COURT OF APPEAL FOR ONTARIO

CITATION: Seif v. Toronto (City), 2015 ONCA 321
DATE: 20150508
DOCKET: C58919

Hoy A.C.J.O., van Rensburg and Brown JJ.A.

BETWEEN

Robin Seif

Appellant

and

City of Toronto and Armel Corporation

Respondent

David A. Zuber and James B. Tausendfreund, for the appellant

Kirsten Franz, for the respondent

Heard: January 19, 2015

On appeal from the judgment of Justice Edward M. Morgan of the Superior Court of Justice, dated May 13, 2014.

Hoy A.C.J.O.:

[1] The appellant, Robin Seif, sued the respondent, the City of Toronto (the "City"), for damages arising from a "trip and fall". She appeals the judgment of the motion judge, granting summary judgment dismissing her claim against the City because the appellant did not have a reasonable excuse for her failure to give notice to the City within ten days of her injury.

[2] For the reasons that follow, I would dismiss the appeal. While I agree with the appellant that she had a reasonable excuse for her delay in giving notice to the City, I am not satisfied that the City is not prejudiced in its defence as a result of that delay.

Background

[3] Briefly, the background is as follows.

[4] On August 19, 2011, the appellant tripped on a "lip" where a City sidewalk met an interlocking brick boulevard. She fractured her non-dominant wrist. She was transported to the hospital by ambulance and her wrist was set and cast. The appellant was released from hospital the same day.

[5] Following the accident, the appellant was quickly mobile. A week or so after the accident, she and her husband stopped and looked at the site of the accident while walking to the bank. They did not, however, measure t ıe lip or, at that time, take photographs of the site.

[6] At the time of the accident, the appellant was trying to re-enter the workforce and, despite the ongoing pain in her wrist, resumed her job search soon after she fell. In the months that followed the accident, she had no intention of filing an action. She still thought her fracture would heal and her life would return to normal. The appellant did not know that the *City of Toronto Act, 2006*,

S.O. 2006, c. 11 (the "Act") required her to notify the city clerk within ten days of her accident if she wished to bring an action for damages.

[7] Sections 42(6) and (8) of the Act provide in relevant part:

> (6) 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 city clerk
>
> [...]
>
> (8) 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 City is not prejudiced in its defence.

[8] At a medical appointment in November 2011, the appellant learned that she would live with pain and limitations in her fractured wrist for the rest of her life. Only then did she turn her mind to legal action. She contacted the Law Society of Upper Canada's lawyer referral service. It took a few weeks to set up an initial meeting with counsel. She met with counsel on December 20, 2011.

[9] Her counsel sent a letter to the City notifying it of the appellant's claim on December 21, 2011 – some four months after the accident. The letter stated that the appellant had tripped and fallen on a sidewalk on Lonsdale Road, just west of

the southwest corner of the intersection of Spadina Road and Lonsdale Road. It said that a significant lip in the sidewalk appeared to have caused the accident.

[10] The appellant's husband took photographs of the accident site a few days after the appellant gave notice. The rock salt in the photos suggests that the temperature had dropped below zero by the time the appellant's husband took the photos.

[11] The respondent received the appellant's notice on December 23, 2011. An independent insurance adjuster visited the intersection of Lonsdale Road and Spadina Road on January 9, 2012. However, he measured and photographed a spot at the southwest corner of Lonsdale and Spadina and not the spot a little to west where the appellant had tripped. On January 18, 2012, the adjuster wrote to the appellant's counsel asking for the exact location of the fall. A City of Toronto field investigator attended on April 24, 2012 and took further photos. He, too, failed to inspect the correct location. Finally, on May 9, 2012, the field investigators received the appellant's husband's photos from the adjuster, who had acquired them from an adjuster for Armel Corporation (a former defendant in this action). A second field investigator, Lou Martino, sought out the site on May 18, 2012.[1] He took several measurements and photographs of the correct

