BY GILLIAN MAYS

MUNICIPAL NOTICE & LIMITATION PERIODS

MEETING NOTICE REQUIREMENTS

Introduction

The 10-day notice periods prescribed by the *Municipal Act, 2001*[1] and the *City of Toronto Act, 2006*,[2] have been judicially referred to as "very unfair"[3] and "unreasonable".[4] Nonetheless, failure to meet the notice requirement in an action against a municipality can be fatal to an otherwise meritorious action.

The *Municipal Act, 2001* provides at section 44(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 one or more municipalities jointly responsible for the repair of the highway or bridge, the clerk of each of the municipalities.

The exceptions to the notice requirement are found at section 44(11), which removes the notice requirement when death has resulted, and at section 44(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.

For injuries occurring as a result of negligence by the City of Toronto, the *City of Toronto Act, 2006*, contains nearly identical provisions at section 42(6), (7) and (8).

Case Law on Exemption Provision

Under section 44(12) of the *Municipal Act,* 2001, failure to satisfy the notice requirements is not a bar to the action if there is a "reasonable excuse" for the delay or insufficiency of the notice, and the municipality is not prejudiced by the delay. Both a reasonable excuse and the lack of prejudice must be established by the plaintiff in order for the action to be allowed, and are considered separately below.

(a) Reasonable Excuse

Historically, Ontario courts were strict with the application of the 10-day notice period. However, more recent cases have definitely shown that courts will give a "broad and liberal interpretation" to the definition of "reasonable excuse".

The applicable test was first articulated in *Crinson v. Toronto (City)*[5] and later in *Seif v. Toronto (City)*[6] as "whether, in all of the circumstances of the case, it was reasonable for the [plaintiff] not to give notice until she did." The relevant factors are the physical and mental capacity of the plaintiff.

(i) Capacity

The first and most important factor is the capacity of the plaintiff to give notice. The focus is on the physical and mental abilities of the plaintiff. However, the test does not require that the delay in notice be solely a result of the injury suffered.[7]

In *Crinson,* the plaintiff slipped and fell on an icy sidewalk, breaking his ankle. He was in the hospital for five days as a result of the accident and given pain medications. The plaintiff did not give notice to the City of Toronto until nearly 5 months after the slip and fall incident. In considering whether the plaintiff had a reasonable excuse for the delay, the Court of Appeal considered the seriousness of the injury, the duration of the hospital stay, the effect of his medications, the subsequent therapy and treatment, and the impact on his mental health.

In holding that the plaintiff had a reasonable excuse for the delay, the Court of Appeal found:

> [T]his evidence describes a man who suffered a serious injury requiring a prolonged period of rehabilitation, during which he was deeply worried about his job, his ability to provide for his family, and whether he would ever be able to return to the only career he had known. He was understandably depressed. In these circumstances, not knowing he was required give notice to the respondent, it was reasonable that he did not do so until the end of June.[8]

The opposite result was reached in *Argue v. Tay (Township),*[9] a case which involved less serious injuries and a longer period of delay. Ms. Argue sustained soft tissue injuries and was able to return to work within two to three weeks after the accident. She also failed to notify the municipality of her claim until nearly two years had passed. For these reasons, her action was dismissed.

(ii) Awareness of the Law

The plaintiff's knowledge and awareness of the notice requirement is a relevant factor, although it does not constitute a reasonable excuse on its own.[10] More extenuating circumstances must be established by the plaintiff in order to constitute a reasonable excuse for the delay.[11]

The court in *Argue* noted that "[t]he reasonable excuse provision of s. 44(12) of the *Act* would be rendered meaningless if all that a plaintiff needed to do was deliver an affidavit stating she was not aware of the notice period and was not experienced in litigation."[12]

However, the plaintiff's lack of knowledge of the notification period was considered in *Crinson,* and assisted the Court of Appeal in finding that the five-month delay was reasonable.

(iii) Length of Delay

The longer the delay in satisfying the notice requirements, the less likely that a court will find that the plaintiff had a reasonable excuse and, that the defendant municipality was not prejudiced by the delay.

There is no explicit rule or case law establishing the acceptable or reasonable length of delay. In *Delahaye v. Toronto (City),*[13] the court summarized the varied and somewhat conflicting approach:

> Some summary judgment cases have left open the issue of the amount of delay 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.

There are also a number of cases in which the courts have refused to permit the plaintiff to continue because of delay: in *Filip,* the delay was either nine or 14 days; in *Bannon,* three weeks; in *Zogjani,* eight weeks; in *Carmichael,* nine weeks (see the decision of the Alberta Court of Appeal at [1933] 2 D.L.R. 702); in *Langille,* 12 weeks; and in *Schoeni* and *Kors v. Toronto,* [2006] O.J. No. 2636, 25 M.P.L.R. (4th) 70 (S.C.)(QL), per Lederman J., the delay was 20 weeks.

