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ROAD Authorities

Winning the tale of two cities: An introduction to municipal liability experts

Road authority liability: Some practical strategies

Your first salting and sanding case: What do you need to know?

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NOTICE, LIMITATION & PLEADING

issues in road authority cases

The duty and standard of care of municipal and provincial road authorities is codified in section 44 of the *Municipal Act,* 2001, and section 33 of the *Public Transportation and Highway Improvement Act*. This article will briefly canvass the statutory notice and limitation periods applicable to claims against road authorities, address how the status of road authorities as "unprotected" defendants affects not only liability for damages but also the running of the limitation period and, lastly, the importance of consulting with experts at the pleadings stage.

BY ROBERT M. BEN

Municipal and provincial road authorities have a general duty of care to maintain their road systems in good repair so as to protect ordinary users of the highways, exercising reasonable care for their safety, from unreasonable risks of harm, including personal injury.

The duty and standard of care of municipal and provincial road authorities is codified in section 44 of the *Municipal Act, 2001,*[1] and section 33 of the *Public Transportation and Highway Improvement Act,*[2] respectively, requiring those authorities to keep highways in a state of repair.

In general terms, the duty to keep highways in a state of good repair encompasses the design, construction, maintenance (including snow and ice removal) and inspection of highways, along with signage, traffic guidance systems, and so on.

This article will briefly canvass the statutory notice and limitation periods applicable to claims against road authorities, address how the status of road authorities as "unprotected" defendants affects not only liability for damages but also the running of the limitation period and, lastly, the importance of consulting with experts at the pleadings stage.

Notice and limitation periods[3]

In an actionable personal injury case arising from the non-repair of a King's Highway, one must comply with the 10-day notice requirement set out in section 33(4) of the *Public Transportation and Highway Improvement Act, supra,* which provides:

> 33(4) No action shall be brought for the recovery of the damages mentioned in subsection (2) [default by the Ministry of Transportation to keep the King's Highway in repair] unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered letter to the Minister within ten days after the happening of the injury, but the failure to give or the insufficiency of the notice is not a bar to the action if a judge finds that there is reasonable excuse for the want or insufficiency of the notice and that the Crown is not thereby prejudiced in its defence.

For cases arising from the non-repair of a municipal roadway, there is a similar 10-day notice period in section 44 of the *Municipal Act, supra:*

> 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 two or more municipalities jointly responsible for the repair of the highway or bridge, the clerk of each of the municipalities.
>
> (11) Failure to give notice is not a bar to the action in the case of the death of the injured person as a result of the injury.
>
> (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.

The notice provisions apply only to the commencement of actions and, as such, have no effect on the bringing of crossclaims or third or subsequent party claims for contribution and indemnity.

In calculating the ten days required for giving proper notice to a municipality or the Minister, one should consult the *Legislation Act, 2006*.[4] The day on which the notice period starts to run (being the "happening" or "occurrence" of the injury) is not counted, but the day on which the notice period expires is counted. Time limits that would otherwise expire on a holiday are extended to include the next day that is not a holiday.

The notice should contain a clear description of the accident and the injury that will form the basis of the claim, as well as sufficient particulars as to date and location so as to allow the road authority to investigate the accident, which is, after all, one of the primary purposes of the short statutory notice period. The court, however, has the statutory discretion to waive strict compliance with the notice period, provided there is a reasonable excuse for the want or insufficiency of the notice, and the road authority is not prejudiced in its defence.[5]

Generally, courts will not presume prejudice absent the road authority putting forward a *prima facie* case of same, but it is always the case that the formal burden of proof of reasonable excuse and prejudice rests with the plaintiff.

In the past, plaintiffs who failed to give timely notice often faced the spectre of motions for summary judgment barring their claims. A recent decision from the Court of Appeal, however, suggests that the courts will give a liberal interpretation to "reasonable excuse" requirement. For example, in *Crinson,*[6] the court considered the case of a plaintiff giving notice to a municipality six months after an accident, well outside the ten day notice period. The evidence was that, after the accident, the plaintiff was anxious, depressed and worried about his work, and that he did not know of the necessity of giving notice. Interestingly, the Court of Appeal found that, in addition to the psychological reasons for failing to give timely notice, the plaintiff's lack of personal knowledge of the notice period was a relevant factor, and found there was a reasonable excuse.

Once proper and timely notice of a claim has been given, plaintiffs must commence proceedings within the applicable limitation period. Since the coming into force of the Ontario *Limitations Act, 2002*[7] on January 1, 2004, the limitation period for commencing claims alleging non-repair of a municipal or provincial highway are governed by the basic two-year limitation period prescribed by section 4 of that Act:

> 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.

Section 5 of the Act codifies the circumstances in which a claim will be considered discovered:

> 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
> (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

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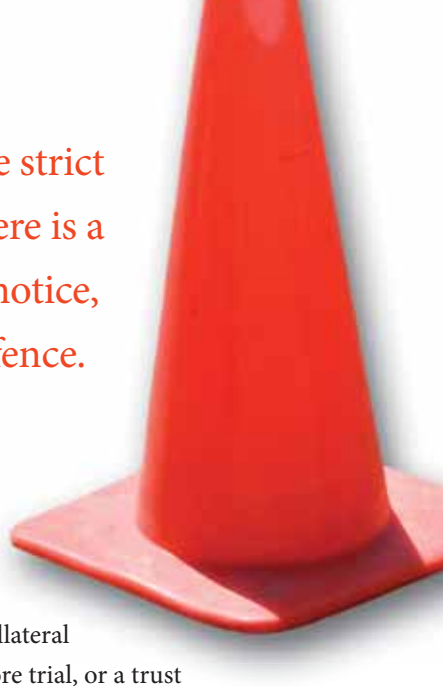

the claim first ought to have known of the matters referred to in clause (a).

