

Before, During and After: Emerging Issues at Every Stage of Motor Vehicle Accident Litigation

Jennifer Stirton

McCall Dawson Osterberg Handler LLP

www.mdolaw.ca

Roadmap:

- **Before:** Ten-day notice period in *Municipal Act, 2001*
- **During:** Prejudgment interest in motor vehicle claims
- **After:** After-the-Event Insurance

Limitation and Notice Periods

- Two-year limitation period generally starts to run on accident date
- Exceptions:
 - Injured child
 - Municipality added by defendant
- Additional statutory notice requirement for road and sidewalk claims against municipalities

Limitation and Notice Periods

- Subsection 44(10):

44(10) No action shall be brought for the recovery of damages under subsection (2) [damages sustained because of municipality's failure to keep highway or bridge in a reasonable state of repair] 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.

- Subsection 44(12):

44(12) Failure to give notice or insufficiency of the notice is not a bar to the action if a judge finds that there is a reasonable excuse for the want or the insufficiency of the notice and that the municipality is not prejudiced in its defence.

Reasonable Excuse for Lack of Notice

- Ensure timely opportunity to investigate
- Plaintiff must establish reasonable excuse and lack of prejudice
- Reasonableness of not giving notice until time it was actually delivered
- Broad and liberal interpretation of "*reasonable excuse*"
- Give words plain and ordinary meaning and consider all circumstances
- Lack of awareness a factor but not reasonable excuse
- Plaintiff or representative capable of forming intention to sue

Prejudice to Municipality

- Length of delay
- Actual notice and investigation of accident
- Other sources of information about circumstances of accident
- Practical effect of lack of timely notice

Patrick v. Southwest Middlesex

- Facts:
 - February 11, 2014: Single vehicle accident due to black ice in Middlesex County
 - June 19, 2015: Notice letters to Southwest Middlesex and Dutton-Dunwich
 - August 6, 2015: Dutton-Dunwich denies jurisdiction
 - November 12, 2015: Plaintiff sues Southwest Middlesex
 - December 17, 2015: Southwest Middlesex defends and raises no issue of jurisdiction
 - February 16, 2016: Middlesex County notified of claim by Southwest Middlesex
 - March 3, 2016: Southwest Middlesex denies jurisdiction
 - March 8, 2016: Plaintiff seeks to add Middlesex County as defendant

Patrick v. Southwest Middlesex

- Limitation period did not prevent addition of Middlesex County:
“To be clear, I am in no way deciding or suggesting that the limitation period and discoverability issues herein are or should be resolved in the plaintiff’s favour. I simply find that they should not prevent the plaintiff from making her desired amendments at this preliminary stage of the litigation.”
- Notice period not appropriately addressed on pleadings motion

Patrick v. Southwest Middlesex

- Reasons of the motions judge:

“Turning to the case before me, I note as a threshold observation that I was provided with no authority indicating or even suggesting that a plaintiff is required to demonstrate satisfaction of the requirements of s. 44(12) of the Municipal Act, or even an arguable case in that regard, as a condition of securing leave to amend a claim so as to add a municipality as a defendant to an action.

To the contrary, all authorities proffered and relied upon by Middlesex County dealt with determination of such ss. 44(10) and 44(12) issues in the context of a motion for summary judgment or trial (or appeals from such decisions). That may simply suggest that parties and courts generally view such issues as ones inherently more suited to determination on the basis of a complete record, rather than the more limited evidence available at a very preliminary pleading stage. ...

In my view, as far as the provisions of the Municipal Act raised by Middlesex County are concerned, the plaintiff therefore is not required to address s. 44(10) or satisfy the requirements of s. 44(12) in the context of this particular motion.”

Patrick v. Southwest Middlesex

- Reasons of the motions judge:

“In particular, in situations where the plaintiff has led evidence making it unclear whether the plaintiff has offered a reasonable explanation for the delay, and/or unclear whether the defendant will be prejudiced in its defence as a result of the delay, then any doubts in that regard should result in the plaintiff being granted leave to make the desired amendments, with the municipal entity thereafter being able to plead and rely upon the alleged failure to provide notice as required, so that the issue can be resolved on a full evidentiary record at trial or by way of summary judgment.”

