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Notice as a Condition Precedent to Bringing Action

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NOTICE AS A CONDITION PRECEDENT TO BRINGING ACTION

Notice, by the plaintiff to the defendant, as a condition precedent to an action against the defendant is, in some cases, expressly required by statute. In the absence of statute, and at common law, the necessity of notice depended upon the particular case. Generally, as is stated in the contract action of *Lent vs. Padelford,* 10 Mass. 425, it is not necessary to give notice to the defendant, prior to bringing the action, when the facts of the case are equally within the knowledge of the plaintiff and the defendant. Nor is it necessary, when the defendant has other means of informing himself of the facts, even though such means are not as adequate or expedient.

No one is bound by law to notify another of that which that other may otherwise inform himself, *Lamphere vs. Cowen,* 24 Vt. 175. On the other hand, when the party stipulates to do a thing, or where the facts relied upon are within the peculiar and exclusive knowledge of the plaintiff, then notice ought to be given to the defendant. *Hayden vs. Bradley,* 66 Am. D. 421. Likewise in *Whitton vs. Whitton,* 38 New Hampshire 127, the court says that the "law implies that notice will be given, where the condition depends upon the act of the person claiming its benefit, of every material circumstance connected with it which is within the party's peculiar and personal konwledge, or which depends upon his choice, and where the other party has no other means of arriving at that knowledge except from the party himself." These general principles apply, not only to contract actions, but to other actions as well.

In actions of damages for injury to the person or to property, the plaintiff need not ordinarily give notice, in the absence of statute, before being entitled to bring action. As was held in the Alabama case of *Railway Co. vs. Wildman,* 24 So. 548, a passenger injured by a carrier need not notify the carrier before bringing action. Nor is it necessary that one, whose cellar drain has been injured, should give notice of the injury to the party responsible, before commencing suit to recover damages, *Ohio & M. Ry. C. vs. Hemberger,* 43 Ind. 462. However, deviations from this rule will be noticed with changes in the circumstances, as are evidenced in the flood cases discussed in 59 L. R. A. 903. There the case of *Eastman vs. Amoskeag Mfg. Co.,* 44 New

Hampshire 143, arrives at the conclusion that the necessity of notice, prior to action, should depend upon whether or not the flooding was by permission of the grantor, and if it was, justice requires notice; while if the flowage was adverse no notice would be necessary. Nor would the law require such notice to abate the flooding as a nuisance and charge the person who built and maintained the dam with the unlawful flowage such dam caused, merely because the land was in the meantime conveyed. But the case of *Pickett vs. Condon,* 18 Md. 412, does require notice prior to an action of damages for injury caused to an upper mill by back water from a lower dam, by one who purchased the upper mill subsequent to the building of the dam, against the grantee of the erector of the dam. But since both parties in this case were not the parties to the original unlawful flowage, the case seems to follow the foregoing general principles in reference to knowledge of possible peculiar facts. These principles practically cover the general law on notice, excepting agreements between the parties, rules of court and statutory enactment.

The question of whether or not agreements between the parties can make notice a condition precedent depends upon the laws of the particular jurisdiction, as to the reasonableness and consequent validity of the particular stipulation. And even where the stipulation is adjudged valid, there is a diversity of opinion whether the notice provided for becomes a condition precedent. The weight of authority is, that if the agreement is valid, the stipulation as to notice is a condition precedent and the performance must be alleged or proved by the plaintiff to entitle him to recover. Some states hold that, unless it is pleaded that notice was given as required by the contract, there is no cause of action, 17 L. R. A. (N. S.) 624. Thus, in the Texas case of *Chicago, Rock Island & Pac. Ry. Co. vs. Thompson,* 97 S. W. 459, 7 L. R. A. (N. S) 191, which was an action of damages against an employer, the court in its discussion of the conflict of laws, came to the conclusion that notice of injury must be given, if a stipulation requiring one is given in the contract, unless the stipulation is adjudged unreasonable and therefore void by the constitution of the particular state. And in *Chicago & A. Ry. Co. vs. Simms,* 18 Ill. App. 68, which was an action for loss by the carrier of the shipper's goods, the court held that the plaintiff could not recover where

he failed to prove the giving of notice, having by special contract made notice of loss within a specified time a condition precedent.

Where statutory provision requires notice to be given before commencing the action, the terms of the statute usually denote the nature of the requirement. Generally, such requirement makes notice "a condition precedent to the right and an essential element of the case of action," *Denver Ry. Co. vs. Wagner,* 167 Fed. 75. But some states construe these statutory requirements to be, not a condition precedent upon the right to sue, but merely a limitation upon the remedy. Prior to these particular provisions, the party injured had a certain length of time to bring action before the statute of limitations acted as a bar. This enabled claims to be brought after long delays, and after evidence was lost and witnesses could no longer be found; thus often it was almost impossible for the party sued to defend himself.

