



The Advocates' Society

PROMOTING EXCELLENCE IN ADVOCACY

April 15, 2014

VIA E-MAIL

The Honourable Madeleine Meilleur
Attorney General of Ontario
7th floor, 720 Bay Street
Toronto, Ontario
M5G 2K1

Dear Attorney General:

Re: Proposed Changes to the Law of Negligence and Joint and Several Liability

As President of The Advocates' Society (the "Society"), I write to offer the Society's comments on your Government's proposed changes to joint and several liability in Ontario. The Society speaks on behalf of litigation lawyers from across the province. With more than 5,000 members, the Society reflects diverse and considered views of the litigation bar. Our membership includes counsel who act on behalf of plaintiffs and defendants, including municipalities, in negligence matters. As such, the Society is in a position to provide a balanced perspective, taking into account the views of various stakeholders, on important issues such as this one.

The Society was asked by email on January 23, 2014 to consider two proposed approaches to the modification of the law of negligence (the "Saskatchewan" model and the "Multiplier" model). The Society has since learned about a proposed third model, a "Combined" model, which features elements of the Saskatchewan and Multiplier models. These proposed models, from the brief description provided to the Society, represent a significant departure from the current law of negligence and, in particular, a significant change to joint and several liability and its application to municipalities in Ontario. This issue has far-ranging ramifications for parties across the province. The Society was originally asked to provide its feedback by January 31, 2014. This deadline was later extended to February 14, 2014.

The Society appreciates the opportunity it had to meet with Kirsten Mercer, Senior Policy Advisor, Justice, Policy and Research, Office of the Premier, and Sabrina Grando, your predecessor's Chief of Staff, on February 3, 2014. At this meeting, the Society, and other bar organizations, voiced our concerns with regard to the short time frame to respond to your Ministry's request for feedback on the proposed models and what we viewed as inadequate consultation with the bar on an important issue. During this meeting, we also learned that the Ministry had engaged in lengthy and extensive consultation with the Association of Municipalities of Ontario (the "AMO") with regard to these issues. Following this meeting, we were provided with an extension to April 16, 2014 to provide our feedback on your Ministry's proposal.

As we indicated in our letter of February 13, 2014, this issue is very complex. Ideally, we would have had access to various sources of information to evaluate and provide a considered,

comprehensive response to the proposed changes. In our letter, we asked for additional information for this purpose. We were advised by letter dated March 20, 2014 that your Ministry has not collected any detailed statistical data or related information on municipal cases or insurance claims. We were directed to the results of a survey conducted three years ago by the Association of Municipalities of Ontario on insurance cost increases. We have reviewed these survey results as well as the report prepared in 2010 by the AMO Municipal Liability Reform Working Group. We note that only 135 of 444 Ontario municipalities surveyed, representing around 50% of the Ontario population, responded to the survey. With respect, we feel this information only tells a part of the story, and only provides a portion of the background that should be considered by the Ministry in proposing such significant changes to the law of negligence.

The Society recognizes the fact that Ontario municipalities have reported being adversely affected by the operation of the principle of joint and several liability to the extent that their insurance premiums have risen and/or public services have been scaled back. Our members who regularly represent municipalities attest to the fact that joint and several liability drives what they perceive to be unfair settlements and places undue burdens on municipalities in cases that proceed to trial.

However, the increases in municipal liability insurance outlined in the AMO's survey results do not, in the Society's view, necessarily lead to a conclusion that any change to the joint and several liability rule is warranted. Other alternatives to address the cost of liability insurance are likely available, might be more equitable, and should be considered.

The Society has not seen evidence that the suggested changes would have the desired result on liability insurance costs. This has not been adequately studied. At a minimum, we would like to see statistics on findings of civil liability in cases involving municipalities, resulting claims by municipalities and types of claims where municipalities have been found jointly and severally liable. While the Society is aware of cases which have resulted in municipalities paying out significantly more than their proportion of a damages award, the Society is currently unaware of the frequency of such decisions and their true impact on municipal liability insurance. Without statistical information, it is difficult for the Society to provide its views on whether the best models for municipal liability are any of the ones which have been proposed, or whether there is another model which could provide a more equitable solution to all parties involved, or whether no change to the law is warranted.

