Citation: Griffiths v. Corp. of City of New Westminster et al.
2001 BCSC 1516

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Docket: C995290
Registry: VANCOUVER

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CHRISTOPHER A. GRIFFITHS

PLAINTIFF

AND:

THE CORPORATION OF THE CITY OF NEW WESTMINSTER, LANGARA COLLEGE, HENRY JOVER and S.M.S. MODERN CLEANING SERVICES INC.

DEFENDANTS

AND:

HENRY JOVER and S.M.S. MODERN CLEANING SERVICES INC., CARRYING ON BUSINESS AS S.M.S. MODERN BUILDING CLEANING

THIRD PARTIES

REASONS FOR JUDGMENT IN CHAMBERS OF THE HONOURABLE MR. JUSTICE BURNYEAT

Counsel for the Plaintiff	J.M. Oostlander
Counsel for the Defendant and Third Party Henry Jover	O. Samuel
Counsel for the Corporation of the City of New Westminster	D.S. Hwang
Date and Place of Hearing:	September 26, 28, 2001 Vancouver, B.C.

[1] In defence of the claim made against it, the Corporation of the City of New Westminster ("New Westminster") relies on s.286 of the ***Local Government Act,*** R.S.B.C. 1996, c. 323 ("***Act***") which reads in part as follows:

> (1) A municipality is in no case liable for damages unless notice in writing, setting out the time, place and manner in which the damage has been sustained, is delivered to the municipality within 2 months from the date on which the damage was sustained.
> (3) Failure to give the notice or its insufficiency is not a bar to the maintenance of an action if the court before whom it is tried...believes
>
> > (a) there was reasonable excuse, and
> > (b) the defendant has not been prejudiced in its defence by the failure or insufficiency.

[2] New Westminster owns and operates the Moody Park Arena ("Arena"). Mr. Griffiths was playing recreational ice hockey on the night of April 14, 1999 when he fell and was injured. In his Statement of Claim, Mr. Griffiths alleges that New Westminster failed to discharge the statutory duty imposed by the ***Occupiers' Liability Act*** and the ***Negligence Act*** and, as a result, Mr. Griffiths has sustained physical injuries, being a permanent injury to his right patella and permanent scarring of his right leg. New Westminster applies for an order pursuant to Rule 18A of the Rules of Court to dismiss the claim of Mr. Griffiths. This judgment deals with the argument

of New Westminster that the claim of Mr. Griffiths is barred as a result of s.286 of the ***Act***.

BACKGROUND

[3] After his fall, Mr. Griffiths was removed from the ice surface and was taken to the hospital by ambulance. Mr. Griffiths was treated at the Royal Columbian Hospital for a compound fracture of his right patella. After discharge from the Hospital, Mr. Griffiths wore a full leg brace that went up to his hip. The orthopaedic surgeon who subsequently examined Mr. Griffiths noted in a July 8, 1999 letter: "The knee was immobilized in a splint for about a month. He started walking and moving the knee. On June 8th he slipped and reinjured the right knee...". The second fall occurred on the premises of Langara College.

[4] Mr. Griffiths did not consult with a lawyer until September 16, 1999 (some five months after the date of the accident). The lawyer immediately gave notice to New Westminster of a potential action against it. In a September 16, 1999 letter forwarded by facsimile transmission, counsel for Mr. Griffiths stated: "Damage sustained by virtue of the City's failure to adequately clear and clean the ice in the ice rink thereby causing a slip and fall while Mr. Griffiths was playing hockey on the ice." New Westminster submits that

this theory of what caused the fall varies from the current theory so that the notice forwarded on September 16, 1999 does not provide New Westminster with adequate notice in writing of the "manner in which the damage has been sustained". The only theory now advanced for the cause of the fall was that there were two "thin sections" of the ice close to where Mr. Griffiths fell and that these somehow caused the fall. In applying to adjourn the application of New Westminster, Mr. Griffiths submits that he should be given further time to consult with experts about this latest theory of what caused the fall.

[5] Leonard Dunlap was the Ice Maintenance Person employed by New Westminster at the Arena that night. He was approached by a member of the group who were playing hockey with Mr. Griffiths, called an ambulance for Mr. Griffiths and completed an "Accident Report Form" ("Form") based on information provided to him by two of the other members of the group who were playing hockey with Mr. Griffiths. Before completing that Form, Mr. Dunlap did not speak directly with Mr. Griffiths. New Westminster submits that the Form is not a "notice in writing" as contemplated by s.286 of the ***Act***.

