Myshrall et al. v. The Corporation of the City of Toronto et al.*

[Indexed as: Myshrall v. Toronto (City)]

52 O.R. (3d) 686
[2001] O.J. No. 481
Docket No. C34083

Court of Appeal for Ontario
Osborne A.C.J.O., Austin and Laskin JJ.A.
February 13, 2001

* Application for leave to appeal to the Supreme Court of Canada dismissed August 30, 2001 (Gonthier, Major and Binnie JJ.). S.C.C. File No. 28524. S.C.C. Bulletin, 2001, p. 1475.

Limitations--Municipalities--Notice--Motions judge erred in dismissing action against municipality on motion for summary judgment on ground that notice under s. 284(5) of Municipal Act was defective as it did not specify date or location of accident--Notice not required to specify date or location of accident if it gives municipality enough information to permit it to investigate accident and take any necessary corrective action--Whether plaintiff's notice complied with s. 284(5) raising genuine issue for trial--Municipal Act, R.S.O. 1990, c. M.45, s. 284(5).

The plaintiff claimed that she broke her leg when she slipped and fell on an icy sidewalk in front of her neighbour's home. She gave the defendant city written notice of her claim within seven days of the accident as required by s. 284(5) of the Municipal Act. On a motion for summary judgment brought by the defendant, the motions judge dismissed the action on the ground that the notice was defective because it did not specify the date or the location of the accident. The plaintiff appealed.

Held, the appeal should be allowed.

Per Laskin J.A. (Osborne A.C.J.O. concurring): A written notice does not always have to set out the time and place of the accident in order to comply with s. 284(5) of the Act. Whether a notice complies with s. 284(5) should be considered in the light of the purposes of the section. These purposes are to give the municipality a reasonable opportunity to investigate the accident and take any necessary corrective action to prevent a similar occurrence. As long as a claimant's notice gives enough information about the claim to permit the municipality to achieve these purposes, it will comply with s. 284(5). The courts should read the notice generously, bearing in mind that the time to deliver it is brief and that in many cases it will be prepared by a person without legal training. Whether the plaintiff's notice contained enough information to comply with s. 284(5) raised a genuine issue for trial, and should not have been decided on a motion for summary judgment.

Per Austin J.A. (dissenting): The plaintiff's notice was defective. It provided neither the time nor the place of the occurrence and the signature was virtually illegible. A notice will not be sufficient merely because it provides the municipality with sufficient information to enable it to commence its own investigation to determine the time and location of the occurrence. Even if that were the standard, the plaintiff did not meet it, the legibility of her signature being at best highly debatable.

Peckham v. Mississauga (City) (1998), 45 M.P.L.R. (2d) 279 (Ont. Div. Ct.), consd

Other cases referred to

Bozak v. Eagle Creek (Rural Municipality) (1965), 53 D.L.R. (2d) 170, 52 W.W.R. 472 (Sask. C.A.), affd (1967), 62 D.L.R. (2d) 64n, 60 W.W.R. 764 (S.C.C.); Filip v. Waterloo (City) (1992), 98 D.L.R. (4th) 534, 12 C.R.R. (2d) 113, 41 M.V.R. (2d) 190, 12 M.P.L.R. (2d) 113 (Ont. C.A.); Mattick Estate

v. Ontario (Minister of Health) (2001), 52 O.R. (3d) 221 (C.A.)

Statutes referred to

Municipal Act, R.S.O. 1990, c. M.45, s. 284 [as am. S.O. 1996, c. 32, s. 54]
Proceedings Against the Crown Act, R.S.O. 1990, c. P.27
Rural Municipalities Act, S.S. 1960, c. 50

APPEAL from a judgment dismissing an action against a municipality.

James D. Singer, for appellants.
T.G. Andrews, for respondents.

[1] LASKIN J.A. (OSBORNE A.C.J.O. concurring):--The appellant Donna Myshrall claims that on January 24, 1998 she slipped and fell on an icy sidewalk in front of her neighbour's home in the City of Toronto and broke her leg. Under s. 284(5) of the Municipal Act, R.S.O. 1990, c. M.45, any person who wants to sue a municipality for injuries caused by ice or snow on a sidewalk must give the municipality written notice "of the claim and of the injury complained of" within seven days of the accident. Ms. Myshrall gave the City of Toronto written notice of her claim within the seven-day period prescribed by the statute.