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[1] On May 17, 2012, the appellant's counsel, in an e-mail to the City's counsel, responded to the adjuster's request for the exact location of the fall. Mr. Martino did not see that e-mail before he measured the lip on May 18, 2012.

location and found no ledge in the area that exceeded two centimetres. He deposed:

> I would not be able to say with certainty that these measurements would have been the same if I had measured the area within 10 days of August 19, 2011 when the accident occurred. Given the passage of an entire winter season, it is possible that these interlocking bricks could have shifted due to temperature fluctuations, freeze thaw cycles and winter maintenance activities. It is possible that the bricks could have been higher on August 19, 2011, thereby creating even less of a ledge than what existed when I measured the area on May 18, 2012. However, it is also possible that the bricks could have been lower. It is also possible that the bricks could have remained at the same level all winter.

[12] While a cigarette butt is visible in some of the photographs taken by the appellant's husband, providing some sense of scale, the evidence of Mr. Martino is that it is impossible to gauge the depth of the ledge from a one-dimensional picture.

[13] Mr. Martino also deposed that, because the appellant had complained and because the area was not completely level, the interlocking bricks were brought back up to grade in June 2012.

[14] The City conducts annual sidewalk inspections and, on June 29, 2011, a summer student inspector walked an area of about eight kilometers, including the area in question. The City employs a negative reporting system. The inspector's report lists deviations two centimeters or deeper that he observed. According to

Mr. Martino, the City "must not have found any fault with the sidewalk at the time as no mention of [fault] is made on the original inspection form."

[15] Some two years after the appellant launched her action, the appellant and her husband deposed that on their visit to the site a week or so after the incident, "it appeared that the lip in the sidewalk was clearly at least one inch, or about 25 centimeters."[2] The appellant also deposed that "the lip in the sidewalk that I tripped on, was in the same condition on the day that the photographs were taken in late December 2011, as they were in the week or so after the accident, in August 2011, when [my husband] and I went to look at the accident scene."

[16] While there was one witness to the accident, the City has been unable to reach her.

Motion Judge's Reasons

[17] The motion judge began by outlining the two requirements of s. 42(8). Failure to give notice pursuant to s. 42(6) will not end an action when: (1) the plaintiff has a reasonable excuse for the failure to comply with the notice provision; and (2) the City would not be prejudiced in its defence as a result of the delay.

[18] Citing *Crinson v. Toronto (City)*, 2010 ONCA 44, 100 O.R. (3d) 366, the motion judge acknowledged that a "broad and liberal" interpretation must be

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[2] The appellant meant 25 millimetres, which is 2.5 centimetres.

given to the phrase "reasonable excuse" in s. 42(8) of the Act. He also cited *Argue v. Tay (Township)*, 2012 ONSC 4622, 1 M.P.L.R. (5th) 77, aff'd 2013 ONCA 247, 10 M.P.L.R. (5th) 11, leave to appeal refused, [2013] S.C.C.A. 246, for the principle that ignorance of the statutory time limit is not a reasonable excuse for late notice.

[19] At para. 19 of his reasons, he found that:

> The [appellant] was not incapable of giving timely notice, and was not particularly hindered in her actions due to her injuries. ... [H]er delay in giving notice was as a result of her indecision as to whether to bring an action at all for the first 4 months after her injury.

[20] At para. 21, the motion judge reasoned that the "exception to the notice requirement was designed to accommodate plaintiffs whose delay is somehow a result of their injury. It is not designed to extend the time for a plaintiff whose delay is a result of their indecision or their apathy toward issuing a claim."

[21] He concluded that the appellant did not have a reasonable excuse for her delay in giving notice to the City and dismissed her claim. Having found that the appellant did not have a reasonable excuse for her failure to notify the City within ten days, the motion judge did not go on to consider whether the delay prejudiced the City in its defence.