[6] In the section of the Form entitled "This Section in Patient's Own Words", Mr. Dunlap noted under the question "How

did accident happen?": "Lost balance & slid into boards". That section was obviously not in the "own words" of Mr. Griffiths. Under the section to be completed by Mr. Dunlap, Mr. Dunlap made the following notation after the words "account of how it happened": "was making a sharp turn & lost his balance."

[7] Mr. Griffiths and a number of medical advisors and affiants on his behalf have provided varying descriptions of what happened on April 14, 1999. Mr. Beaubien who was playing hockey with Mr. Griffiths stated: "He...appeared to have lost his footing on the ice, fell down and slid into the boards." Dr. Perey who treated Mr. Griffiths on April 14, 1999 noted in his "Consultation Report": "He was playing hockey tonight when he lost an edge of his skate and slid into the boards suffering a direct blow to his right knee".

[8] In a "Voluntary Statement" given by Mr. Griffiths on November 9, 1999, Mr. Griffiths stated: "I suddenly slipped. I was within a foot of the boards when I fell. I fell hard. The front of my body fell into the boards." The Statement of Claim indicates a slip and fall and that the "condition of the surface of the ice" "constituted a hidden danger" which caused the fall. In answer to further Interrogatories, Mr. Griffiths in his February 6, 2001 Affidavit stated: "I remember that my

skate hit something on the ice just before I lost my balance." In his March 28, 2001 Discovery, Mr. Griffiths stated that "I hit something" but confirmed that he did not notice any ruts, holes or gouges in the ice surface or any "deficiencies" on April 14, 1999.

[9] Mr. Griffiths in his July 19, 2001 Affidavit states:

> "I was chasing a puck alone in my section of the ice. I was not being pursued by anyone. I was within a foot of the boards, near the blue line of the arena when my skate caught on something. I fell." "[Mr. Len Dunlap]...told us of the existence of a hump on the floor of the Arena, under the ice in the approximate area where I fell." "He stated that the effect of this hump is that it makes the ice in this area thinner than in the other parts of the arena." "Mr. Dunlap also stated that it was his usual practice to start shaving the ice with the Zamboni near the bleachers, which is the approximate area where I fell. Because he starts in this area, he ends in this area to ensure that he shaves the ice in one complete circle."

[10] The "thin ice" theory only emerges in the July 19, 2001 Affidavit of Mr. Griffiths. The application of New Westminster raises two questions:

(a) assuming the notice had been within the time limit set out in s.286(1) of the ***Act***, is the notice sufficient to meet the requirements of the ***Act?***; and

(b) as the notice was not given within two months, are the circumstances of this case such that the

maintenance of the action of Mr. Griffiths should not be barred?

CASE AUTHORITIES AND DISCUSSION

[11] Section 286(1) requires a notice within two months setting out not only the time and place where the damage was sustained but also the "...manner in which the damage has been sustained." New Westminster submits that, even if the notice had been received in time, the manner in which the damage has been sustained has never been set out in a written notice. New Westminster submits that the theory behind what caused the fall has only recently emerged and that no notice has ever been given that "thin ice" was the alleged cause of the damage. I am satisfied that this submission ignores the wording of s.286(1).

[12] Section 286(1) does not require a notice in writing setting out the "cause of the damage". Rather, it only requires the notice to contain a description of the "manner in which the damage has been sustained". The "manner" was the fall. The manner was clearly set out in the notice which was received by New Westminster. It is often the case that a potential plaintiff will not know the cause of an accident before the notice must be forwarded. As well, one of the purposes of the subsection is to provide a municipality with

notice so that it may explore the question of the cause of the accident. To suggest that it is necessary for the cause of the damage to be set out with particularity places an excessive burden on a potential plaintiff which was not contemplated by the subsection.

[13] In ***The Law of Canadian Municipal Corporations***, (2d), (Carswell: Toronto, 1971), the learned author states:

> Generally speaking, a notice is good if it gives enough information to enable the municipality to investigate the claim....it is a question of fact in every case having regard to all the circumstances whether the notice given was a "substantial notice of what has occurred" so that inquiries might be made (quoting *Young v. Bruce* (1911) 24 O.L.R. 546 (C.A.).