(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.

By virtue of Sections 6 and 7 of the Act, the two-year limitation period does not run during any time in which the person with the claim is a minor or incapable and is not represented by a litigation guardian in relation to the claim.

The question of when a road authority claim was discovered or discoverable, and hence when the two-year period begins to run, is complicated by the status of road authorities as "unprotected" defendants in motor vehicle accident personal injury claims, as discussed below.

Road authorities as unprotected defendants

In an actionable personal injury case arising from a motor vehicle accident, sections 267.5(1), (3) and (5) of the *Insurance Act*[8] create a class of defendants known as "unprotected" defendants, being anyone other than the owner or occupants of the involved motor vehicles, or any person present at the scene of the accident. In a typical case where the allegation is non-repair of a highway by a provincial or municipal road authority, these entities will generally[9] be unprotected defendants.

Unprotected defendants cannot avail themselves of certain statutory immunities or protections. For example, unprotected defendants are liable for 100 per cent of pre-trial income losses (rather than 70 per cent from seven days after the accident). Moreover, unprotected defendants are liable for 100 per cent of health care expenses and non-pecuniary general damages, regardless of whether or not the injured plaintiff has met the statutory "threshold" (i.e., suffered a permanent serious disfigurement or a permanent serious impairment of an important physical, mental or psychological function). Finally, unprotected defendants do not get the benefit of the statutory deductibles that apply to any non-pecuniary damages award. However, unprotected defendants are entitled to receive a deduction for collateral benefits received or available before trial, or a trust or assignment of future collateral benefits entitlements,[10] as set out in section 267.8 of the *Insurance Act, supra.*

Section 267.7 of the *Insurance Act* addresses the issue of what happens in a case where both protected and unprotected defendants are found liable for a plaintiff's damages, and has been authoritatively interpreted to mean that the unprotected defendant's liability is to be determined as follows:[11]

(a) the unprotected defendant is jointly and severally liable with the protected defendant for the damages for non-pecuniary loss for which the protected defendant is liable under the Act; and

(b) using the gross figure for non-pecuniary loss, the unprotected defendant is solely liable to the plaintiff for the amount, if any, by which the amount the unprotected would have been liable to make contribution and indemnify the protected defendant under the *Negligence Act* exceeds the figure calculated in (a).

In those cases where a road authority is an unprotected defendant, plaintiffs' counsel should be mindful of the fact that two-year limitation period likely begins to run from the date of the accident (subject to the statutory discoverability provisions in section 5 of the *Limitations Act, 2002, supra*). With respect to discoverability, the date on which the plaintiff discovered that her claim met the statutory threshold for recovery of non-pecuniary damages and health care expenses is of no assistance. Plaintiffs cannot extend the discoverability period and thereby postpone the running of the limitation period because, in the case of non-protected defendants, the threshold (i.e., whether and when the plaintiff has sustained

a permanent serious impairment) is an entirely irrelevant consideration.

Pleadings

It is imperative in road authority liability cases to give timely notice and to commence proceedings within the prescribed limitation period. It is equally imperative to identify the theory of the plaintiff's case as quickly as possible. Pleadings need to be drafted properly to set the stage for meaningful discovery. Early expert advice can be of great assistance in this regard, as well as in staving off motions for summary judgment.

The expert is essential in ensuring that the theory of the case is technically grounded on correct assumptions. Commencing proceedings without the benefit of expert advice can result in wasted time and, in some cases, be fatal to the claim. For example, one might assume that a case turns on a road authority's failure to conduct adequate winter patrols and to ensure that the roadway is free of snow and ice, causing a car to drive off the curve of a rural road. Early consultation with an appropriate expert, however, allows for the informed exploration of other potential alternate or contributing causes to the accident. An accident reconstruction expert, for example, might determine that the accident was attributable, in part, to the road authority negligently posting the wrong road curve warning sign and the wrong reduced speed advisory sign, causing the driver to enter the curve at too high a speed.[12] If this theory is not developed at the pleadings stage, with advice from an expert knowledgeable in the types of relevant documents and other information that might be in the possession of the road authority, then the discovery process will be misdirected.

Conclusion

Be timely with your notice and the limitation, the latter particularly in the case of a non-protected defendant where discoverability many not be helpful. And, be thoughtful and professionally-guided in preparing your pleading so as not to overlook theories of liability that could increase the chance of a successful outcome.

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NOTES

[1] S.O. 2001, c. 25

[2] R.S.O. 1990, c. P.50

[3] The statutory notice and limitation provisions discussed relate to claims discovered after December 31, 2003.

[4] S.O. 2006, c. 21, Schedule F

[5] For a comprehensive discussion about the sufficiency of a notice and waiver of compliance with notice provisions, please see Bhogosian and Davison, *Municipal Liability in Canada,* looseleaf (Markham: LexisNexis Canada, 2013) at Section 10.37ff.

[6] *Crinson v. City of Toronto,* 2010 ONCA 44 (CanLII) (C.A.)

[7] S.O. 2002, CHAPTER 24, Schedule B

[8] R.S.O. 1990, c. I.8

[9] Where a motor vehicle accident involves a motor vehicle driven by an employee of a municipality or the province, then the municipality or the province will be a protected defendant. But only to the extent its liability is vicarious. See: Section 267.5(10.1) of the *Insurance Act, supra.*

[10] *Burhoe v. Mohammed,* (2009) 97 O.R. (3d) 391 (S.C.J.)

[11] *Sullivan Estate v. Bond* (2001), 55 O.R. (3d) 97 (C.A.)

[12] See, for example: *Ferguson v. The Corporation of the County of Brant,* 2013 ONSC 435 (CanLII) (S.C.J.)