IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20171127
Docket: S131532
Registry: New Westminster

Between:

Sherry Wilson

Plaintiff

And:

City of New Westminster

Defendant

And:

Terasen Gas Inc., Web Engineering Ltd. and Winvan Paving Ltd.

Third Parties

Before: The Honourable Mr. Justice Branch

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	R. Morgan
Counsel for the Defendant:	L.W. Woo
For the Third Parties:	No appearance
Place and Date of Hearing:	New Westminster, B.C. November 27, 2017
Place and Date of Judgment:	New Westminster, B.C. November 27, 2017

[1] **THE COURT:** This is an application to strike a slip and fall claim pursuant to Rule 9-7(2) on the basis that notice was not provided as required by s. 736 of the *Local Government Act*, R.S.B.C. 2015, c. 1.

[2] Beginning with the question of appropriateness for summary determination, the parties agreed that this issue is capable of resolution under Rule 9-7. I also agree, particularly given the encouragement for summary disposition provided by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7.

[3] In terms of the applicable legislation, s. 736 of the *Local Government Act*, provides as follows:

> Notice requirement respecting damages
>
> 736 (1) A municipality or regional district 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 or regional district, as applicable, within 2 months from the date on which the damage was sustained.
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> (2) In case of the death of a person injured, failure to give the notice required by this section is not a bar to the maintenance of the action.
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> (3) Failure to give the notice required by this section or its insufficiency is not a bar to the maintenance of an action if the court before whom it is tried, or, in case of appeal, the Court of Appeal, believes
>
> (a) there was reasonable excuse, and
>
> (b) the defendant has not been prejudiced in its defence by the failure or insufficiency.

[4] As to the purpose of this section, the Court of Appeal stated in *Anonson v. North Vancouver (City)*, 2017 BCCA 205:

> [38] In British Columbia, notice provisions for local government have been interpreted as substantially different from limitation period provisions. The Legislature chose to treat local government differently from other litigants by requiring that local government be given notice within a short period following an incident to allow the City to investigate the potential claim.

[5] Moving to the issue of notice, the first question is whether proper notice was provided pursuant to s. 736(1) of the *Act*. In this case, the plaintiff conceded that her Notice was not compliant with this section, specifically in relation to the provision of

information as to the place of the accident. This was a reasonable concession, for the reasons set out below.

[6] The alleged accident took place on May 29, 2010.

[7] On July 22, 2010, within the required time frame, the plaintiff's former counsel delivered a notice (the “Notice"), stating the injuries were sustained "while walking on the sidewalk at or near 6th Street and 7th Avenue in New Westminster, when she stepped off the sidewalk and into a puddle breaking her ankle/foot".

[8] In a slip and fall case, the provision of information as to the correct location is obviously crucial. The word “place” is expressly noted in the relevant section as a required element. The allegations of negligence in such a case will normally be specific to the area. That was certainly the case here, where the alleged negligence relates to the presence of a particular pothole, rather than any generalized condition covering an entire area.

[9] As it turns out, the fall actually occurred in front of 523 6th Street, about two blocks away from the location identified in the Notice. The specific location was only made known to the defendant as a result of an examination for discovery of the plaintiff conducted by the former third party Web Engineering Ltd. on November 29, 2012.On November 22, 2016, the plaintiff amended her claim to specify that the accident occurred "in front of 523 6th Street, New Westminster, British Columbia".

[10] Again, the plaintiff accepts that there was an error on the Notice. The plaintiff says she always knew where the accident occurred.

[11] Given the error in the location and the materiality of the location to a claim such as this, I agree that proper notice was not provided. Hence the plaintiff must rely on the saving provision in s. 736(2) in order to avoid an order dismissing her claim.

[12] There are two elements to the saving provision. The court must first conclude that there is a reasonable excuse; and second, that the defendant has not been

prejudiced in its defence by the failure or insufficiency: *Kazemi v. North Vancouver (City)*, 2016 BCSC 1240 at paras. 22-26.

[13] Although some of the same evidence may be relevant to both, I find that it is necessary to satisfy both branches of the test.