[14] The notice which was given on September 16, 1999 set out the date, the approximate time, the location and the name of Mr. Griffiths as well as the fact that Mr. Griffiths had slipped and fallen while he was playing hockey on the ice surface at the Arena. This was more than enough to satisfy the requirements of that part of s.286 of the ***Act*** which requires the "manner in which damage has been sustained" to be set out in the written notice. I adopt the comment made by Legg J (as he then was) in ***Sandhu v. Prince George*** (1981), 31 B.C.L.R. 1 (B.C.S.C.) that a notice under this section:

> ...should not be construed with extreme strictness and as a general rule is sufficient if it reasonably

> discloses the ground of complaint relied upon by the plaintiff. See also: ***Pearson v. Vancouver Bd. of School Trustees***, [1941] 3 W.W.R. 874 (B.C.S.C.) and ***Gard v. Duncan School Trustees***, [1945] 3 W.W.R. 485 (B.C.S.C.) reversed on other grounds (1946) 62 B.C.R. 323 (B.C.C.A.)(at p. 3)

[15] I find that the form of notice was appropriate. The question then is whether I should exercise the discretion which is provided by s.286(3) of the ***Act*** as the notice was received outside the two month period stipulated by s.286(1) of the ***Act***. The claim of Mr. Griffiths will be barred unless it can be said that Mr. Griffiths had a "reasonable excuse" and New Westminster has "not been prejudiced in its defence by the failure" to give the notice or any "insufficiency" of the notice.

[16] In dealing with this two fold test, the onus is on Mr. Griffith to prove that he had a "reasonable excuse" for not giving the notice within two months: ***Bates v. Olson***, [1992] B.C.J. (Q.L.) No.3032 (B.C.S.C.); and ***Lloyd v. Richards***, [1985] B.C.J. (Q.L.) 2823 (B.C.S.C.).

[17] New Westminster cites the decision in ***Pemberton Waterfront Project Group Inc. v. North Vancouver (District)*** (1988), 41 M.P.L.R. 63 (B.C.C.A.) in support of the proposition that the onus to prove both elements rests on Mr. Griffiths. However, the District in that case had admitted

that it was not prejudiced and Wallace J.A. on behalf of the Court does not state that the onus for this part of the test is on the Plaintiff - only that the court must determine whether or not the municipality has been prejudiced.

[18] More recently, Southin J.A. in ***Teller v. Sunshine Coast (Regional Dist.)***, [1990] 43 B.C.L.R. (2d) 376 stated:

> I do not think the application of this section is a matter of burden of proof in the classic sense.... Those words [in the section], in my opinion, simply mean that the court is to look at all the evidence and come to an opinion. (at p. 389).

[19] The knowledge of whether a plaintiff has a "reasonable excuse" rests only with the plaintiff. Therefore, it is logical that the burden of proof will be on the plaintiff to show that he or she has a reasonable excuse for not notifying the municipality within two months. The knowledge of whether a municipality has been prejudiced rests with the municipality. If one of the parties is to bear the burden of proof to show that there has been prejudice then it should be the municipality. However, one of the ways that a municipality can meet that burden of proof is to show that there has been inordinate delay in providing the notice required by s.286 of the ***Act***. What is inordinate will depend on the facts of a particular case but, if inordinate delay can be shown, then a municipality will have met the burden of

proof subject to a plaintiff being in a position to show that the presumption of prejudice can be rebutted. In addition to being in a position to have a court presume prejudice because of inordinate delay, a municipality will also be in a position to show that there has been actual prejudice.

[20] In the case at bar, I am not satisfied that New Westminster has shown actual prejudice. First, on the night of the accident, New Westminster knew through Mr. Dunlap that there had been an accident. Second, the records relating to the steps to clean the ice surface prior to the use by the Jover group are still available. Third, New Westminster undertook an assessment of the thickness of the ice only days after the accident. The drilling of 31 holes into the ice to ascertain the distance between the ice surface and the underlying concrete surface provides a contemporary record of the thickness or thinness of the ice in a number of locations close to where the fall occurred. Therefore, there is information not only about the fall but also about the most current theory of the plaintiff about what might have caused the fall.

[21] I am also satisfied that there has not been an inordinate delay in providing the notice. Accordingly, I cannot presume prejudice. While five months is clearly outside the two month

limit set out in s.286 of the ***Act***, it is not so long as to allow me to presume that prejudice has occurred.

[22] If I am wrong in holding that the onus was on New Westminster to show that it had been prejudiced by the delay in providing the notice, then I am satisfied that Mr. Griffiths has met the onus of showing that New Westminster has not been prejudiced by the delay. If neither party bears the burden of proof, then I am satisfied that the evidence does not establish that New Westminster was prejudiced as a result of the delay in providing notice.