[2] However, on a motion for summary judgment brought by the City, the motions judge, Nordheimer J., held that the notice was defective because it did not specify either the date or the location of the accident. He therefore granted the City's motion and dismissed the action.

[3] Ms. Myshrall and her co-plaintiffs appeal. I would allow their appeal and permit the action to proceed. In my opinion, whether the notice complied with s. 284(5) of the Act raises a genuine issue for trial.

Facts

[4] Donna Myshrall lived at 41 Earnscliffe Road in Toronto. At about 8 o'clock in the morning on Saturday, January 24, 1998, Ms. Myshrall fell on the sidewalk in front of 39 Earnscliffe Road and broke her leg. She was taken to the hospital in an ambulance where her leg was put in a cast.

[5] A few days later she consulted a lawyer who told her that she had seven days to give the City notice of her claim. In her evidence, Ms. Myshrall said that she telephoned the City on January 31, 1998, a week after the accident, and spoke to Ms. Heather Dillabough, who was an administrative assistant in the City Clerk's Office. One of Ms. Dillabough's duties was answering phone calls from individuals who may have claims against the City.

[6] According to Ms. Myshrall, Ms. Dillabough spent several minutes asking her a series of specific questions. Ms. Myshrall answered by telling Ms. Dillabough her name, her address, where she fell, and what caused her to fall--the icy sidewalk. Ms. Dillabough then told Ms. Myshrall to send a written notice of her claim--"just do up a brief description . . . that will be fine"--to the Metropolitan Toronto Clerk, Novina Wong. After speaking to Ms. Dillabough, Ms. Myshrall hand-wrote a notice of her claim, signed it at the bottom and faxed it to Novina Wong. The notice read:

> Attention Novina Wong
>
> On Saturday morning I was on my way out the door. I was on the sidewalk in front of my nabours [sic] house. I fell on the Ice on the sidewalk, and broke my leg. I was unable to call the City Clerks Office untill today for I have a cast all the way up to the top. Today is friday, Jan. 31/98. I called Heather Dillabough. She ask me to fax a note to you.
>
> I would like to put in a claim of notice.
>
> Yours Truly,

D. Myshrall

[7] Ms. Dillabough acknowledges that the City received the fax on January 31, 1998, within the seven-day period prescribed in s. 284(5) of the Act. However, the City took no steps to investigate the accident. In her affidavit sworn 15 months after the accident occurred, Ms. Dillabough said that she receives over 1,000 phone calls a year. Though she does not deny that Ms. Myshrall called her, she has no recollection of the conversation. She said that she read Ms. Myshrall's fax but did not act on it because it had no address, no telephone number, no accident location and a signature that was hard to read. She contended that the City could not investigate Ms. Myshrall's claim until it received the statement of claim on March 31, 1998. By then, an investigation would have been pointless because the condition of the sidewalk would have changed.

Analysis

[8] Section 284(1) of the Municipal Act imposes a duty on a municipality to keep its roads and sidewalks "in repair". Persons wishing to sue a municipality for breach of this duty must give written notice of their action. The notice requirement is set out in s. 284(5):

> 284(5) No action shall be brought for the recovery of the damages mentioned in subsection (1) unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered mail to the head or the clerk of the corporation, in the case of a county or township within ten days, and in the case of an urban municipality within seven days, after the happening of the injury, nor unless, where the claim is against two or more corporations jointly liable for the repair of the highway or bridge, the prescribed notice was given to each of them within the prescribed time.

[9] Under s. 284(6), the court has the power to relieve against an insufficient notice or the absence of notice altogether, but this curative provision does not apply to

injuries caused by snow or ice on a sidewalk. Section 284(6) reads:

> 284(6) In the case of the death of the person injured, failure to give notice is not a bar to the action and, except where the injury was caused by snow or ice upon a sidewalk, failure to give or insufficiency of the notice is not a bar to the action, if the court or judge before whom the action is tried is of the opinion that the corporation in its defence was not prejudiced by the want or insufficiency of the notice and that to bar the action would be an injustice, even if reasonable excuse for the want or insufficiency of the notice is not established.