[14] Turning to the question of reasonable excuse, in *Thauli v. Delta (Corporation)*, 2009 BCCA 455, the court confirmed that an inquiry into reasonable excuse requires:

> [50] . . . a determination informed by the purpose or intent of the notice provision, taking into account all matters put forward as constituting either singly or together a reasonable excuse. The determination of whether there is reasonable excuse is contextual. The question is whether it is reasonable that the plaintiff be excused, having regard to all the circumstances.

[15] Hence the determination of whether there is a reasonable excuse is contextual. It is incorrect to state that there is an onus on the plaintiff in the traditional sense. Rather, the court has to look at all the evidence and come to an opinion. *Thauli*, at para. 60.

[16] In *Persall v. Bond*, 2009 BCSC 1001 at para. 17, the court listed several non-exhaustive factors that have been considered by B.C. courts in determining whether a reasonable excuse for a failure to provide notice exists, including:

a) The plaintiff's knowledge of the statutory obligation to provide notice;
b) Actions or representations by the local government which have the effect of lulling the plaintiff into a false sense of security;
c) The plaintiff's awareness of his/her injuries and awareness of the seriousness of his/her injuries;
d) The plaintiff's awareness of the involvement of the local government in the matter giving rise to the litigation; and
e) The plaintiff's capacity to provide notice.

[17] Here, the plaintiff suggests that she was lulled into a false sense of security by the defendant's failure to:

(a) raise an issue with the lack of specificity in the Notice;

(b) raise an issue with the conflicting references to both the original intersection, and the 500 block of 6th Street, in the Notice of Civil Claim; and

(c) raise the issue in its pleadings until 2016.

[18] The plaintiff also suggests that the same factors collectively created a situation where the parties were essentially "ships passing in the night" on the issue of the proper location, and that this mutual misapprehension creates a reasonable excuse.

[19] I note that the list of factors in *Persall* are more germane in a situation where no notice is provided at all. A municipality could obviously create a lulling effect that suggested no notice would be required by, for example, telling a plaintiff orally that they knew all about the situation and were looking into it. The ability to raise “lulling” as a reasonable excuse is more rationally and appropriately raised in the context of a failure to provide notice within the time frame, rather than in the context of a failure to provide adequate information.

[20] When inadequate information is provided in a notice letter from a lawyer retained to commence litigation, the other identified factors, other than lulling, fall away, including the awareness of the requirement to provide notice, the awareness of the seriousness of the injury, the awareness of the local government's involvement; and the capacity to give notice.

[21] The “lulling” factor itself is less compelling where the issue is the provision of an inadequate notice, and where the alleged conduct of the defendant in lulling the plaintiff occurs after the notice period. The evidence would generally have to signal to the plaintiff that the defendant was somehow disinterested in the proper level of information, and/or did not require more.

[22] Moving into the evidence here, following receipt of the Notice, the plaintiff notes that there was communication within the defendant on November 1, 2010, stating:

> We have no incident records or telephone log entries regarding any slip and fall incidents in the general area given in the letter from McQuarrie Hunter. The area given is not very specific. Inspection records that we have for 7th Avenue and 6th Street show no level 2 defects that would trigger repair work.
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> Without a more specific location we can offer no further information.

[23] The plaintiff suggests that this communication should have stimulated the defendant to make further inquiries of the plaintiff, which could have avoided the confusion.

[24] While the plaintiff suggests that this communication shows the defendant should have followed up for better information, there is no obligation imposed on the City under the statute to seek better notice. It is the plaintiff's obligation to provide proper notice.

[25] Furthermore, the internal communication noted can more reasonably be read as expressing a conclusion that nothing could be found in the relevant general area provided by the Notice, as opposed to expressing a concern or awareness that the wrong area was in fact identified by the plaintiff in the Notice.

[26] The plaintiff also relies on the Notice of Civil Claim, which stated the plaintiff was "walking on the sidewalk at or near the 500 block of 6th Street". The 500 block only extends from the south side of 6th Avenue down to the north side of 5th Avenue, and includes 523 6th Street, the correct location.