Issues Raised

[22] The appellant argues that the motion judge erred in law (1) by requiring that she establish that she delayed giving notice because of her injury and (2) by failing to interpret "reasonable excuse" broadly and liberally and to consider all of the circumstances, including her relatively short four-month delay, her ignorance of the notice requirement, and her initial uncertainty as to the severity of her injuries.

[23] Both parties argued on the issue of whether the appellant's delay prejudiced the City in its defence.

Analysis

[24] My analysis proceeds in two parts. First, I examine whether the appellant had a reasonable excuse for her delay in giving notice. Second, having concluded the appellant does have a reasonable excuse, I address the question of prejudice to the City's defence as a result of the delay.

Does the Appellant Have a Reasonable Excuse for the Delay in Notice?

[25] I agree with the appellant that the motion judge erred in his approach to determining whether the appellant had established a reasonable excuse for her delay. While the motion judge acknowledged that "reasonable excuse" is to be given a broad and liberal interpretation, he then narrowed his focus to whether

the appellant's delay was a result of her injury and whether she was capable of giving notice sooner.

[26] The test to be applied is whether, in all of the circumstances of the case, it was reasonable for the appellant not to give notice until she did: see *Crinson,* at para. 23. It was an error to require that the delay be solely a result of the injury suffered.

[27] While in *Crinson* the focus was on the post-accident physical and mental abilities of the plaintiff in assessing whether the plaintiff had a reasonable excuse for the delay, other circumstances may create a reasonable excuse. One need only imagine a parent, injured on a City sidewalk, whose child is in hospital undergoing a lengthy course of treatment for a life-threatening illness. The child's circumstances, rather than the injury sustained by the parent, would provide the reasonable excuse.

[28] Interpreting "reasonable excuse" broadly and liberally, in all of the circumstances of this case, it was reasonable for the appellant not to give notice until she did. The appellant did not intend to sue the City at the outset because at first she did not think her injuries were serious. She followed a course of treatment. She decided to explore legal action only when she found out that she

would suffer pain and limitations in her fractured wrist for the rest of her life.[3] Once she decided to seek a legal remedy, she promptly retained counsel. Counsel immediately gave notice to the City.

[29] Lack of awareness of the notice requirement in s. 42(6) of the Act does not constitute a reasonable excuse on its own: see *Argue,* at para. 47. However, ignorance of the notice requirement can add to another extenuating circumstance (such as lack of knowledge of the severity of the injury) to create a reasonable excuse: see *Crinson*, at para. 38.

[30] I note that a broad and liberal interpretation of "reasonable excuse" does not render the City without protection. "[T]he protection granted to the municipality where it is prejudiced in its defence is good reason why a liberal interpretation should be given to the words 'reasonable excuse'": *Crinson*, at para. 20, quoting with approval *Cena v. Oakville (Town)* (2009), 56 M.P.L.R. (4th) 11 (Ont. S.C.), at para. 15.

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[3] The circumstances in this case bear some similarities to those in *Hennes v. Brampton (City)*, 2014 ONSC 1116, 20 M.P.L.R. (5th) 163. In *Hennes*, although the Court granted the City of Brampton's motion for summary judgment because the plaintiff had waited a year and a half after his fall to give notice to the City of his claim, the Court noted at para. 35 that it would have been reasonable for the plaintiff to give notice to the City roughly four and a half months after the fall – the moment when he was offered surgery on his left knee. In other words, had the plaintiff given notice to the City four and a half months after his fall (the moment when the full gravity of his injuries became apparent), it appears the Court would have concluded the plaintiff had a reasonable excuse for the delay in giving notice.

Is the City Prejudiced in its Defence as a Result of the Delay?

[31] Unfortunately, the motion judge did not go on to consider whether the appellant's delay in giving notice prejudiced the City in its defence. It would have been preferable had he done so.

[32] In their factums, the parties proposed that this court decide the issue on the record before the motion judge, rather than send it back to the motion judge.[4] Neither party argued that the issue of prejudice was a genuine issue requiring a trial. In his oral submissions, counsel for the appellant said that he "[got] the sense... that there might be some concerns of the court in terms of the sufficiency of the evidence". He indicated that if the court did not think that it had enough evidence to decide the question of prejudice, the court should send the question to trial.

