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INSURANCE LAW BULLETIN

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OCCUPIERS' LIABILITY ACT – BILL 118: LEGISLATURE MANDATES NOTICE OF PERSONAL INJURY TO BE GIVEN WITHIN 60 DAYS TO OCCUPIER OR CONTRACTOR IN SNOW AND ICE CASES

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On December 8, 2020, Bill 118, the *Occupiers' Liability Amendment Act*, received royal assent. As such, there are significant changes coming to occupiers' liability litigation in Ontario. Bill 118 provides that plaintiffs are barred from bringing an action for damages for personal injury caused by snow or ice against an occupier or the occupier's independent contractor unless, within 60 days of the subject loss, written notice of the claim (including the date, time, and location of the loss) has been personally served on or sent by mail to either the occupier or the contractor. Failure to provide notice in accordance with the new 60-day timeframe does not bar actions in the case of death to the injured person. Importantly, if a judge finds that there is a reasonable excuse for the want or insufficiency of the notice and the defendant is not prejudiced in its defence, the failure to provide notice will not bar an action for damages from continuing. Finally, as long as the notice within 60 days is provided to an occupier or independent contractor, the notice requirement is satisfied regardless of whether the action is to be brought against a person that did not originally receive the notice.

There are three benefits immediately apparent from the implementation of a 60-day notice requirement. First and foremost, occupiers, contractors, and their insurers have an additional statutory defence to rely on when defending claims. How powerful such a defence will be remains to be seen. We note that s. 44(10) of the *Municipal Act, 2001* imposes a 10-day notice requirement on plaintiffs who wish to commence an action for damages against a municipality for non-repair of a highway. While defences relying on this 10-day notice have often proven difficult, there have been several instances where the court found in favour of the defendant and found a failure to provide timely notice to be a complete bar to the plaintiff's action. For example, in *Patrick v. Middlesex (County)*, our firm moved for summary judgment on the grounds that the plaintiff had failed to provide the municipality notice of her loss within 10 days (notice was not provided until more than two years after her loss). Justice Grace granted our motion for summary judgment and thus the plaintiff's claim was dismissed. The occupiers' liability 60-day

notice requirement may provide a more reliable and/or stronger defence when compared to its 10-day *Municipal Act* counterpart on the grounds that the plaintiff has a more generous timeframe to comply with the notice requirement and thus should be afforded less sympathy in failing to do so.

The second and third benefits are somewhat interrelated. Because occupiers can expect to receive information regarding a plaintiff's injury within 60 days, they may in some cases be able to learn of and correct certain hazards before they lead to further mishaps. The shorter timeframe will of course also allow the occupier to gather crucial evidence before it is lost. Collecting log notes, witness information, security footage, and other documentation is often much more fruitful within the first few weeks or months of a loss rather than two years later. The early gathering and preserving of evidence will allow for better decision-making regarding which cases to resolve and which cases may be worth defending through to trial.

Reasonable Excuse and Prejudice to the Defendant?

Bill 118 introduces the concepts of "reasonable excuse" and "prejudice to the defendant's defence" to the *Occupiers' Liability Act*, both of which are included under the notice provisions of the *Municipal Act, 2001*.

We note that the jurisprudence under s. 44(10) of the *Municipal Act, 2001*, from which we expect judges to seek guidance in interpreting the new notice provisions in the *Occupiers' Liability Act*, establishes the following factors to consider when determining whether the plaintiff has shown a reasonable excuse for his or her delay in providing timely notice:

- The question to be addressed is whether, having regard to all the circumstances of the case, it was reasonable for the plaintiff not to give notice until the time at which it actually was delivered.

- "Reasonable excuse" is generally provided a broad and liberal interpretation.

- Relief from the notice requirement is not confined to the narrow circumstance of a plaintiff who is so incapacitated as to be unable to give notice to the municipality. Moreover, while the impacts of an accident on the physical health, mental health and career of a plaintiff may be relevant and sufficient to provide a "reasonable excuse", the concept of "reasonable excuse" extends beyond such considerations.

- Lack of awareness of the notice requirement does not constitute a reasonable excuse on its own. However, ignorance of the notice requirement can be an extenuating circumstance to create a reasonable excuse.

In terms of prejudice suffered by the defendant, the jurisprudence provides:

- ...the onus is on the plaintiff to establish both a reasonable excuse and that there has been no prejudice to the defendant as a result of the delay in giving notice. Whether or not prejudice results from the failure to give timely notice is a fact-based inquiry.

- …where a plaintiff does not provide notice within 10 days, an "inherent probability of prejudice arises from the bare fact of the accident and the lack of notice". However, a plaintiff can address that "inherent probability of prejudice" with evidence demonstrating that the municipality became aware of the accident and took action to investigate it in a sufficiently timely manner.

- The length of delay is a relevant consideration. The longer the delay, the stronger the defendant's position and the more difficult it is for the plaintiff to establish reasonable excuse.

Conclusion

The ability for an occupier or independent contractor to successfully rely on the new notice defence provided via Bill 118 will depend on several factors listed above. However, we expect that a failure of a plaintiff to provide timely notice within 60 days will prove to be a more significant hurdle than plaintiffs who fail to provide the 10-day notice required under the *Municipal Act*. Bill 118's royal assent can only be seen as good news for occupiers, contractors, and their insurers as it provides an additional defence to combat slip and fall claims arising out of snowy or icy conditions. It should assist occupiers and contractors in obtaining important evidence to assist both in defending claims and managing risks.