[23] The question of whether I should exercise my discretion to forgive the delay in giving notice then revolves around the question of whether Mr. Griffiths has shown that he had a "reasonable excuse" for giving the notice some five months after the accident occurred.

[24] The leading case in British Columbia dealing with the interpretation of the "reasonable excuse" part of the test is the decision of the unanimous five judge panel in ***Teller***, *supra*. Southin, J.A. on behalf of the court concluded that "ignorance of the law" must be "taken together" with other factors in determining whether the plaintiff was shown that there was "reasonable excuse":

> In the end, the question is simply what do the words at issue mean in the context. In my opinion, ignorance of the law is a factor to be taken into account. So for that matter is knowledge of the law. But all matters put forward as constituting either singly or together a reasonable excuse must be considered.
>
> Those decisions of the court below which exclude ignorance of the law as a factor are, therefore, overruled. (at p. 388).

[25] The materials establish that Mr. Griffiths was not aware of s.286 of the ***Act***. I expect that almost all citizens of British Columbia are not aware of this particular section. Unless Mr. Griffiths can establish that there were other excuses available to him, he can rely only on his ignorance of the law to excuse the fact that notice was given to New Westminster five months after the accident and three months after what was stipulated in s.286(1) of the ***Act***. After reviewing the evidence, I find that Mr. Griffiths can only rely on his ignorance of the law.

[26] In finding whether there has been a reasonable excuse or not, British Columbia courts have taken into account factors such as whether a potential claimant has been lulled into a false sense of security, whether there is uncertainty as to whether a municipality was involved or whether a potential plaintiff is incapacitated. In ***Archer v. Powell River (District)***, [1982] B.C.J. (Q.L.) No. 464 (B.C.S.C.), after

giving verbal notice to the Deputy Clerk of the District, the Plaintiff was advised that the District would look into the matter and the Plaintiff was subsequently visited by an insurance adjuster. In ***DeRousie v. District of North Vancouver*** (1985) 34 A.C.W.S. (2d) 181 (B.C.S.C.) the mayor had attended the scene of flooding and had led plaintiffs to conclude that the City was looking after the problem. In both cases, the court held that the plaintiffs had been lulled into a sense of security on the assumption that their claims were being acted upon so that formal written notice was not necessary. In the case at bar, I can find no facts which would support such a finding of a false sense of security. There is nothing before me to suggest that Mr. Griffiths knew that Mr. Dunlap had spoken to other players on the night of the accident, that a Report had been completed so that New Westminster was aware of the accident, and that a Report had set out the manner in which the damage had been sustained. As well, there is no evidence that anyone from New Westminster had discussed the matter with Mr. Griffiths.

[27] The incapacity of a plaintiff may also be a reasonable excuse for not giving notice: ***Bissel v. Rochester (Township)*** (1930), 65 O.L.R. 310 (Ont. S.C.); ***Horie v. Nelson (City)*** (1987), 20 B.C.L.R. (2d) 1 (B.C.C.A.); ***Lost Lake Properties***

Ltd. v. Parksville (City), [2000] B.C.J. (Q.L.) No. 596 (B.C.S.C.); ***Estepanian*** (***Guardian ad Litem of) v. Brown,*** [1997] B.C.J. (Q.L.) No. 337 (B.C.C.A.); and ***Landrey v. North Vancouver (City)***, [1993] B.C.J. (Q.L.) No. 69 (B.C.S.C.). In ***Bissel***, *supra,* the court noted:

> ...if there is any principle to be extracted from the decisions, it is that to constitute reasonable excuse there must be such incapacity, either mental or physical, on the part of the injured party, as to incapacitate him from discussing business affairs or from being able to give instructions for the notice. (at p. 315).

[28] While the right knee of Mr. Griffiths was immobilized in a splint for about one month, his doctors note that he started walking and moving the knee after about one month. There is no suggestion that Mr. Griffiths could not have gone to a lawyer at an earlier date. He was at Langara College on June 8, 1999 when he slipped and fell. If he was mobile enough to go to Langara College within the two month period after the accident, he was mobile enough to seek legal advice. As well, there is nothing to suggest that Mr. Griffiths did not have access to legal or other advice by telephone, letter or internet. In the circumstances of this case, Mr. Griffiths cannot use any incapacity as an excuse for not providing notice.

