TORONTO LAWYERS ASSOCIATION

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**Ministry of the Attorney General**
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Dear Ms. Strom,

**Re: AMO's proposed amendments to the Law of Negligence**

I am writing to you on behalf of the Toronto Lawyers' Association (TLA) in response to the proposal by the Association of Municipalities of Ontario to amend the law of negligence, which was recently brought to our attention. The TLA represents the interests of its 3,200 members who practice law in all disciplines across the GTA. Despite our large constituency, we were not included in the Ministry's call for consultation with respect to this matter. We are, nevertheless, pleased to provide the following comments.

As you know, Toronto is the busiest judicial centre in Canada. Therefore, issues touching on improving and enhancing access to justice for Torontonians are of particular importance to the TLA Board and to our members. The issue of modifications to the *Negligence Act* to provide preferential treatment to municipalities is serious and of universal impact, and we trust that the Ministry will give these submissions due consideration.

Overview of TLA Position

The TLA has serious concerns regarding the proposed amendments to the negligence laws, and the negative effect they would have on access to justice for Ontarians. One of the foundational pillars of our province's tort system is the concept of joint liability among tortfeasors who collectively contribute to a victim's injury. The policy basis for this long-established rule is sound – as between those who caused the injury, and the person who has suffered the injury, the risk of loss should be borne by the negligent actor(s) and not by the injured individual.

To the knowledge of the TLA, the AMO has not provided any principled basis, grounded in policy and objective evidence, for seeking to change this fundamental aspect of our common law. Indeed, the only reason for change advocated by the AMO is its concern about the rising risk of paying damages caused by its negligence. The TLA is unaware of any empirical evidence

establishing that the rising cost of municipal insurance is tied to the risks associated with municipalities' *joint* liability, which they bear along with all other insured individuals. It would, therefore, be unreasonable to effect a significant change to our current system of recovery for injured individuals when it has not been determined either that joint liability is the root cause of the rising cost of insurance, that such a legislative change would result in reduced premiums, or that it is socially desirable to shift the burden of loss to injured individuals.

It is the view of the TLA that a concern over universally rising insurance costs does not ground, on a policy-based analysis, a need to overhaul the law in respect of joint liability, and particularly it does not support such a dramatic and imbalanced modification of the law in favour of municipalities, and against injured persons, and potentially against their (not insolvent) joint tortfeasors, who might also be left responsible for a disproportionate share of the damages jointly caused. In the case of municipalities, the ultimate cost of liability insurance is borne by and spread across the entire tax payer base. That tax base consists of the same people who would otherwise bear the far greater public costs of supporting an undercompensated tort victim through such expenses as social services and publicly funded healthcare. The public would also bear the overarching social burden arising from a delay or inability of the injured person to return to the workforce as a result of having been undercompensated for their losses. Such consequences are antithetical to the traditional tort regime, and would be contrary to the important social purposes of compelling negligent actors to pay damages to compensate persons they have injured – a key component of access to justice.

Discussion

As the Ministry is aware, the common law tort system embraces several key policies including not only compensation for loss, but also deterrence and fairness. It is important that all of these objectives be maintained in order to ensure that the integrity of our judicial system is sustained.

It would appear that the AMO's position may flow from a misapprehension with respect to the basic concepts of joint and several liability. While the *Negligence Act* requires the trial judge to apportion liability among joint tortfeasors for the purposes of determining the amount for which each joint tortfeasor is accountable to make compensation *inter se*, each joint tortfeasor is fully responsible for the entire, indivisible loss sustained by the plaintiff. The court will have determined that *but for* the actions of [the municipality] the injury would not have been sustained. As the Supreme Court explained in the seminal case of *Athey v. Leonati*, the law does not excuse a defendant from liability merely because other causal factors for which it is not responsible also helped produce the harm. Hence, if the court determines that the negligence of the municipality is one of the causal agents resulting in injury, the municipality is liable for the whole of the loss. In cases where there are other actors who also contributed to the injury, then joint liability will be found. The onus is not on the plaintiff to parse out the contributing factors resulting in their loss.

A municipality will not be held liable to pay any damages under our current tort regime unless it is established that it owes a duty of care to the injured party, it has acted without due care, and as a consequence it has caused or contributed to the injury sustained by the person to whom the duty of care is owed. This is the traditional test of causation – but for the negligent conduct, the plaintiff would not have been injured. As the Supreme Court has reiterated in the recent decision

of *Clement v. Clement*, inherent in the phrase "but for" is the requirement that the defendant's negligence was *necessary* to bring about the injury, i.e. the injury would not have occurred without the defendant's negligence. Hence, if a municipality is found to be jointly liable with other wrongdoers, the court has determined that the municipality's conduct was necessary to cause the plaintiff's injury. If the municipality's negligence caused the loss, then it should be held accountable for the loss it caused - not only a fraction of the loss, in situations where it did not act alone.