[27] However, the reliance that the plaintiff could place on the Notice of Civil Claim is undermined by the very next words in the Notice of Civil Claim, which stated:

> . . . at or near the intersection with 7th Avenue, in the City of New Westminster, in the Province of British Columbia, when she stepped off the sidewalk and into a hole on the road causing the Plaintiff to fall . . .

[28] As such, I find that neither any “lulling” nor the plaintiff's “ships passing in the night” theory rise to the level of a reasonable excuse in that:

(a) If the parties were ships passing in the night, any darkness was drawn over the situation by the plaintiff. The plaintiff could have shone a light on the

situation with a proper Notice or subsequently with a proper Notice of Civil Claim.

(b) The mere fact that the defendant did not question the plaintiff's erroneous Notice cannot be held against the defendant. At the time of the Notice, up until the receipt of the Notice of Civil Claim, there was no reasonable basis upon which to question the stated location.

(c) The plaintiff is not in a position to say that the failure to raise an issue after receipt of the Notice of Civil Claim created a lulling effect, given that the plaintiff erroneously continued to refer to the wrong intersection. The defendant's lack of response could reasonably have been the result of confusion or oversight, rather than any intention to lull the plaintiff into a false sense of security.

(d) The defendant did provide a strong signal to the plaintiff that it was relying on the wrong location provided in the Notice when it issued third party proceedings that identified a problem at the wrong location, specifically problems with a gas valve box at the wrong location. As such, the plaintiff had greater knowledge and ability to correct any misapprehension than did the defendant.

(e) There is no direct evidence from the plaintiff that she was in fact lulled into a false sense of security.

[29] The failure of the defendant to advance a motion from November 2012 until September 2017 could conceivably be a factor in the analysis, in the absence of any explanation. However, the record shows that the plaintiff changed solicitors on July 8, 2013, and took no further steps to move the proceeding forward until a Notice of Intention to Proceed was filed on July 12, 2016. A Notice of Trial was not filed until October 5, 2016. The plaintiff only amended her pleading to detail the correct location on November 22, 2016, and the defendant replied to the amended pleading

on December 8, 2016, which response specifically raised the issue with respect to the adequacy of the Notice.

[30] Given that the delay in the prosecution of the action during this period was the result of the conduct of both sides, I find that it cannot be invoked by the plaintiff to support a finding of reasonable excuse.

[31] The plaintiff suggests that the error was made by her lawyers. However, she does not advance the fact that it was her lawyer's error as a reasonable excuse in and of itself. This is consistent with the applicable legal principles.

[32] In *Persall,* the court considered whether a lawyer's failure to deliver timely notice constitutes a reasonable excuse:

> [19] When a plaintiff acts through a solicitor, responsibility for providing a municipality with timely notice of a damages claim is shared. In *Horie v. Nelson* (1987) Can LII 2508 (B.C.C.A.), a majority of the British Columbia Court of Appeal held that a solicitor's negligent failure to deliver timely notice does not necessarily constitute a reasonable excuse. In response to an argument that the appellants relied on their solicitor to deliver notice, but the solicitor inexplicably failed to do so, MacDonald J.A. stated:
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> > [18]. . . That approach can only help the appellants if they can put forward their own reasonable conduct and dissociate themselves from the failure of their solicitor.
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> > [19] I agree with Locke J. when he said in the course of his reasons [p. 112]: "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". The section requires reasonable excuse for "failure to give the notice". That means that when a party acts through a solicitor the conduct of both must be examined to determine whether there was reasonable excuse for failure to give the notice.
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> …
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> [28] As stated by MacDonald J.A. in *Horie*, when a plaintiff acts through a solicitor responsibility for delivering notice of damages in accordance with the *Act* is collective. Accordingly, the Court must examine the conduct of both to determine whether there was a reasonable excuse for late notification. In my view, the reason is obvious. A plaintiff will not be excused from the statutory notification obligation merely because he or she retains a new solicitor who adopts a new approach to a potential claim for damages against a municipality. Were it otherwise, the Legislature's decision to impose a short limitation period for such claims would be easily overcome.

> [29] In this case, I am satisfied that Mr. Persall acted through his previous solicitors from no later than October 10, 2006 in connection with the Accident. I am unable to reach a conclusion, however, as to why those solicitors did not provide the City with written notice of his damages as required by the Act. That being so, I am unable to determine whether Mr. Persall does or does not have a reasonable excuse for his failure to comply with his statutory obligation to provide timely notice to the City. The onus is on Mr. Persall to establish a reasonable excuse. The onus has not been met.

