

Slip and Fall and a Failure to Give Notice – Action Statute-Barred

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Crinson v. Toronto (City), 2009 CanLII 6836 (Ont. S.C. J. Feb. 20, 2009) is a rare case in which the court dismissed an action against the City of Toronto, arising out of a slip and fall, due to the claimant's failure to give the statutory notice. On February 4, 2004, Mr. Crinson fell and broke his ankle on an icy sidewalk. He (and a witness who came to his aid) stated that the sidewalks were very slippery – instead of walking normally, pedestrians had to slide over the ice. His injury required surgery and the insertion of a permanent screw to stabilize the bone. He was hospitalized for five days and did not return to work for two months. He sued, but failed to give the City the requisite notice pursuant to s. 44(10) of the *Municipal Act* ("no action shall be brought for the recovery of damages ... 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, the clerk of the municipality") until June 30, 2004. He relied on s. 44(12) of the *Municipal Act*, which provided that the failure to give notice, or the insufficiency of the notice, was not a bar to an action if the court found, with respect to the non-compliance, that there was a "reasonable excuse," and, second, that the municipality was not prejudiced in its defense as a result.

The plaintiff argued that, during his hospital stay, he was given morphine, Tylenol, and Gravol, and was mostly asleep. Afterwards, recuperating at home, he was medicated with Tylenol and Percocet, a narcotic, and claimed that this "knocked [him] out: "I was very, very tired and still had intense pain which clouded my thoughts and affected my ability to focus." He called, as an expert, an eminent pharmacologist to testify as to the effects of Percocet. His opinion was that Crinson's state of mind "was severely impaired during the two weeks" he was taking the drug, but did not specifically testify as to the plaintiff's capacity to make decisions, or the point in time that the drug would likely affect decision-making. None of the doctors or nurses who attended Crinson while he was in the hospital were called to give evidence, although his hospital records were entered into evidence. One of these, the "General Surgery Intervention Flow Sheet," listed, for the period of Crinson's hospital stay, the following under "Neurological" and "meets expected outcomes": "alert & oriented to person, place & time, follows simple commands, responds appropriately to all questions & behaves appropriately; no speech or swallowing difficulty." The plaintiff did not go to see his family doctor until November, 2004.

The court rejected the plaintiff's argument that he had a "reasonable excuse" pursuant to s. 44(12). "[F]rom the plaintiff's admission to hospital on February 4 to his discharge on February 8 he has failed to prove that he was so incapacitated that he was unable to arrange for the required notice to be given to the City." In any event, the June 30 notice fell far beyond the period in which Crinson's mental state could possibly be adversely affected by the drugs. The court also considered an additional argument, referring to *Bannon v. Thunder Bay (City)* [2000] 9 M.P.L.R. (3d) 165 (Ont. C.A.). *Bannon* concerned a predecessor to the *Municipal Act* that imposed a seven-day notice period. The *Bannon* court held that nothing in that municipal legislation precluded the application of the *Limitations Act* ("Where a person entitled to bring an action ... is at the time the cause of action accrues a minor, mental defective, mental incompetent or of unsound mind, the period within which the action may be brought shall be reckoned from the date when such person became of full age or of sound mind"). Here, even assuming this argument had merit, the court held that Crinson, at the time he fell, was not mentally defective or incompetent, nor was he incapacitated. Citing *Bannon*, the court indicated there had to be a distinction between "incapacity and simple failure to address one's mind to the steps, if any, which should be taken to protect one's legal interest." In fact, Crinson "never turned his mind to any action against the City until he was contacted by a lawyer," a lawyer who heard from one of Crinson's friends and then contacted Crinson. Accordingly, his action was statute-barred.

Lastly, the court addressed the liability issue on the merits. The *Municipal Act*, s. 44(4), provided that, except in the case of gross negligence, a municipality was not liable for a personal injury caused by snow or ice on a sidewalk. The day before and the day of the plaintiff's fall, the area experienced precipitation in the form of ice pellets, snow, and rain, with the temperature fluctuating between freezing and thawing. The City's employees testified that they were monitoring weather conditions and, because the temperature was to drop on February 4, ploughing and salting of sidewalks began by 2:00 p.m. that day, including the place where the plaintiff fell ("Beat 8"). It required almost 12 hours to complete treating the 28 kms of streets and sidewalks that comprised Beat 8, depending on the conditions, and it was likely that the "crews had not yet arrived at the area where the

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to the risks that various options present, and provides municipalities with a roadmap for avoiding liability, if not litigation.