If the municipality is at fault for the injury for which the laws of this Province has determined they should be held accountable at law, and there are no other parties who are also at fault, then the municipality will be obliged to pay 100% of the plaintiff's loss – there is no change to the insurance cost in that situation. However, here, if the municipality is one of two or more negligent parties, the AMO argues that it should be held less than fully responsible for the loss it caused, although there remains but one loss sustained by the plaintiff. There is no principled basis for distinguishing between the two scenarios, if the only rationale for change is insurance costs. In both cases, the municipality's negligence resulted in an injury. In both cases it should be held responsible for the damages it caused. Taking into consideration the policy ground of allocation of risk – the risk is more fairly to be borne by the municipality that caused or contributed to the loss. It is unfair to transfer the risk of an impecunious or underfunded joint tortfeasor to the injured party – the party least able to bear the loss.

The objective of deterrence should not be undervalued in the current analysis. If, as the AMO would have it, municipalities are not held accountable to fully compensate for injuries they cause, then the public will be put at risk in their interactions with municipalities, be those interactions intentional (such as attendance at a municipal function) or unintentional (such as falling down poorly maintained stairs in a public space). If the municipalities do not have to pay for the consequences of their failure to meet their duty of care, they will be less incentivized to avoid causing the loss through proactive risk control or risk management from the outset. If the deterrence factor is diminished, the risk of negligence leading to personal injury is increased.

Furthermore, the proposed reforms would work an injustice on the injured party. It would place the onus on the plaintiff to establish and quantify the degree of fault of each person who contributed to her loss, when more than one tortfeasor may have caused the damage. It would then impose a further burden on her to seek to enforce the judgment against each and every defendant. This is an unfair and potentially impossible burden to impose on the injured party. The law has never imposed such a burden on a plaintiff. It is sufficient if she can demonstrate that she suffered harm as a result of the negligent conduct of the group of defendants as a whole.

The plaintiff should also not be responsible to ensure that every possible person who contributed to the loss is brought into the proceeding if he wants to ensure full recovery. Compelling the plaintiff to sue every possible wrongdoer to ensure that he is fully compensated would complicate and lengthen legal proceedings, contrary to the goal of achieving efficiency in litigation and promoting access to justice.

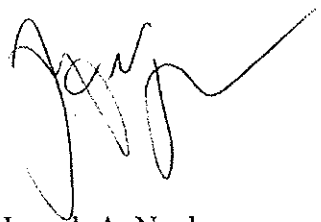
Oftentimes, the plaintiff will not be in possession of the information about all possible contributors to the injury sustained – information which more often rests with the defendants. Removing the defendant municipality's incentive to bring all the potentially negligent actors into

the proceeding is unfair to the plaintiff who is not permitted to bring multiple actions in respect of one injury, and who is subjected to short limitation periods with respect to commencing claims against municipalities, already. As the Law Commission of Ontario noted in its Report on Joint and Several Liability under the Ontario *Business Corporations Act* (Feb. 2011), at p. 8, "joint and several liability is efficient, promotes access to justice and reflects the underlying reality of who has the best access to information in relation to wrongdoing."

A further policy objective of which the Ministry should be mindful is the need for finality and efficiency in the civil litigation process – especially in the overburdened judicial system in this province and in Toronto in particular. The "Saskatchewan Model" of proportionate payments runs contrary to those important objectives. Under the Saskatchewan Model, if one defendant is unable to pay her proportion of the damages award, the shortfall is to be allocated among the remaining defendants and the plaintiff in accordance with the proportions of fault determined at trial. However, this Model is an invitation to further litigation, as it leaves open questions of the measures to which the plaintiff must go to establish that he was unable to recover in full from one defendant. What proof is required to be established if the non-paying defendant is impecunious but not bankrupt? What then if another defendant is unable to make up their newly allocated redistributed amount? And must the plaintiff go back to court to obtain a fresh judgment for enforcement purposes based upon the reallocation? Potentially forcing the plaintiff through a second round of litigation, or even forcing him to take such extraordinary steps to collect the judgment from the wrongdoers is neither fair, nor reasonable. It is contrary to the goals of finality and efficiency in litigation.

Based upon the forgoing factors, it is the view of the TLA that the current system of joint liability for tortious conduct should remain intact, and there should be no special protections granted to municipalities beyond those already established through truncated limitation periods. The TLA thanks the Ministry of the Attorney General for its consideration of these submissions.

Yours truly,



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