[10] Because ice on a sidewalk caused Ms. Myshrall to fall and break her leg, she cannot rely on s. 284(6) of the Act. Her fax of January 31, 1998 had to meet the requirements of s. 284(5). In concluding that it did not, the motions judge relied on the decision of the Divisional Court in Peckham v. Mississauga (City) (1998), 45 M.P.L.R. (2d) 279, where Cunningham J. said in a brief oral judgment at p. 280:

> If the purpose of the notice provision of section 284(5) of the Municipal Act is to provide the municipality with a fair opportunity to investigate the occurrence then surely such notice ought to set out with clarity the injury complained of, the time and the place of the occurrence.

[11] If Peckham means that to comply with s. 284(5) a written notice must always set out "the time and place of occurrence", then I respectfully disagree with the judgment. Section 284(5) requires only that the injured claimant give "notice in writing of the claim and of the injury complained of". I do not think that courts should embellish the notice by insisting that it contain particulars not specified in the section. Had the Legislature wanted to make the time and place of the accident mandatory ingredients of the notice, it could have done so. As it is, many courts have called for legislative reform of s. 284(5), commenting on how stringent and uncertain its requirements are and how it can often work an injustice. See for example Filip v. Waterloo (City) (1992), 98 D.L.R. (4th)

534, 12 M.P.L.R. (2d) 113 (Ont. C.A.).

[12] I agree with these comments and therefore I cannot subscribe to an interpretation of s. 284(5) that places even more hurdles in the way of an injured claimant. Whether a notice complies with s. 284(5) should be considered in the light of the purposes of the section. These purposes are to give the municipality a reasonable opportunity to investigate the accident and take any necessary corrective action to prevent a similar occurrence. As long as a claimant's notice gives enough information about the claim to permit the municipality to achieve these purposes, it will comply with s. 284(5). Moreover, the courts should read the notice generously, bearing in mind that the time to deliver it is brief and that, in many cases, it will be prepared by a person without legal training.

[13] My colleague Goudge J.A. took a similar approach to the notice provision in s. 7(1) of the Proceedings Against the Crown Act, R.S.O. 1990, c. P.27. See Mattick Estate v. Ontario (Minister of Health) (2001), 52 O.R. (3d) 221 (C.A.). So too did the Saskatchewan Court of Appeal in considering the sufficiency of a notice given under s. 237 of the Rural Municipalities Act, S.S. 1960, c. 50, a provision that, like s. 284(5) of the Ontario Act, required "notice in writing of the claim and of the injury complained of". Although the notice in that case gave only a vague description of where the accident happened and did not specify why or when it happened, the court held that the notice was sufficient. Woods J.A. wrote:

> The statute does not require particulars in so many words. There is no requirement for a summary of the nature of the proposed action and the facts upon which it is to be based. The requirement is for notice of the claim and injury. There is no requirement that either be spelled out. In my view, the present notice is sufficient to enable the municipality to investigate the matter with a view to protecting its interests. It is sufficient to give the defendant a chance to get the facts while evidence is fresh in the minds of the witnesses. There is no evidence that the defendant was in any way prejudiced by the form and content of the notice. I

would, accordingly, hold that the content of the notice meets the requirement of the statute.

See Bozak v. Eagle Creek (Rural Municipality) (1965), 53 D.L.R. (2d) 170 at p. 173, 52 W.W.R. 472 (Sask. C.A.), affd (1967), 62 D.L.R. (2d) 64n, 60 W.W.R. 764 (S.C.C.).

[14] The sufficiency of Ms. Myshrall's fax should, therefore, be considered in the light of the purposes of the notice requirement. Viewed in this way, whether her fax contains enough information to comply with s. 284(5) at least raises a triable issue. Her fax put the City on notice that she intended to file a claim. It specified her injury, a broken leg. It described the cause of the injury, a fall "on the ice on the sidewalk" and it alerted the City to when she fell, on a Saturday morning, which could reasonably be taken to be the Saturday before the notice was faxed.

[15] A trier of fact could find that the City had a reasonable opportunity to investigate Ms. Myshrall's accident and take any needed preventive action. The notice says that the accident occurred "on the sidewalk in front of my nabours [sic] house." Although Ms. Myshrall did not give her neighbour's address nor indeed her own address or telephone number, her signature is legible and she is one of only two Myshralls in the City of Toronto telephone book. A trier of fact could conclude that with little effort the City could have ascertained where Ms. Myshrall lived and where she fell. Therefore a trier of fact could reasonably conclude that Ms. Myshrall's fax gave the City enough information to allow the City to satisfy the purposes of the notice provision. Instead the City did nothing.