[33] As I am asked to perform the role of a judge hearing a summary judgment motion, I assume that the record contains all evidence relevant to the issue of prejudice that the parties would present if there were a trial: see *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at

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[4] Para. 91 of the appellant's factum reads as follows:

> Whereas the learned motion judge made no finding as to whether or not the City was prejudiced by the Appellant's delay in notice, the Appellant submits that this Honourable Court is in a position to make such a finding, based on the evidence before the court, both on the underlying motion, and on the present appeal.

A similar provision is included at para. 19 of the respondent's factum.

para. 17; see also *Goudie v. Ottawa (City)*, 2003 SCC 14, [2003] 1 S.C.R. 141, at para. 32; *Aronowicz v. EMTWO Properties Inc.*, 2010 ONCA 96, 98 O.R. (3d) 641, at para. 17-18.

[34] Respectfully, I do not agree with my colleagues that this action should be sent to trial. I am satisfied that the issue of prejudice can be fairly and justly determined on the record before the motion judge without hearing oral evidence and would accordingly accede to the parties' initial request to determine this matter on the record, rather than send it back to the motion judge. I do not suggest that this court should routinely take on this task. [5]

[35] The onus of showing that there is no prejudice to the defendant as a result of the delay in giving notice rests on the plaintiff: see *Colangelo v. Mississauga (City)* (1988), 66 O.R. (2d) 29 (C.A.), at p. 44, leave to appeal refused, [1988] S.C.C.A. No. 477; *Argue v. Tay (Township)*, 2013 ONCA 247, 10 M.P.L.R. (5th) 11, at para. 2, leave to appeal refused, [2013] S.C.C.A. 246.

[36] The purpose of provisions like s. 42(6) of the Act "is to ensure that a Municipality has a timely opportunity to investigate the place and circumstances of the accident": *Argue*, at para. 61. Where the injured party does not provide notice within ten days, an "inherent probability of prejudice [arises] from the bare fact of the accident and the lack of notice": *Carmichael v. Edmonton (City)*, [1933]

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[5] Generally, nor should il send a maller on lo trial simply because a molion judge has failed lo deal wilh an issue on a summary judgment motion.

S.C.R. 650, at p. 655. Essentially, prejudice is presumed: *Argue*, at para. 60. However, prejudice is fact-based: *Zogjani v. Toronto (City)*, 2011 ONSC 1147, [2011] O.J. No. 1002, at para. 18. A plaintiff can rebut this "inherent probability" or presumption with evidence showing other sources of information about the accident's circumstances: see *Argue*, at para. 58. For example, a plaintiff might rebut the presumption of prejudice by adducing evidence that "the City had taken steps to investigate the scene in spite of not having notice from the plaintiff, or by timely photographs of the scene having been taken by the plaintiff or by [the plaintiff] having obtained the name of a witness to the accident": *Argue*, at para. 59, quoting *Langille v. Toronto (City),* 2010 ONSC 443, 69 M.P.L.R. (4th) 73, at para. 22.

[37] The appellant acknowledges that in these circumstances a presumption of prejudice arises, though she would characterize the presumption as weak. However, she argues that the City has not been practically prejudiced in its defence by her delay in giving notice. The City in turn argues that the delay prejudiced its defence because it prevented the City from measuring the lip before weather conditions may have shifted the lip up or down. And, in this case, the precise height of the lip in August 2011 is critical.

[38] In order to understand the question of prejudice in this case, it is important to consider the statutory provisions relevant to liability. Sections 42(1) and (2) of the Act provide that the City is liable if it fails to keep a highway or bridge in a

reasonable repair and if a person suffers damages as a result of that failure. The City acknowledges that the accident would fall within these provisions if the appellant tripped on a City sidewalk or boulevard.