The provision requiring notice cured this mischief. It required the plaintiff to inform the defendant, within a specified time, of the plaintiff's intent and afforded the defendant the just opportunity to investigate and preserve his evidence, *Malloy vs. C. & N. W. Ry. Co.,* 109 Wis. 29. In those states where no specified time was prescribed by the statute the notice had to be served within a reasonable time, and after notice was given, the plaintiff was not deprived of the usual statutory period within which to commence his action, but the defendant was given the just opportunity to protect himself. This, it was said in some cases, was the primary purpose of the provision and therefore notice could be waived, if the complaint was actually served and the action started within the time required for the service of the notice, *Welsh vs. Barber Asphalt Co.,* 167 Fed. 465.

But even those states which expressly state or construe such service of notice to be an absolute requirement and a condition precedent, allow provisions for the waiving of the notice, *Peninsular Stove Co. vs. Osman,* 73 Mich. 570, 41 N. W. 693. And this seems to be the rule when the complaint is filed and the action is actually commenced within the time required for the service of notice, or when voluntary appearance is made in court by the parties. As a general rule then, notice is required, to be served within the time prescribed or within a reasonable time, only when the party sues or intends to sue after the expiration

of the time required for such service by statute, or after such reasonable time, but within the time prescribed by the statute of limitations. *Siebert v. Dudenhoefer Co.*, (Wis.) 188 N. W. 610.

In Wisconsin, notice, as a condition precedent to bringing action, is expressly provided for by statute. Section 402 (5) R. S., which follows Ch. 304, *Laws of 1907*, refers to injuries to the person and requires a notice in writing. Such notice must be signed by the party bringing the action, his agent or attorney, and must be served upon the party or corporation responsible for the damage, in the manner provided for the service of summons, within two years after the happening of the event complained of. It must state the time and place of the happening of the event, a brief description of the injuries and how received, the grounds of the claim and a claim for satisfaction. This section further expressly provides for a waiver of such notice, if the action is brought and a complaint actually served within the two years required for the service of such notice.

In *Gatzow vs. Buening*, 106 Wis. 1, 89 N. W. 1003, this section was held to be applicable to bodily injuries only. *Lawton vs. Waite*, 103 Wis. 244, 79 N. W. 331, which accrued before the passage of the act, construed the requirement of notice, in effect, to be a provision of limitation and not a condition precedent to the commencement of the action. However, the later case of *Klingbeil vs. Saucerman*, 165 Wis. 60, 160 N. W. 1051, which was an action of malpractice for the infliction of bodily injuries, decided that the notice required by this section, was a "condition precedent to the maintenance of an action to recover damages for an injury to the person," whether the action be in tort or on contract. See also *Siebert v. Dudenhoefer Co.* But, by the terms of the statute, such right of notice can be waived by the actual service of the complaint and the commencement of the action within the time limited for the giving of notice, *Hoffman vs. Milw. E. R. & L. Co.* 127 Wis. 76, 106 N. W. 808. Hence, an irregular or insufficient notice, served within the time limit and acted upon by the party without requiring another notice or returning the faulty one, will serve as a waiver by the party receiving the notice. *Maurer vs. N. W. Iron Co.*, 151 Wis. 172, 138 N. W. 636.

Another class of actions, which requires notice before commencement, is that of actions against railroad companies for injury to property by fire from locomotives, or for damages for

stock killed or injured by the company. Section 1816b R. S., provides that such actions cannot be maintained unless notice in writing, signed by the owner of the property or his agent or attorney, is served upon the corporation within one year after the happening of the injury complained of, in the manner provided for the service of summons. Such notice must contain the time and place where such damage occurred and a claim for satisfaction This section also contains a waiver clause, eliminating necessity of notice if the action is brought within the time specified for the service of such notice.

This statute was added by the joint committee in 1898. Its requirement of service is mandatory, but the method of service is permissive merely. The service must be made on the defendant corporation and in its name, and service on a claim agent is insufficient and invalid, *Smith vs. Chicago etc., Ry. Co.,* 124 Wis. 120, 102 N. W. 336. Still, an earlier case held that *delivery* on the general claim agent of the defendant was a sufficient and valid notice. *Atkinson vs. Chicago etc. Ry.,* 93 Wis. 362, 67 N. W. 703.