[29] In ***Teller***, *supra*, Southin J.A. noted that it was not clear who was in control of a particular road and who had placed a post and chains on the road which had caused the accident and that the gravity of the injury did not become apparent until after the expiry of the period of notice. In the case at bar, the gravity of the injury was known immediately and the owner of the Arena would have been readily apparent. Accordingly, these factors as set out in ***Teller***, *supra*, do not apply to the case at bar.

[30] No decision was cited by counsel for Mr. Griffiths that ignorance of the law alone will be reasonable excuse. In fact, the contrary has often been stated: ***Lloyd v. Richards,*** [1985] B.C.J. (Q.L.) No. 2823 (B.C.S.C.)***; Holland v. Oak Bay*** (1978), 84 D.L.R. (3rd) 91 (B.C.S.C.); ***Schmidt v. Prince Rupert*** (1960), 24 D.L.R. (2d) 443 (B.C.S.C.); and ***O'Connor v. City of Hamilton*** (1905) 10 O.L.R. 529 (Ont. C.A.).

[31] If the time provisions set out in s.286(1) of the ***Act*** are to have any meaning at all then it cannot be the case that only ignorance of the section is sufficient excuse to bring into play the two fold test set out in s.286(3) of the ***Act***. The Legislature long ago decided that municipalities should be given notice of potential claims long prior to the expiry of the limitation periods for actions relating to those claims.

That decision having been taken by the Legislature, is not for the court to remove the effectiveness of the notice provisions where a plaintiff can only rely on his or her ignorance of s.286. In the circumstances of this case, I am satisfied that Mr. Griffiths has not shown that he had reasonable excuse for not giving the notice within the required two months.

[32] The completion of the Form by Mr. Dunlap was not sufficient to satisfy the purposes of the ***Act*** as it does not constitute notice. First the Form did not eminate from the Plaintiff. By using the words “unless notice in writing...is delivered to the municipality”, the Legislature made it clear that the notice must emanate from the plaintiff or someone acting on his behalf. It can hardly be said that what Mr. Dunlap wrote that night was “delivered” to New Westminster. See ***Sandhu v. Prince George*** (1982), 31 B.C.L.R. 1 (B.C.S.C.) in this regard. Second, any notice given by the two fellow players to Mr. Dunlap that night were hardly “in writing”. Although it contributed to showing that New Westminster had not been prejudiced by the lack of timely notice, the verbal notice given on the night of the accident does not comply with the requirement of s.286(1) of the ***Act*** that the notice be in writing: ***O’Connor v. City of Hamilton***, *supra*. Finally, what was stated to Mr. Dunlap and what was written by Mr. Dunlap

gave no real indication of what happened that evening other than the fact that Mr. Griffiths “lost his balance”. There is no “notice of complaint of fault” (per ***Sandhu***, *supra*).

[33] As well, Mr. Griffiths is not in a position to rely on s.24 of the ***Law and Equity Act***, R.S.B.C. (1996), c.253. The court cannot relieve against penalties or forfeitures which are statutory in origin: ***Lloyd v. Richards***, *supra*; ***Trans-West Development Ltd. v. Nanaimo***, 17 B.C.L.R. 307 (B.C.S.C.); ***Re: Knipfel and Summerland*** (1981), 29 B.C.L.R. 130 (B.C.S.C.); ***Mulholland v. Zwietering***, [1998] B.C.J. (Q.L.) No. 2698 (B.C.S.C.); ***Canadian Northern Railway Co. v. Canada*** (1992), 64 S.C.R. 264 affirmed, [1923] A.C. 714 (P.C.); ***Martin Mine Ltd. v. British Columbia***, [1985] 4 W.W.R. 515 (B.C.C.A.) and ***British Columbia v. Smith***, [1989] B.C.J. (Q.L.) No. 1761 (B.C.S.C.).

[34] The notice not having been given within the time limits set out in s.286(1) of the ***Act*** and no reasonable excuse being proven regarding the failure to give that notice, the claim of Mr. Griffiths against the Corporation of the City of New Westminster is dismissed. In view of this finding, the application of New Westminster pursuant to Rule 18A of the Rules of Court to dismiss the claim of Mr. Griffiths on other

grounds is adjourned. The City will be entitled to its costs on a Party/Party(Scale 3) basis against Mr. Griffiths.

"G.D. Burnyeat, J."
The Honourable Mr. Justice G.D. Burnyeat