- Did not decide statutory notice issue in plaintiff's favour but it did not prevent addition of Middlesex County

Azzeh (Litigation guardian of) v. Legendre

- Facts:
 - September 7, 2007: Infant injured in accident while mother driving
 - April 2008 – August 2011: Mother starts and settles own lawsuit
 - October 2011: Mother signs infant's SABS application as "*guardian*"
 - June 2014: Lawsuit started for infant but Sudbury not named as defendant
 - May 31, 2015: Litigation guardian puts Sudbury on notice of claim
 - September 15, 2015: Plaintiff seeks to add Sudbury as defendant

Azzeh (Litigation guardian of) v. Legendre

- Limitation period:
 - Mother was litigation guardian in relation to claim against Sudbury
 - Limitation period started when claim was issued on June 11, 2014
 - Not expired when plaintiff moved to add Sudbury as defendant
- Notice period:
 - Did not run/reasonable excuse until plaintiff had litigation guardian
 - Mother represented him with intention to sue and no conflict of interest
 - No reasonable excuse for lack of notice until he had new litigation guardian

Azzeh (Litigation guardian of) v. Legendre

- Dissent:
 - Low threshold on motion to amend pleading
 - Motions judge not to determine merits of action or amendments
 - "*Myriad credibility issues and issues of fact*" that need evidentiary record:
 - Plaintiff capable of forming intention to sue?
 - Lack of prejudice if Sudbury had information about the accident?
 - Possible explanation for long delay in giving notice?
 - Law not fully developed

Prejudgment Interest in Accident Claims

- Starts when cause of action arises and accrues throughout
- Section 128 of *Courts of Justice Act*.

“A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated from the date the cause of action arose to the date of the order.”
- Starts on date of notice for motor vehicle accident claims per section 258.3(8) of *Insurance Act*

Prejudgment Interest in Accident Claims

- Rate is *"the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding was commenced"*

| | Q1 | Q2 | Q3 | Q4 |
|------|------|------|------|------|
| 2011 | 1.3% | 1.3% | 1.3% | 1.3% |
| 2012 | 1.3% | 1.3% | 1.3% | 1.3% |
| 2013 | 1.3% | 1.3% | 1.3% | 1.3% |
| 2014 | 1.3% | 1.3% | 1.3% | 1.3% |
| 2015 | 1.3% | 1.0% | 1.0% | 1.0% |
| 2016 | 0.8% | 0.8% | 0.8% | 0.8% |
| 2017 | 0.8% | 0.8% | 0.8% | 0.8% |

Prejudgment Interest in Accident Claims

- Exception for general damages in motor vehicle accident claims:
“Despite subsection (1), the rate of interest on damages for non-pecuniary loss in an action for personal injury shall be the rate determined by the rules of court made under clause 66(2)(w).”
- Rule 53.10 of *Rules of Civil Procedure*:
“The prejudgment interest rate on damages for non-pecuniary loss in an action for personal injury is 5 per cent per year.”

Prejudgment Interest in Accident Claims

- Section 258.3(8.1) of *Insurance Act*.

“Subsection 128(2) of the *Courts of Justice Act* does not apply in respect of the calculation of prejudgment interest for damages for non-pecuniary loss in an action referred to in subsection 8.”

- Retrospective application?
 - *Cobb v. Long Estate*
 - *El-Khodr v. Lackie*

Cobb v. Long Estate

- Facts:
 - July 2008: Motor vehicle accident
 - 2008 (?): Notice of intention to commence action
 - December 2009: Lawsuit started
 - Fall 2015: Jury awards \$50,000 in general damages at trial
- Prejudgment interest possibilities:
 - 1.3% - \$4,500
 - 5% - \$17,500
 - 3% - \$10,500

Cobb v. Long Estate

- Section 130 of *Courts of Justice Act* gives discretion to modify prejudgment interest rate
- Factors:
 - Changes in market interest rates
 - Circumstances of the case
 - Advance payment
 - Circumstances of medical disclosure
 - Amount claimed and recovered
 - Conduct of any party that shortened or lengthened proceeding
 - Any other relevant consideration

El-Khodr v. Lackie

- Facts:
 - January 2007: Motor vehicle accident
 - 2007 (?): Notice of intention to commence action
 - April 2015: Jury awards \$225,000 in general damages at trial
- Prejudgment interest possibilities:
 - 5% - \$90,000
 - 2.5% - \$45,000

Cobb v. Long Estate

- Subsection 258.3(8.1) of *Insurance Act* applies retrospectively to all actions tried after January 1, 2015
- Reasons:
 - Legislature does not intend to interfere with vested rights but no vested right to prejudgment interest rate
 - Contextual analysis demonstrates retrospective intent as goal was to bring down cost of claims to achieve reduction in automobile insurance rates

Impact of *Cobb* and *El-Khodr*

- Should apply to unprotected defendants
- Rehearing request denied but leave sought to appeal to SCC
- Litigation to move forward more promptly?
- More requests for judicial discretion regarding prejudgment interest rate?