[39] Section 42(3)(c) of the Act provides that the City is not liable if minimum maintenance standards established by regulation are in force at the time of the incident and if the City has met those standards. At the time of the incident, the minimum standards stated that if a surface discontinuity on a sidewalk exceeded two centimetres, the City was to treat the surface discontinuity within 14 days.[6] The City contends that it is not liable for the appellant's injuries if the lip did not exceed two centimetres at the time of the incident. The City also contends that the appellant tripped and fell on the boulevard, not on a City sidewalk, and that the standard of care is lower for a boulevard than for a sidewalk (such that even if that even if the lip exceeded two centimetres, the City might not be liable).

[40] I am not satisfied that the appellant's delay in giving notice has not prejudiced the City in its defence.

[41] The precise measurement of the lip at the time of the accident is critical to a significant defence relied on by the City. It does not matter that the City may argue an alternative defence.

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[6] See *Minimum Maintenance Standards for Highways in the City of Toronto*, O. Reg. 612/06, s. 16.1(2).

[42] The question before me is whether the appellant's delay prejudiced the City in its defence that the lip did not exceed two centimeters. I do not need to decide whether the lip was or was not greater than two centimeters. And I do not need to determine the credibility of the appellant's and her husband's evidence to determine the issue of prejudice.

[43] At trial, the City would have to respond to the appellant's and her husband's evidence that the lip exceeded two centimeters at the time of the accident. The defence evidence consists of the measurement taken by Mr. Martino on May 18, 2012, nearly nine months after the accident, and the results of the City's annual sidewalk inspection on June 29, 2011. Mr. Martino concedes that his measurement is not reliable evidence of what the lip would have measured at the time of the accident because an entire winter season passed between the accident and his measurement. And the reliability of the City's annual sidewalk inspection would be open to challenge at trial – just as the appellant's and her husband's eyeball approximations would be. Neither those approximations nor the photographs taken by the appellant's husband in December 2011 provide an objective basis to determine the precise height of the lip in August 2011. The City has been unable to contact the one witness to the accident despite repeated efforts. Moreover, there was no suggestion that the witness measured the lip.

[44] While the appellant did not make this argument, I am not satisfied that the City would not have measured the lip until winter even if the appellant had given notice within ten days of the accident. That the City did not successfully measure the lip until five months after the appellant's notice does not mean the City would have taken five months to measure the lip had it received an on-time notice. In my view, too many variables are at play to comfortably draw that inference. The City might have investigated an on-time claim with more urgency, before weather conditions had a chance to change. The independent investigator assigned might have located the spot where the accident occurred on his first visit. Or photographs taken by the appellant's husband pinpointing the precise site of the accident might have found their way to the City more quickly.

[45] In my view, the appellant has not established that the City is not in a materially worse evidentiary position than it would have been in without the appellant's delay. It did not have the opportunity to obtain a *reliable* measurement of the lip to counter the evidence of the appellant and her husband.

[46] As a result, I would dismiss this appeal.

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van Rensburg and Brown JJ.A.:

[47] We agree with the conclusions of Hoy A.C.J.O. with respect to whether the appellant had a reasonable excuse for her failure to give notice within ten days of her slip and fall accident, as required by s. 42(6) of the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A (the "Act"). Respectfully, however, we do not agree with her conclusion that the motion judge's summary dismissal of the action should be upheld on the basis that the appellant has failed to prove that the City will not be prejudiced in its defence by her delay in giving notice. That is, in our view, a genuine issue requiring a trial. Put another way, we are not satisfied - in our review of the evidence as an appeal court (since the issue was not addressed by the motion judge) - that the respondent has met its burden under Rule 20 to establish that there is no genuine issue requiring a trial on the issue of prejudice.

The Consequences of the Failure of the Motion Judge to Deal with the Issue of Prejudice

[48] The motion judge's decision granting summary judgment and dismissing the appellant's action was based on his conclusion that the appellant did not have a reasonable excuse for failing to give the City notice of her claim within ten days of the slip and fall accident. He did not find it necessary to deal with whether there was prejudice to the City in its defence as a result of the delay.

