

DRAFT

16 October 2019

The Honourable Doug Downey
Attorney General of Ontario
McMurtry Scott Building, 11th Floor
720 Bay Street
Toronto, ON
M7A 2S9

Dear Attorney General Downey,

Re: Joint & Several Liability Study

As the Mayor of the City of Hamilton, I extend thanks from our entire municipal organization for the opportunity to provide details of Hamilton's experience with joint and several liability.

The approach to handling liability claims in the City of Hamilton is rooted in fairness. City Council has provided Risk Management Services with a mandate to compensate claimants equitably when our investigation indicates a legal liability to do so. To that end we are in complete agreement with the commentary from the Association of Municipalities Ontario (AMO) in their submission to you of October 1, 2019, stating:

Municipal governments accept the responsibility to pay for their fair share of a loss. Always. Making it right and paying a fair share are the cornerstones of our legal system. Citizens expect nothing less of their local governments.

Where liability claims are concerned, joint and several liability exists in contrast to the good intentions of Ontario municipalities. Not only do municipalities pay far more than a fair share in claims resolution, be it through negotiation or court judgment, cost of risk as a whole is significantly inflated. "Cost of risk" encompasses claims payments, claims reserves, insurance costs, and all related administrative costs to managing risk.

An examination of Safranyos et al v City of Hamilton, which is Hamilton's most recent experience with a judicial application of joint and several liability, illustrates clearly how a disproportionate financial burden is placed on what is considered to be a "deep pockets" defendant.

Plaintiff motorist Safranyos, with four children in her vehicle, attempts to turn right onto a four-lane roadway, failing to recognize the excessive speed of an oncoming motorist. A collision ensues. Safranyos is familiar with the intersection and has negotiated this

maneuver many times previously. Allegations against Hamilton focus on the absence of a stop line on the pavement and intersection sightlines, both of which were clearly of secondary influence compared to the actions of both motorists. The trial judge assessed partial liability of 25% against Hamilton, and 25% against the speeding motorist. Hamilton's attempts at appeal were unsuccessful. The speeding co-defendant was successful on appeal and had the action against him dismissed. With no contribution from the speeding co-defendant and only a \$1,000,000 policy limit contribution from Safranyos, a claims expense of approximately \$15,000,000 was the ultimate result for Hamilton and its insurer.

Safranyos is merely one example where a trial outcome has resulted in an onerous financial burden for Hamilton and its insurers due the disproportion created by the presence of joint and several liability. Your office will no doubt be hearing similar accounts of trial judgments and associated disproportionate claims expenses from municipalities across Ontario. The AMO correspondence referenced earlier discusses a number of the more newsworthy cases from recent years. There is no shortage of examples establishing the extreme financial risk of trying a case for Ontario municipalities. In this regard the scales of justice are clearly not balanced.

While it may be possible to calculate the sum total of disproportionate claims payments made by Ontario municipalities and their insurers relative to trial judgments over the years, it would be folly to attempt to calculate the impact of joint and several liability on day to day claims handling, file reserving, and out of court settlements. Suffice it to say, the impact is constant, severe, and obvious in light of the risks of going to trial and factors in virtually all claims handling decisions. The presence of joint and several liability hangs over the heads of risk managers, municipal lawyers, elected officials, and insurers like the sword of Damocles. As a result, claims handling has become an exercise in financial management as opposed to an analysis of municipal law. Plaintiff lawyers are of course well aware of the risk issues arising from joint and several liability and apply it consistently as leverage in file negotiation.

If we look at the Safranyos case in hindsight, the fact circumstance unquestionably justified a vigorous defence by any reasonable analysis of law. Driver error was clearly the significant cause of this unfortunate accident. The intersection did not have a notable accident history, and the allegation of insufficient sightlines seemed dubious at best. An offer to settle capable of appealing to the plaintiffs was not seriously considered for all the above reasons, yet, in hindsight, settling the matter for \$10,000,000 would have brought considerable savings to Hamilton and the insurer.

Judgments like Safranyos and those discussed in the AMO submission have made Ontario municipalities risk adverse in terms of using court for defensible positions with the lack of balance and fairness built into joint and several liability. Consequently, settling claims, often at very high dollar values, has become the lesser of two evils.