[16] Moreover, in assessing the sufficiency of the notice, a trier of fact would be entitled to consider the context in which the notice was given -- here, Ms. Myshrall's telephone conversation with Ms. Dillabough. The Legislature has required that the s. 284 notice be in writing. But a trier of fact need not consider the written notice in a vacuum. In deciding whether the notice met the requirements of s. 284(5) and gave the municipality a fair opportunity to investigate, the trier

of fact is entitled to consider the surrounding circumstances. Here, the trier of fact may be entitled to consider that Ms. Myshrall telephoned and discussed her claim with the City employee responsible for administering these claims and referred to that telephone conversation in the notice itself.

[17] For these reasons, I conclude that whether Ms. Myshrall's January 31, 1998 fax complies with s. 284(5) should not have been decided by summary judgment. It raises a genuine issue for trial.

[18] The appellants put forward two other arguments to preserve the notice: the doctrine of special circumstances and the principle of estoppel. I agree with the motions judge that neither argument has any merit.

[19] The doctrine of special circumstances permits a party to be added to an existing action after the expiry of a limitation or notice period. The doctrine does not apply here where there was no existing action when the notice was given. Moreover, by enacting the curative provisions of s. 284(6), the Legislature has defined when a court will be permitted to relieve against the requirements of s. 284(5).

[20] The City cannot be estopped from relying on s. 284(5). As the motions judge held:

> The plaintiff also submits that there is a basis to allege promissory estoppel against the City and relies in this regard on the decision of the Supreme Court of Canada in Maracle v. Travellers Indemnity Co. of Canada (1991), 3 C.C.L.I. (2d) 186. Even assuming for the moment that such a plea can be set up against a mandatory limitation period in a statute, there is no evidence before me that would support that there were words or conduct of anyone on behalf of the City that was "intended to affect" the legal relationship between the City and the plaintiff. Indeed, to the contrary, the plaintiff was specifically told by Ms. Dillabough of the need to file the written claim and of the 7 day period for so doing.

[21] Nonetheless, I would allow the appeal, set aside the summary judgment, dismiss the City's motion and permit the action to go to trial on the issue whether Ms. Myshrall's January 31, 1998 fax complied with s. 284(5) of the Municipal Act.

[22] Although the City's motion was unsuccessful, it was nevertheless reasonable. I would therefore award the appellants their party-and-party costs of the motion for summary judgment and of this appeal.

[23] AUSTIN J.A. (dissenting):--Although I agree with Laskin J.A. that "many courts have called for legislative reform of s. 284(5) [of the Municipal Act, R.S.O. 1990, c. M.45] commenting on how stringent its requirements are and how it can often work an injustice", I would dismiss the appeal, substantially for the reasons given by the motion judge.

[24] I agree with the suggestion of Cunningham J. in Peckham, set out in para. 10 of the reasons of Laskin J.A., that the purpose of the notice requirement of s. 284(5) is to provide the municipality with a fair opportunity to investigate the occurrence. Accordingly, the notice ought to set out with clarity at least the time and the place of the occurrence. In the absence of such particulars, the requirement of notice would appear to be pointless.

[25] The notice sent by the plaintiff by fax is set out in para. 6 of the reasons of Laskin J.A. It provides neither the time nor the place of the occurrence. The signature is virtually illegible. Ms. Dillabough described it as follows:

> The signature was somewhat illegible, such that I was unable to determine the precise spelling of the name. No last name was contained in printed letters anywhere on the letter. No first name was contained in the letter.

[26] Had Ms. Dillabough been able to make out the signature the plaintiff's address might have been determined from the Toronto telephone book. That however would not have identified the place of the accident which is said to have occurred "in

front of my nabours [sic] house". Nor does the phrase "on Saturday morning" provide the municipality with the date or time of the occurrence.

[27] I do not subscribe to the reasoning of Laskin J.A. that all that is required is to provide the municipality with sufficient information to enable it to commence its own investigation to determine the time and location of the occurrence. Even if that were the standard, I am not persuaded that the plaintiff would have met it, the legibility of her signature being at best highly debatable.

[28] I would therefore dismiss the appeal, but in the circumstances, without costs.

Appeal allowed.