[49] Given the two-part test created by s. 42(8) of the Act, having granted summary judgment by dealing only with the first part of the test, it would have been helpful for the motion judge to have gone on to review the evidence on the second part of the test and to make the necessary findings of fact. Had he done so, this court would have had the benefit of his assessment of the evidence and conclusions with respect to the second part of s. 42(8).

[50] In their factums, both parties submitted that this court is in a position to determine whether the appellant's failure to give timely notice prejudiced the City. In oral argument, however, the appellant submitted that the question of prejudice is an issue in respect of which there is conflicting evidence, and which should be left for determination at a trial.

[51] For an appellate court to determine whether there exists "no genuine issue requiring a trial with respect to a claim or defence," it must be able to conclude that, through the appellate review process, it can "make the necessary findings of fact" in order to reach a fair and just determination on the merits, and that the process gives it the confidence to find the necessary facts and apply the relevant legal principles so as to resolve the dispute: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 49-50.

[52] As a practical matter, an appellate court does not have at its disposal all of the tools available to a summary judgment motion judge to make such a

determination. While *Hryniak* identified three levels of evidentiary review available to a motion judge – reviewing the record without using the new fact-finding powers under rule 20.04(2.1); using the fact-finding powers, including evaluating credibility; and, using the fact-finding powers with oral evidence under rule 20.04(2.2) – an appellate court realistically is limited to its review of the written record.

[53] Although s. 134(1)(a) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 states that a court to which an appeal is taken may make any order or decision that ought to or could have been made by the court appealed from, and s. 134(4)(a) permits an appellate court, in a proper case, to draw inferences of fact from the evidence, our ability to determine the issue of prejudice in this appeal depends on whether, on the basis of the written record, we can confidently make the necessary findings of fact. For the reasons that follow, we have concluded that we are unable to do so, and that the question of whether the City is prejudiced in its defence of the action is a genuine issue requiring a trial.

Prejudice in s. 42(8) of the Act

[54] A plaintiff who has failed to meet the ten day limitation period under s. 42(6) has the onus of establishing both that there is a reasonable explanation for the delay and that the defendant will not be prejudiced in its defence as a result of the delay: see *Colangelo v. Mississauga (City)* (1988), 66 O.R. (2d) 29 (C.A.),

at p. 44, leave to appeal refused, [1988] S.C.C.A. No. 477; *Argue v. Tay (Township)*, 2013 ONCA 247, 10 M.P.L.R. (5th) 11, at para. 2, aff'g 2012 ONSC 4622, 1 M.P.L.R (5th) 77, leave to appeal refused, [2013] S.C.C.A. 246.

[55] As Hoy A.C.J.O. observes in her reasons in this case, the purpose of a provision like s. 42(6) of the Act "is to ensure that a Municipality has a timely opportunity to investigate the place and circumstances of the accident": *Argue* (S.C.), at para. 61. While the onus is on the plaintiff to meet both branches of s. 42(8), that section does not use language that creates a presumption of prejudice resulting from the plaintiff's failure to give timely notice. As a result, whether or not prejudice results from the failure to give timely notice is a fact-based inquiry: *Zogjani v. Toronto (City)*, 2011 ONSC 1147, [2011] O.J. No. 1002, at para. 18.

[56] At the same time, in *Carmichael v. Edmonton (City),* [1933] S.C.R. 650, the Supreme Court of Canada observed that, where the injured party does not provide notice within ten days, an "inherent probability of prejudice [arises] from the bare fact of the accident and the lack of notice". The Court noted that "against this inherent probability of prejudice arising from the bare circumstances, there might, in many cases, be offered by a plaintiff important evidence that there was no prejudice": at p. 655. A plaintiff can address the "inherent probability of prejudice" with evidence showing other sources of information about the accident's circumstances: see *Argue* (S.C.), at para. 58; *Zogjani*, at para. 18. As noted by Hoy A.C.J.O., a plaintiff might adduce evidence that "the City had taken

steps to investigate the scene in spite of not having notice from the plaintiff, or by timely photographs of the scene having been taken by the plaintiff or by [the plaintiff] having obtained the name of a witness to the accident": *Argue* (S.C.), at para. 59, quoting *Langille v. Toronto (City),* 2010 ONSC 443, 69 M.P.L.R. (4th) 73, at para. 22.