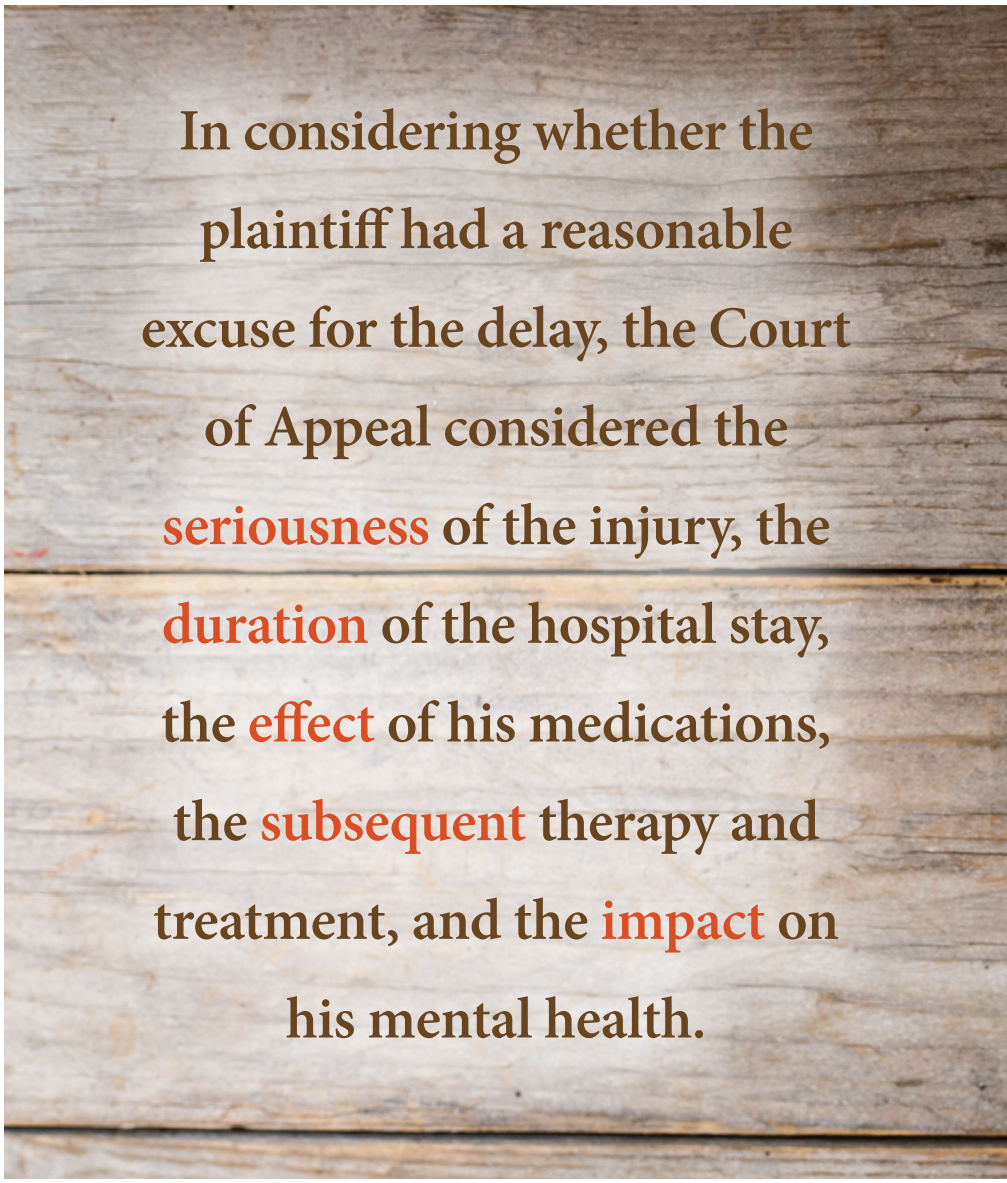
Nonetheless, the more recent cases have held that longer periods of delay are reasonable, if there are other extenuating circumstances.

(iv) Discoverability

The issue of applying the principle of discoverability to municipal notice periods is not a settled one. The notice period outlined in section 44(10) has been referred to as a "limitation period within a limitation period".[14] The courts have treated discoverability as a significant factor when determining whether the plaintiff has a reasonable excuse, rather than operating as an automatic extension of the 10-day period.