[33] In *Kazemi*, the court stated:

> [20] The court must examine the conduct of both the plaintiff and lawyer to determine whether there was a reasonable excuse. A plaintiff should not be excused because they retain a new solicitor who takes a different approach to the potential claim for damages. If so, the legislative intent of imposing a short limitation period in these circumstances would be overcome: *Persall*, at para. 28.

[34] As such, any error by her lawyer is attributed to the plaintiff. That is not to say that the lawyer might not have a reasonable excuse. However, in this case there is no explanation proffered from the plaintiff's prior counsel.

[35] In *Kazemi*, the court noted:

> [40] Without an explanation from Mr. Emami or the lawyer, I am unable to assess whether the delay in giving notice after he was engaged was reasonable. In *Persall*, Madam Justice Dickson, as she then was, emphasized the importance of considering the conduct of those involved to determine if there was a reasonable excuse for late notification . . .

[36] As such, I find that no reasonable excuse has been provided by the plaintiff. This alone supports granting the defendant's motion. However, for the sake of completeness, I will also consider the question of prejudice.

[37] In *Griffiths v. New Westminster (City)*, 2001 BCSC 1516, the court stated the following in relation to the prejudice requirement:

> [19] … 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.

[38] Here the delay ran from the date of the accident on May 29, 2010, until November 29, 2012, a period of two-and-a-half years, which is inordinate in these circumstances.

[39] In *Griffiths*, the court found that a five-month delay was not inordinate, but noted that the municipality had already been provided with some verbal and written notice within the notice period and therefore, without sufficient information, it commenced an adequate investigation. That was not the case here.

[40] In *Thauli*, the court found that a six-month delay could be subject to a saving provision, but a municipal employee had immediately assisted the plaintiff and an accident report form was completed on the same day. Again, that was not the case here.

[41] The plaintiff suggests that her flawed Notice could be treated as comparable to the municipal accident reports in *Griffiths* and *Thauli*, i.e. documents that were not in the proper form but were nonetheless adequate to mitigate any prejudice.

[42] I disagree. The flaw in the Notice steered the defendant away from the proper location where an investigation should have been conducted. The accident reports and other knowledge in *Griffiths* and *Thauli* steered the municipality towards the proper focus of any investigation. The flawed Notice here compounded rather than mitigated any prejudice.

[43] In this case the defendant's submission goes beyond a simple allegation that the delay was inordinate. The defendant says that real prejudice began soon after the provision of the letter. Specifically, their street supervisor investigated the wrong location in the summer of 2012.

[44] This misdirected investigation led the City to believe that the problem may have been the result of a problem with the area surrounding a gas valve box at the

alleged intersection. Given that the gas valve box was controlled by Terasen Gas Inc., now Fortis BC, they commenced a third party Notice against Terasen and others. After the true location was revealed, these third party proceedings had to be dismissed and were so on a without costs basis on April 17, 2013.

[45] The plaintiff's own evidence is that the offending pothole was patched sometime between June 2010 and August 2011. However, the defendant no longer has any records in relation to this patchwork. It is at least possible that, had proper Notice been provided at the outset, the defendant would have been more alive to the need to retain proper emails about any such patching, including the reason for same, and the identity of the individual who prepared the patch. This information could have assisted them at trial.

[46] The defendant also says that prejudice was created in that the entire block was repaved by the defendant in the summer of 2012, preventing any further effective investigation.

[47] At a practical level, the defendant says that the real prejudice is that they are no longer in a position to refute the plaintiff's claim that there was a pothole at 523 6th Street on May 29, 2010.

[48] Between (1) the delay itself, (2) the steps taken by the defendant in the face of the lack of proper notice, and (3) the difficulty the defendant now faces in building up their own evidence to rebut the plaintiff's evidence, the defendant has certainly done enough to at least put any evidentiary burden back onto the plaintiff to show that any prejudice has been mitigated. It is correct that any prejudice can be mitigated or rebutted by the plaintiff.