The AMO's report entitled "The Case for Joint and Several Liability Reform in Ontario" dated April 1, 2010, identifies several jurisdictions where there have been changes to joint and several liability. However, there is no indication of the results of those changes, including whether there have been savings to municipalities (in the form of premium reductions, or otherwise) and what the practical impact has been on injured plaintiffs who have not been completely compensated. The legislative protection sought by the municipalities is, we believe, the first of its kind. Although some Canadian municipalities have occasional legislative protection (and sometimes statutory immunity) in specific areas, these are contrasted to the damages limit or cap scenarios proposed in this matter. Limited information has been provided about what if any measures have been adopted in other jurisdictions.

Faced with a lack of information, the Society is in a position to comment only generally on the proposed models and their potential ramifications on plaintiffs and non-municipal defendants involved in an action where joint and several liability is at play. The Society has assembled a Task Force to examine this issue, and the Task Force is made up of counsel who represent plaintiffs, municipal defendants, and non-municipal defendants in these types of cases.

Comments on the Proposed Models

All members of the Task Force agree that the Multiplier model appears to be arbitrary. A liability cap for municipalities that is equal to double their liability is not necessarily logical or justifiable. The Society is aware that variations of the Multiplier model have been enacted in other jurisdictions, primarily in the U.S., but does not have any information on how successful those legislative changes have been to strike a balance between competing interests. The Society is unable to understand, with the information currently available to it, why this particular proposed “multiplier” was evaluated as one of the best alternatives in considering a change to the law of negligence.

The members of the Task Force agree that the Saskatchewan model appears to be more rational and fair than the Multiplier model. However, faced with limited information as indicated above, the Society is not in a position to endorse this model without further study and consultation.

Concerns from the Plaintiff’s Perspective

The key danger for a plaintiff, particularly one who is not at fault, is that a limitation on the damages that could be paid by a municipality could result in a severely undercompensated plaintiff. In any case, defendants are only blameworthy if they are found to be a part of the cause of the plaintiff’s injury. The foundation for joint and several liability is that it is appropriate for a blameworthy party, who has contributed to causing an injury to a plaintiff, to make the plaintiff “whole”, even if there are other blameworthy parties who would share in the financial burden if not for an inability to compensate the plaintiff.

In particular, your Ministry recognizes that the Multiplier model has the potential to result in a seriously injured plaintiff being unable to fully recover their damages in light of a limitation of liability for a municipality which is two times its proportion of damages. The justification for this is that this model would apply only to those cases where municipalities bear the most significant and unfair burden (*i.e.* road authority cases). The natural consequence of this rationale is that the compensation of a seriously injured plaintiff would fall significantly short in those cases where damages may be at their highest.

In cases of catastrophic impairment where a plaintiff cannot be fully compensated, the practical result will be that costs of future care (including treatment, rehabilitation, etc.) will be funded through the Ontario Health Insurance Plan (“OHIP”). In cases where a plaintiff is unable to return to the work force, particularly where a plaintiff is quite young, there could be a significant claim for future loss of income. That person will have to look to other government sources for support. A change in the liability regime could therefore have the effect of shifting the financial burden to the government via OHIP or through a government-sponsored disability support program. Implementing one of the proposed models might ease the burden on municipalities, but would not remove the burden on the taxpayer.

Concerns from the Non-Municipal Defendant’s Perspective

Providing protection to any defendant, including a municipal defendant, who would otherwise be jointly and severally liable to the plaintiff would shift what might be a significant burden to other defendants who have not themselves lobbied for change. This includes individual defendants (whether insured, uninsured or underinsured), corporations, and insurance companies. The AMO appears to advocate that municipalities are often put on the hook because they have the “deepest pockets”, but this ignores that often other defendants have similar assets or high insurance limits. Crown immunity was abolished decades ago. The liability of municipalities should not be limited on the basis that to hold a municipality liable requires that damages be paid out of public funds.

In terms of auto insurers as a specific co-defendant, the Society is unable to comment on whether the proposed changes might affect auto insurance premiums. However, the impact the proposed models may have on auto insurers is a factor that should be considered.

The Society remains of the view that its submissions should constitute part of a dialogue between the bar and the Government. We are very strongly of the view that the proposed changes would constitute a significant change to a settled and important aspect of the tort liability regime in Ontario and should ordinarily be the subject of extensive study followed by an exchange of information and views between the government, affected parties and the legal profession. We are unaware of any circumstances which would justify a complete abridgment of this process and, indeed, the length of time this matter has apparently been under consideration by the government suggests no such urgency.

Yours truly,

A handwritten signature in cursive script, appearing to read "A. Mark", written in black ink.

Alan H. Mark
President