Jones v. Hanley

- Facts:
 - 2007: Motor vehicle accident #1 – prejudgment interest rate 4.5%
 - 2013: Motor vehicle accident #2 – prejudgment interest rate 1.3%
 - 2017: Jury awards \$425,000 in general damages
- Request for higher prejudgment interest rates because:
 - No advance payment was made
 - Conduct of some defendants lengthened the case
 - One defendant failed to mediate

Jones v. Hanley

- Reasons of the trial judge:

“While the court has discretion with respect to the prejudgment interest rate, in my view the issues set out by the plaintiff do not persuade me it is necessary to exercise my discretion in the awarding of prejudgment interest. Therefore, the prejudgment interest rate will be at the rates set in accordance with the *Courts of Justice Act* for both actions.”

After-the-Event Insurance

- Successful party generally entitled to costs and disbursements
- Court has discretion with respect to costs
- Mitigate risk of adverse costs with After-the-Event Insurance

“After The Event insurance provides comprehensive coverage for automobile and non-automobile personal injury claims. It gives your clients the financial protection they need to continue their case over time and against well-funded foes.”

After-the-Event Insurance

- No standard policy
- Policy limits of \$50,000 to \$100,000
- Coverage:
 - Defence costs and disbursements
 - Claimant's disbursements
 - Costs orders during the proceeding
 - Costs awarded for failing to beat a settlement offer

After-the-Event Insurance

- Insure individual files or entire practice
- Premium not payable until end of file

“The coverage is retroactive to the date of the retainer and the premium is deferred and self-insured, meaning that the premium is only paid upon successful conclusion of the case.”

- Access to justice?

After-the-Event Insurance

“In this case, the costs of advancing even the claims on which the plaintiffs were not successful were extremely large. Also, in general, even the strongest claim of a plaintiff may not be successful depending on how the evidence comes out and how it is perceived by a trier of fact. Without costs insurance, the fear of a very large adverse costs award would cause many plaintiffs of modest means to be afraid to pursue meritorious claims. It is in the interests of justice that plaintiffs be able to pursue meritorious claims without fear of a potentially devastating costs award.”

After-the-Event Insurance

- Impediment to litigation process?
 - Plaintiffs willing to pursue risky claims
 - Insurers' risk of unpaid costs award reduced
 - Increased number of trials?

After-the-Event Insurance

- Rule 30.02 of *Rules of Civil Procedure* requires disclosure and, if requested, production for inspection of:
 - Insurance policy that may satisfy all or part of a judgment
 - Insurance policy that may indemnify or reimburse a party for money paid in satisfaction of a judgment
- *Abu-Hmaid v. Napar*.
 - Question about disclosure of After-the-Event insurance refused
 - Court held disclosure required but not production in this case

After-the-Event Insurance

- *Abu-Hmaid v. Napar.*

“Having considered the matter, I am of the view that the existence of such protection is relevant to the resolution of personal injury disputes, and ought to be disclosed at the same stage as disclosure by the defendant is required under Rule 30.02.

However, I am not convinced that with respect to this novel coverage, the specifics of the policy or the carrier are of any probative value in this case. It may be in the future that the factual situation in a case would justify the coverage quantum details equivalent to what is required by the rule with respect to tort claims.”

- Production of policy ordered in *Fleming v. Brown*

After-the-Event Insurance

- Rule 57.01 of *Rules of Civil Procedure* and disbursement Tariff
- After-the-Event insurance premiums require judicial discretion
- *Markovic v. Richards:*

“While it is clearly the plaintiff’s prerogative to obtain ATE insurance, I do not accept that such premium should be reimbursed by the defendants as a compensable disbursement. Such disbursements have not, as far as I am aware, ever been entertained in Canada and have certainly not been the subject of legislative reform as was the case in the UK. I can think of no policy reason that such should be compensated as a taxable disbursement. Existence of the policy may well provide comfort to the plaintiff, it is however an expense that is entirely discretionary, does nothing to advance the litigation, and may in fact even act as a disincentive to thoughtful, well-reasoned resolution of claims. I do not think it fair and reasonable that an insurer be expected to cover the disbursement for this payment of premiums.”

After-the-Event Insurance

- Same approach in *Foster v. Durkin* and *Valentine v. Rodriguez-Elizalde*
- *Wynia v. Soviskov*:
“[The] cost of insurance coverage is not a proper or necessary disbursement incurred in the conduct of the proceeding. No doubt it provides a measure of financial comfort to the plaintiff, however, it does not arise from the exigencies of the proceeding and relate directly to the direction, management, or control of the litigation used to prove a claim against the defendants. Accordingly, the cost of the insurance coverage is disallowed.”

Thank You!

Jennifer Stirton

McCall Dawson Osterberg Handler LLP

www.mdolaw.ca