[49] The first potential for mitigation of any prejudice here was the provision of the Notice of Civil Claim, which referred to the 500 block (as discussed above). Again however, the problem with that evidence is that any potential mitigation was undermined by the very next words in the Notice of Civil Claim, which suggested that the accident occurred "at or near the intersection with 7th Avenue".

[50] The plaintiff notes that during her examination of the defendant, the defendant admitted that it did not conduct a further investigation of the 500 block of 6th Street after receiving the Notice of Civil Claim. However, I do not find that this failing adds much to the prejudice mitigation argument, given that there was an inherent inconsistency in the location information provided and one of the two alternatives remained consistent with the original Notice.

[51] On balance, I find that any potential mitigation created by the reference to the 500 block was undermined by the continued reference to 7th Avenue, such that the Notice of Civil Claim has little or no influence on the prejudice evaluation.

[52] The plaintiff also notes that almost four years passed between obtaining the information about the proper location and the advancement of this motion. This could raise some evidence that the information did not cause any prejudice absent some reasonable explanation. However, as noted above, there was essentially a mutual agreement to stand down the litigation over this period.

[53] Further, much of the alleged prejudice had already crystallized by the time of the November 2012 examination, in that the patch had apparently occurred, the paving project had completed, and memories would already have started to fade.

[54] There is prejudice directly tied to the purpose of the notice provision, in that the defendant was not able to conduct a timely investigation of the relevant area. The changes to the relevant area in terms of the initial patch and the later repaving solidify that prejudice and make it far more difficult to mitigate or remediate.

[55] Although the defendant is still able to mount a defence, that is not the relevant test. The question is whether they have been prejudiced in their defence. I conclude that they have.

[56] The plaintiff does offer certain evidence that she says mitigates any prejudice. The plaintiff notes that she recently provided to the defendant photographs of the location of the accident, photos taken by the plaintiff prior to and following the patch of the relevant pothole. However, the defendant notes that:

(a) The photographs are unclear as to their specific location;

(b) The photographs do not perform a particularly scientific analysis of the measurement of the depth of the pothole, using only a slightly bent envelope along with a ruler in order to attempt to illustrate depth; and

(c) The photographs do not provide a detailed indication of the horizontal size of the pothole.

[57] As such, I am not able to find that the plaintiff's own photographs are an adequate substitute for an initial and proper investigation of the correct area.

[58] Furthermore, I note that the photographs were not produced in the plaintiff's first list of documents in May 2012, as plaintiff's counsel candidly admitted they should have been. Had they been, the defendants may have been in a position to at least conduct some investigation of the accuracy and location of the photographs before the street paving was conducted in the summer of 2012. This indicates how the photographs, coupled with their late delivery, are not an adequate proxy for a proper investigation. As the plaintiff admitted, it is reasonable for the defendant to want to have access to their own photographs.

[59] The plaintiff also notes that she is able to provide a witness statement from a Rick Molstad who attended on the plaintiff shortly after the accident. However:

(a) he is not sure that he saw the fall itself; and

(b) although he saw a pothole filled with water, he does not know how deep it was.

[60] Again, this witness was not disclosed to the defendant until 2017, when memories would have faded. As such, both the nature of his evidence and the timing of its production make it impossible to accept it as a reasonable proxy for a proper investigation.

[61] As such, I am unable to conclude that these two pieces of evidence, even gathered together, are curative of the prejudice incurred as a result of the flawed Notice.

[62] In conclusion, given:

(a) the failure to provide proper notice under s. 736(1) of the *Act*;

(b) the lack of a reasonable excuse for failing to provide such notice; and

(c) the prejudice suffered by the defendant as a result of the failure to provide proper notice,

I conclude that the defendant's motion for dismissal of the claim under Rule 9-7(2) must be granted.

[63] As to costs, my inclination would be to just issue standard Scale B costs, sunless either of the parties are inclined to make further submissions in that regard.

[64] MS. WOO: Scale B is fine, My Lord.

[65] MR. MORGAN: Scale B.

[66] THE COURT: And so we will make that order for costs at Scale B.

"The Honourable Mr. Justice Branch"