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14. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 502-03 (1987).
15. *See, e.g.*, Texas Power & Light Co. v. City of Garland, 431 S.W.2d 511 (Tex. 1968); City of Tukwila v. City of Seattle, 414 P.2d 597 (Wash. 1966).
16. Southern Calif. Gas Co. v. City of Santa Ana, 336 F.3d 885, 896 (9th Cir. 2003).
17. AFSCME, Local 2957 v. City of Benton, 513 F.3d 874, 882 (8th Cir. 2008).
18. *Id.*
19. Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412 (1983).
20. Chicago Bd. of Realtors, Inc. v. City of Chicago, 819 F.2d 732 (7th Cir. 1987).
21. Baltimore Teachers Union v. Mayor and City of Council of Baltimore, 6 F.3d 1012, 1017 (4th Cir. 1993).
22. United States v. County of Muskegon, 298 F.3d 569, 585 (6th Cir. 2002).
23. *See, e.g.*, Contributors to Penn. Hosp. v. City of Philadelphia, 245 U.S. 20 (1917) (eminent domain power cannot be surrendered by contract); Pub. Serv. Co. of Colo. v. City of Loveland, 245 P. 493 (Colo. 1926) (city officials lacked the authority to execute a disclaimer upon behalf of themselves or future city councils that would deprive them of the exercise of their eminent domain power); and Bd. of County Com'rs of Calvert County v. East Prince Frederick Corp., 559 A.2d 822 (Md. App. 1989) (County's policy requiring reserved sewage and water capacity to be used within two years or payment of minimum user fees did not offend the doctrine, as the County lacked the power to create sewer rights in perpetuity and effectively prevent the enactment of future laws to fit changed circumstances).
24. *See, e.g.*, Wheat Ridge Urban Renewal Auth. v. Cornerstone Group XXII, LLC, 176 P.3d 737, 742-44 (Colo. 2007) (agreement to exercise eminent domain enforceable).
25. 478 P.2d 585 (Nev. 1970).
26. Morrison Homes Corp. v. City of Pleasanton, 130 Cal. Rptr. 196, 202 (Cal. Ct. App. 1976).
27. Hudson v. City of Bossier City, 930 So.2d 881 (La. 2006).
28. City of Clinton v. Cedar Rapids & Mo. River R.R., 24 Iowa 455, 475 (Iowa 1868) (Dillon's Rule states that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable).
29. The Seventh Circuit has made the interesting point that if a contract allows a party to pursue a claim for breach of contract, there is actually no impairment of the contract. Horwitz-Matthews, Inc. v. City of Chicago, 78 F.3d 1248, 1250-51 (7th Cir. 1996). Under this rule, one could argue that the Hampton provision renders any Contracts Clause claim moot, because Verizon would retain the ability to sue for breach of contract under the same standards that would apply to a Contracts Clause claim.
30. *See* City of Covington v. Covington Lodge No. 1, Fraternal Order of Police, 622 S.W.2d 221 (Ky. 1981). ML

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plaintiff fell" at the time he broke his ankle. Nonetheless, the court held that the plaintiff failed to prove that the City was grossly negligent in the manner in which it handled the ploughing and/or sanding of the sidewalks. "All municipalities, especially large cities [,] have a monumental task to keep the public safe during all sorts of winter conditions," and the conditions at the time the plaintiff fell were a "unique situation."

The court dismissed the action, concluding with a request that the City not demand costs, as this "would only make the plaintiff's bad situation worse." ML

Ordinances

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4. Westport, CT, Retail Checkout Bags Ordinance (Sept. 5, 2008).
5. *Id.*
6. *Id.*
7. Maui County, HI., Ordinance Pertaining to Plastic Bag Reduction (July 14, 2008).
8. Austin, TX., Resolution No. 20070419-026 (Apr. 19, 2007).
9. *After a Year, Local Retailers Report Less Plastic Bag Usage*, Austin Business Journal, Nov. 18, 2008, at http://austin.bizjournals.com/austin/stories/2008/11/17/daily23.html.
10. Adam Lisberg, *Mayor Bloomberg Paints Grim Economic Picture for New York City 2009 Budget*, New York Daily News, Jan. 30, 2009, at http://www.nydailynews.com/ny_local/2009/01/30/2009-01-30_mayor_bloomberg_paints_grim_economic_pic.html.
11. Anne Thompson, *Paper or Plastic – What's the Greener Choice?* MSNBC.com, May 7, 2007, at http://www.msnbc.msn.com/id/18538484.
12. Joe Eskenazi, *The City's Politicos Made the Enviros Happy by Banning Plastic Bags, But Left Us With More Pollution and Cost*, SFWeekly.com, Jan. 07, 2009, at http://www.sfweekly.com/content/printVersion/1297386. See also, http://sfenvironment.org/downloads/library/2008_litter_audit.pdf.
13. Press Release, IKEA, *The Results are in ... over 92% of IKEA Customers Bagged the Plastic Bag!* (April 2, 2008) (on file with author).
14. Kathy Mulady, *$1280,625 to Fight 20-cent Bag Fee*, Seattle Post-Intellingencer, Sept. 11, 2008, at http://seattlepi.nwsource.com/local/378828_bags12.html. ML

Listserve

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