Is There a Genuine Issue Requiring a Trial on the Issue of Prejudice?

[57] The question of prejudice arises in the context of the statutory provisions imposing liability on the City for the failure to repair. Sections 42(1) and (2) of the Act provide that the City is liable for all damages sustained by any person as a result of any default of the City in complying with its obligations to keep in a state of repair reasonable in the circumstances "highways and bridges over which it has jurisdiction". It is acknowledged that if the appellant's accident occurred on a City sidewalk[7], it would come within this provision.

[58] Section 42(3)(c) of the Act provides that if there are minimum standards established by regulation in force at the time of the incident and those standards have been met, the City is not liable. At the time of the incident, the minimum standards in force stated that if a surface discontinuity on a sidewalk exceeded two centimetres, the minimum standard was to treat the surface discontinuity

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[7] The City contends that the appellant slipped and fell on the boulevard, not on a City sidewalk, and that the established standard of care is less for boulevards than for a sidewalk.

within 14 days.[8] The City contends that, if the lip did not exceed two centimetres at the time of the incident, it may have a statutory defence to the appellant's claim. The regulation now provides in s. 16.1(2.1) that a surface discontinuity on a sidewalk is deemed to be in a state of repair if it is less than or equal to two centimetres. However that provision was not in force at the time of the accident. The City contends that the effect of the regulatory minimum standards in this case is the same.

[59] Assuming, without deciding, that the City is correct in asserting that it would have a statutory defence to the appellant's claim if the "lip" was in fact less than two centimetres, does the record enable this court to determine, with the degree of confidence required by *Hryniak*, that there is no genuine issue requiring a trial with respect to the issue of prejudice under s. 42(8) of the Act? We conclude that it does not, because of the existence of material facts in dispute, together with the incomplete nature of the record.

Material Facts in Dispute

[60] The circumstances in this case differ from those in *Argue*, where the plaintiff claimed her injuries had resulted from an accident caused by a pothole on the roadway. By the time she had given notice of her claim some two years after the accident, the pothole had been repaired. The plaintiff had not taken any

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[8] See *Minimum Maintenance Standards for Highways in the City of Toronto*, O. Reg. 612/06, s. 16.1(2).

measurement or photograph of the pothole, and she had "no idea" of the size of the pothole. There was no evidence to respond to the "inherent probability" of prejudice to the defendant municipality, which had no ability to investigate the circumstances of the accident as a result of the delay: see *Argue* (S.C.), at para. 65.

[61] By contrast, in the present case, the appellant took photographs a few days after notice was given. She recalled seeing a "significant lip in the sidewalk" of at least one inch when she revisited the location of her fall a week after the accident. The City took measurements and photos before the area was repaired. The appellant provided the name and contact information of a witness, that the respondent attempted without success to contact, but only shortly before the motion.

[62] So, unlike in *Argue*, in the present case the appellant has adduced evidence on the issue of prejudice. Evaluating this evidence will require, in part, an assessment of the appellant's credibility and reliability, including weighing the evidence of her observations about the size of the lip of the sidewalk made a week after the accident against the City's evidence that no problem with the sidewalk had been reported in its June 2011, annual inspection.

[63] The City asserts that it has suffered prejudice because it lost the opportunity to take a "definitive" measurement of the area where the accident

occurred as a result of the appellant's delay in giving notice. In our view, whether the City will be prejudiced in its defence by not having taken measurements of the "lip" when the accident occurred, and whether such prejudice resulted from the appellant's delay in giving notice, cannot be determined with confidence at this stage of the litigation.