In the recent 2016 case of *Bourassa v. Temiskaming Shores (City),*[15] the plaintiff argued that the discoverability principle should postpone the commencement of the 10-day notice period. The court ultimately held:

> 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.

It is also consistent with the purpose of such notice provisions, which was set out above.[16]

As with limitation periods, discoverability will affect the reasonableness of the delay if the plaintiff is not immediately aware of the severity of his or her injuries. In *Seif,* the plaintiff's delay in notifying the City was reasonable because she did not realize the severity and permanence of her injuries until later.[17]

The court in *Bourassa* also noted that if the discoverability principle did apply to an action, the threshold triggering the need to notify a municipality is lower than commencing an action. The lower threshold was held to be appropriate because giving notice is a simple and inexpensive process, which will not trigger a summary judgment motion or carry the risks of costs consequences.[18]

The plaintiff must show due diligence if arguing the application of discoverability. In *Argue,* for example, the court found that the discoverability principle had no application because the plaintiff did not exercise due diligence in investigating the accident or complaining to the municipality.[19]

(b) Prejudice

Once the plaintiff has established a reasonable excuse for the delay in notification, the onus is again on the plaintiff to establish that there is no prejudice to the defendant as a result of the delay. However, "the absence of prejudice to the City … does not automatically permit the court either to dispense with the notice period, or to elongate it to two years."[20]

There is a presumption that the municipality suffered prejudice due to a plaintiff's failure to comply with the notice requirements.[21] The purpose of the 10-day notice period is to ensure that a municipality "has a timely opportunity to investigate the place and circumstances of the accident."[22]

To establish absence of prejudice, the plaintiff could adduce evidence that "[t]he City had taken steps to investigate the accident in spite of not having notice from the plaintiff, or by timely photographs of the scene having been taken by the plaintiff or by his having obtained the name of a witness to the accident."[23] In *Zogjani v. The City of Toronto,* the Court found that the City's ability to investigate the scene was not prejudiced, as the warm weather would have melted the snow bank within 10 days. However, the Court was persuaded that the delay in notification prevented the City's field

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inspector from specifically recalling the circumstances surrounding the incident.[24] Additionally, the court found that the City had no other source of information, such as photographs or timely statements from witnesses, to mitigate the prejudice.

Conclusion

The exemption set out in 44(12) of the *Municipal Act, 2001* and section 44(8) of the *City of Toronto Act, 2006,* is a fact-based finding that depends heavily on all of the circumstances of the case. Succeeding in an action against a municipality where the 10-day notice requirement has not been satisfied is an uphill battle from the beginning. Fortunately, courts in recent years have shown increased openness to finding that a plaintiff had a reasonable excuse for the delay, based on factors such as depression and the effects of medication.

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NOTES

[1] *Municipal Act, 2001,* S.O. 2001, C. 25 [*Municipal Act, 2001*].

[2] *City of Toronto Act, 2006,* S.O. 2006, c. 11, Sch. A.

[3] *Filip v. Waterloo (City)* (1992), 98 DLR (4th) 534 (ONCA) at 540.

[4] *Bannon v. Thunder Bay (City)* (2000), 48 OR (3d) 1 (ONCA) at para 72 [*Bannon*].

[5] *Crinson v. Toronto (City),* 2010 ONCA 44 at para 23 [*Crinson*].

[6] *Seif v. Toronto (City),* 2015 ONCA 321 at para 26 [*Seif*].

[7] *Ibid* at para 26.

[8] *Crinson, supra* at para 38.

[9] *Argue v. Tay (Township),* 2012 ONSC 4622, aff'd 2013 ONCA 247, leave to appeal refused (2013), 466 NR 392, (SCC) [*Argue*].

[10] *Ibid* at para 47.

[11] *Langille v. Toronto (City),* 2010 ONSC 443 at paras 35-37 [*Langille*]; *Crinson, supra* at para 38.

[12] *Argue, supra* at para 53.

[13] *Delahaye v. Toronto (City),* 2011 ONSC 5031 at paras 37-38 [*Delahaye*].

[14] *Bannon, supra* at para 22.

[15] *Bourassa v. Temiskaming Shores (City),* 2016 ONSC 1211 [*Bourrassa*].

[16] *Ibid* at paras 54-55.

[17] *Seif, supra* at para 28.

[18] *Bourassa, supra* at para 64.

[19] *Argue, supra* at para 57.

[20] *Delahaye, supra* at para 41.

[21] *Argue, supra* at para 58.

[22] *Ibid* at para 61,

[23] *Langille, supra* at para 22.

[24] *Zogjani v. The City of Toronto,* 2011 ONSC 1147 at para 26.