The impact of joint and several liability on the municipal insurance market for Ontario municipalities is harsh. Presently the world market is in a hard cycle, largely due to the problematic emerging influence of:

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- climate change
- terrorism
- cyber crime
- environmental impairment
- rapidly rising damage awards
- shrinking market

The state of the world market is exacerbated in Ontario by the continued presence of joint and several liability. In fact, Ontario is one of the few jurisdictions remaining in North America to have unrestricted joint and several liability legislation. A majority of states in the United States have moved away from the strict scheme which still exists in Ontario, as have a number of provinces. Accordingly, the number of insurers willing to underwrite Ontario municipalities has been in slow decline over the last 10 years, drastically reducing competition. Municipalities of all sizes and levels of service, even those with solid loss ratios, are experiencing increases far exceeding the rate of inflation.

Municipalities, like Hamilton, where a full range of services is provided, including transit, police, and public health, are particularly exposed to the significant rate increases.

City of Hamilton General Liability Premium Increase 2000-2019

- Compound premium increases of \$1,612,000 over the last 5 years / Premium 72% higher than 2014
- Compound premium increases of \$1,612,000 over the last 10 years / Premium 72% higher than 2009
- Compound premium increases of \$4,078,000 over the last 20 years / Premium 540% higher than year 2000

City of Hamilton Total Insurance Premium Increase 2000-2019

- Compound premium increase of \$5,569,000 (\$) over the last 5 years / Premium 75% higher than 2014
- Compound premium increases of \$6,145,000 (\$) over the last 10 years / Premium 91% higher than 2009
- Compound premium increases of \$15,030,000 over the last 20 years / Premium 404% higher than year 2000

The cost of insurance represented 0.3% of the City's budget in the year 2000. In 2019, at 0.7%, the amount of budget devoted to insurance premiums has more than doubled. In a market situated to stay hard for the foreseeable future the percentage will surely increase.

Consequently, a greater amount will be removed each year from available funds for the provision of municipal services.

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Ontario municipalities are united in their commitment to paying their fair share of a loss. These same municipalities also understand the need to ensure that accident victims receive fair compensation. Joint and several liability is often cited as a necessary means to ensure fair compensation. It is important to understand, however that the concept of joint and several liability was born of a time when few, if any, social support mechanisms were in place to assist accident victims. Modern times in Ontario have seen the development of accident benefit programs, universal healthcare, employer benefit plans, private benefit plans, title insurance, and workers compensation programs. Joint and several legislation in Ontario exists largely as an anachronism, the primary beneficiaries being not accident victims but personal injury lawyers.

Discussions with staff at all levels in Hamilton illustrate clearly that joint and several liability creates unreasonable and elusive challenges for the entire organization. Sound policies and procedures followed with all due diligence operationally are not sufficient to protect municipalities from large, disproportionate liability losses. Financial staff scramble to find funds for losses, reserves, and insurance premiums. Elected officials scramble to control tax rates in the face of the rising cost of risk. Public Works staff scramble to constantly align policies and procedures to recent case law. Risk Managers scramble to explain confounding losses and to keep the organization abreast of new exposures. Lawyers scramble to provide defenses in an unbalanced, unpredictable legal environment.

Accident victims deserve to be compensated fairly. Determining fairness; however, requires a sound and logical assessment, one which carefully considers the positions of all stakeholders. It stands against reason that damage judgments are rising exponentially in comparison to the inflation rate. It stands against reason that strict joint and several liability legislation continues to exist in a time when numerous social support mechanisms are in place. It stands against reason that jury trials are not permitted for trials involving municipal defendants. It stands against reason that municipalities are considered as “deep pocket” entities when funding shortfalls exist in all areas of municipal service provision.

To level the playing field for Ontario municipalities, the City of Hamilton offers the following:

1. In recognition of the fact that municipalities are not “deep pocket” defendants, full proportionate liability to replace joint and several liability.
2. Minimum automobile liability coverage increased to \$2,000,000.
3. Make jury trials available to municipal defendants.
4. Implement a cap for economic loss awards.

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5. A compensation fund for accident victims when defendants are unable to fund reasonable compensation to their proportionate level.
6. In recognition of the fact that the primary cause of 90% of all serious motor vehicle accidents is driver error, an increased commitment to safety initiatives such as Vision Zero.
7. Establish a provincial and municipal working group to consider input from all stakeholders and to put forward recommendations to the Attorney General.

Again, I extend thanks from our entire municipal organization at the City of Hamilton for the opportunity to provide details of our particular experience with joint and several liability. I am available at your convenience to discuss any questions or concerns you may have with our submission.

The City of Hamilton looks forward to assisting your office however it can in finding a reasonable alternative to joint and several liability, an alternative that will fairly compensate victims while not placing an unmanageable, disproportionate financial burden on municipalities.

Sincerely,

Mayor Fred Eisenberger
(Insert standard sign-off)