[64] First, the City had the opportunity to measure the "lip" before the area was repaired. It has evidence to support its statutory defence and, to the extent that this evidence is accepted, the appellant will have to establish that the measurement at that time did not reflect the conditions in August 2011, when she fell.

[65] Second, it is far from clear at this stage that, had timely notice been given, the City would have measured the area of the "lip" before there was any possibility of winter conditions affecting the bricks.

[66] The City did not measure the area where the accident occurred promptly upon receipt of notice. Although an independent adjuster and a field investigator attended at the location indicated in the appellant's notice letter in January and April 2012, they did not photograph and measure the area where the accident occurred. The only explanation for their failure to identify at that time the area of the "lip" is that the appellant's counsel had neglected to respond to a request for

information about the exact location of the accident.[9] The motion judge held that the notice was substantially sufficient, a finding that was not challenged on appeal.

[67] The independent adjuster attended at the location indicated in the notice and took photos and measurements on January 9, 2012. He attended without first asking for more information about the location. As the motion judge observed, he photographed a spot right on the corner of Lonsdale and Spadina rather than the gap in the sidewalk that was located a small distance west of the southwest corner, as described in the notice letter.

[68] There is contradictory evidence as to what Mr. Martino, the second field investigator, knew and what information he had before he took his May 18, 2012 measurements: on discovery he said he had not seen the appellant's photos, while on cross-examination he said he had. In any event, he did not have the information given to the respondent's lawyer about the precise location of the accident before he attended, and he stated that he never learned exactly where the appellant tripped and fell. Nevertheless, on that occasion he took measurements "all along the side of the sidewalk where it meets the interlocking brick boulevard", and he observed that "there was no ledge in that area that exceeded two centimetres".

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[9] This request was contained in a letter from the adjuster to the appellant's counsel dated January 18, 2012, advising that the plaintiff had failed to comply with the notice period and that the City would rely upon s. 42(5) of the Act.

[69] In *Argue* it was clear, at the motion for summary judgment stage, that a timely investigation of the accident location was not possible solely as a result of the plaintiff's two year delay in giving notice. In the present case, it is not clear to what extent, if at all, the appellant's delay in giving notice prevented the City's timely investigation of the accident.

The Incompleteness of the Record

[70] In addition to the existence of material facts in dispute, the record on the issue of prejudice is incomplete. The City contends that there is a "possibility" that the interlocking bricks could have shifted due to temperature fluctuations, freeze-thaw cycles and maintenance activities between August 2011, when the accident occurred, and May 2012, when its employee finally took measurements and photographs. The City states that the bricks could have been higher, lower or at the same level. There is no evidence at this stage about the climate conditions and precipitation, and how the interlocking bricks might have been affected, between the date of the accident and when notice was given in December 2011. In the absence of such evidence, it is not possible to know whether the inability to measure the area before the seasons changed will prejudice the City in its defence.

[71] As in *Fremeau v. City of Toronto* (2009), 61 M.P.L.R. (4th) 279 (Ont. S.C.); *Delahaye v. Toronto (City)*, 2011 ONSC 5031, 87 M.P.L.R. (4th) 100, and *Grant*

v. City of Kingston, 2012 ONSC 6332, 5 M.P.L.R. (5th) 263, leave to appeal refused, 2013 ONSC 4689, 13 M.P.L.R. (5th) 60 (Div. Ct.), we conclude that the question of whether the City is prejudiced in its defence by the appellant's delay in giving notice of her claim is a genuine issue requiring a trial.

Conclusion

[72] For these reasons, we would allow the appeal. With respect to the City's defence under s. 42(6) of the Act, while the appellant has a reasonable excuse for the delay in giving notice, whether the City is prejudiced in its defence as a result of the delay is an issue that shall be determined at trial. The appellant is entitled to costs in the agreed amount of $4,000, inclusive of HST and disbursements.

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