr. Longpre was not familiar with s. 755 of the ***Municipal Act*** although it has been part of our municipal legislation in its present form for more than 50 years. He may not have turned his mind to considering notice or even the possibility of a claim being made against the District. That may or may not have been justified on the information that was reasonably available to him. He may, in the circumstances, have properly dismissed as untenable the claim which is now made and decided that advice on notice was unnecessary; although, that would appear somewhat difficult to reconcile with his having advised on the time within which action could be commenced against Ms. Brown. On the evidence there simply is no telling why, when he was apparently asked at the beginning of March to give advice concerning any claims Ms. Estepanian may have, no advice about notice was given. There may or there may not have been negligence on his part that resulted in the District not receiving the required notice.

Conclusion

19 The burden rests on a plaintiff to establish a reasonable excuse and, in my view, to be reasonable an excuse must be complete. Here it cannot be said whether negligence was an element

because the evidence falls short. The burden has not been discharged. Accordingly, I cannot conclude that there is a reasonable excuse for the failure to give notice to the District.

Disposition

The action against the District will be dismissed with costs.

"Lowry, J."

January 31, 1996
Vancouver, B.C.