In all the earlier cases and including, *Ryan vs. Chi. & N. W. Ry. Co.,* 101 Wis. 506, 77 N. W. 894, the notice of this section was held to be a condition precedent to the bringing of the action; but after *Meisenheimer vs. Kellog,* 106 Wis. 30, construed Sec. 4222 (5), R. S., to be a limitation on the remedy merely, the subsequent cases in construing Sec. 1816b R. S., followed, and held in addition that the allegation of the service of the notice was unessential and unnecessary, *Mallory vs. C. & N. W. Ry. Co.,* 109 Wis. 29, 85 N. W. 130. However, since *Klingbeil vs. Saucerman, supra,* has reconstrued Sec. 4222 (5) R. S., to be a condition precedent, no doubt the provision concerning the railroad corporation cases will be likewise reconstrued to follow the earlier condition precedent doctrine.

Another particular requirement of notice is provided for in Section 1339 R. S., for actions maintained against counties, town, cities or villages for injuries sustained to person or property and caused by defects in or failure to repair highways and bridges. In such actions the notice must be served upon the mayor or city clerk in the case of a city, within fifteen days after the happening of the injury complained of; and in the case of counties, towns or villages, within thirty days after the injury, upon the super-

visor of a town, or the county clerk, or one of the trustees of a village. The body of it must state the place of damage; a description generally of the injury sustained and of the defect or lack of repair; and a claim for satisfaction. This section does not contain a waiver clause. Soon after the passage of this act the constitutionality of this provision was attacked, but the court held it was not unconstitutional as placing an unreasonably short limit for the service of notice of injuries; or because of the difference between the limitation in the case of cities and towns, *Daniels vs. Racine,* 98 Wis. 649, 74 N. W. 553.

This notice is not merely a proceeding in an action, but is an essential preliminary to its commencement. Proof that it was given must be made and a complaint wherein it is not alleged is fatally defective. *Schroth vs. Prescott,* 63 Wis. 652, 24 N. W. 405. However, a general allegation that the required notice issued within the prescribed time is sufficient, *Cairncross vs. Pewaukee,* 78 Wis. 66; and the notice itself, in any action, is competent evidence to prove its service, *McDonald vs. Ashland,* 78 Wis. 251, 47 N. W. 434.

As to the contents of the notice itself, the constructions are liberal. In giving the time, place and description of the injury, all that is required to make the notice valid, is good faith with no intent to deceive or mislead. And even inaccuracy in description of the place of the injury, if it does not mislead the adverse party, will not invalidate the notice, *Redepenning vs. Town of Rock,* 136 Wis. 372.

It is necessary that the notice be given in behalf of the plaintiff. In *McKeague vs. Green Bay,* 106 Wis. 577, 82 N. W. 708, where the wife gave notice of her injuries, stating that she would claim satisfaction, the court held that this notice was insufficient for an action by her husband for loss of services. Prior to this decision the rule was otherwise and two actions by two different persons for the same injury could be brought on one notice of injury, as in the case of a minor and his father, *Reed vs. Madison,* 83 Wis. 171, 53 N. W. 547.

The statutory provision admits of no exceptions, but its terms do not apply to damages resulting from the obstruction of a navigable river by reason of the insufficiency or want of repair of a bridge, *Weisenberg vs. Winneconne,* 56 Wis. 24, 43 N. W. 656. Nor do they apply to defeat the action of an administrator

where the party injured died within the time allowed for the service of the notice, and no notice had been served, *McKeague vs. Janesville,* 68 Wis. 50, 31 N. W. 298. It was held not to be necessary to serve it upon a defendant who obstructed a street and was sued with the municipality, *Cairncross vs. Pewaukee,* 86 Wis. 181, 56 N. W. 648. But this decision was overruled by a later case, where it appeared that a private corporation also was liable because it was responsible for the defective condition of the street; such notice of injury upon the municipality did not operate as a notice to the corporation. *Uhlenburg vs. Milw. Gas Light Co.,* 138 Wis. 148, 119 N. W. 810. In no case need the service of notice be personal, and the mailing thereof is sufficient, *Small vs. Prentice,* 102 Wis. 256, 78 N. W. 475.

These principles practically cover the statutory law in this State, on notice before bringing of action. They abrogate the common law in that the majority of the cases coming within their purview consist of facts which are, ab initio, within the knowledge and even equal knowledge of both parties. In summary then, notice of injury before action is a condition precedent in Wisconsin only in the following cases. 1. Where the plaintiff sustains injury to his person, whether in tort or contract, and the defendant is either a corporation or a private person, the plaintiff must serve a written notice of his injury within two years after its happening. Sec. 4222 (5) R. S. 2. Where the plaintiff sustains injury to his property by fire from locomotives, or to his livestock, and the defendant is a railroad corporation, the plaintiff must serve the written notice of the injury within one year after its occurrence. Sec. 1816b R. S. 3. Where the plaintiff sustains injury to his person or property because of defects in or lack of repair of highways and bridges and the defendant is a municipality, the plaintiff must serve his written notice of injury upon the proper official, within fifteen days in the case of a city and thirty days in case of a county, town or village. Sec. 1339. R. S.

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