

**WIN-WIN LITIGATION STRATEGIES:
DEVELOPING A STRATEGY THAT WORKS**

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I. INTRODUCTION

In dealing with this subject, I am mindful of the fact that this program is designed for a variety of professionals, including lawyers, risk managers and insurance professionals. Each discipline brings a different perspective to the table. However, there is always one thing in common: How do we respond to a claim and minimize the loss? Remarkably, after practicing public liability litigation for 38 years, there is still a significant lack of appreciation for developing a comprehensive, but flexible strategy in responding to claims.

Most municipalities and government agencies have a simple procedure in place when provided with notice of a claim or potential claim. If it is an insurable claim, it will be reported to the insurer and investigated by a local adjuster. In many public institutions, the legal department is not involved. If the matter goes to litigation, the insurer will pass the file on to legal counsel, who will then be in charge of the litigation strategy, subject to getting instructions from the insurer. If there are coverage issues involved, the insurer may defend the claim under a non-waiver agreement or reservation of rights letter, and may even obtain a coverage opinion from another counsel. Often claims get settled and the municipality or government institution involved has little involvement or knowledge in the outcome.

What is wrong with this picture? A number of things:

- History is known to repeat itself – if you are not involved in the process, you can't learn from the mistakes

- A lack of comprehensive strategy, from beginning to end, never produces the best result.
- Strategies should be developed from the outset, and be flexible.
- Strategies should be mindful of the special and unique characteristics that affect claims against government
- Your claims paid record will ultimately affect your premiums
- News Travels fast:
 - Results (whether judgments or settlements) can provoke new claims – even an assumption that any mistake leads to strict liability
 - A significant victory can discourage claims (e.g. WNV litigation)

II. THE BIG PICTURE: ANALYSIS, PROCESS AND STRATEGY

Every claim should be seen in this context.

Analysis

This is the first step in any action. An analysis should be done to determine what are the liability issues and what defences are available. An assessment should be done to look at the broader legal issues giving rise to the claim. For example, if the claim is based on allegations of negligence, there must be a breach of a requisite duty of care arising from a reasonably foreseeable risk of harm to one person, created by the act or omission of another.¹ Thus in looking at the liability issues in a negligence action, an analysis must be done with respect to both foreseeability and causation.

A recent decision of the Supreme Court of Canada is helpful in looking at both of these issues.²

This is a significant case in the area of the law of negligence and puts the brakes on some recent developments in this area. The following is the reported headnote:

H, the operator of a ice-resurfacing machine, was badly burned when hot water overflowed the gasoline tank of the machine, releasing vapourized gasoline which was then ignited by an overhead heater, causing an explosion and fire. H sued the manufacturer and distributor of the machine for damages, alleging that the gasoline and water tanks were similar in appearance and placed close together on the machine, making it easy to confuse the two. The trial judge dismissed the action. He found that H did not establish that the accident was caused by the negligence of the manufacturer or distributor. The Court of Appeal ordered a new trial, concluding that the trial judge had erred in both his foreseeability and causation analyses.

Held: The appeal should be allowed and the trial judgment is restored.

While the Court of Appeal would have preferred a different approach to foreseeability, no error of law or palpable and overriding error of fact or mixed fact and law has been established in the trial judge's approach or conclusion on this issue. There was evidence supporting his finding that H was not confused by the two tanks, notably H's own admission, and the seriousness of H's injury and the relative financial positions of the parties were not matters relevant to foreseeability. [10-12]

With respect to causation, the trial judge did not need to engage in a contributory negligence analysis because he found, not only that H's carelessness was responsible for his injuries, but also that the alleged design defects were not responsible for these injuries. Further, the Court of Appeal erred in holding that the trial judge should have applied the "material contribution" test to determine causation. The basic test remains the "but for" test. This test ensures that a defendant will not be held liable for the plaintiff's injuries where they may very well be due to factors unconnected to the defendant and not the fault of anyone. The "material contribution" test only applies in exceptional cases where factors outside of the plaintiff's control make it impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test, and the plaintiff's injury falls within the ambit of the risk created by the defendant's breach of his duty of care owed to the plaintiff. [17, 21, 23-25, 29]

The Court made an important finding relevant to foreseeability in the context of deep pocket defendants:

The Court of Appeal's second criticism of the trial judge's rejection of reasonable foreseeability was that the trial judge failed to consider policy



matters, namely the seriousness of the injury and the relative financial positions of the parties. The Court of Appeal erred in suggesting that these matters are relevant to foreseeability. Foreseeability depends on what a reasonable person would anticipate, not on the seriousness of the plaintiff's injuries (as in this case) or the depth of the defendant's pockets: Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73, at para. 55.

On the issue of causation and the application of the “but for test” as opposed to the “material contribution test” the court stated:

Much judicial and academic ink has been spilled over the proper test for causation in cases of negligence. It is neither necessary nor helpful to catalogue the various debates. It suffices at this juncture to simply assert the general principles that emerge from the cases.

First, the basic test for determining causation remains the ‘but for’ test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that ‘but for’ the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.

This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in Athey v. Leonati, at para. 14, per Major J., ‘[t]he general, but not conclusive, test for causation is the ‘but for’ test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant.’ Similarly, as I noted in Blackwater v. Plint, at para. 78, ‘[t]he rules of causation consider generally whether ‘but for’ the defendant’s acts, the plaintiff’s damages would have been incurred on a balance of probabilities.’

The ‘but for’ test recognizes that compensation for negligent conduct should only be made ‘where a substantial connection between the injury and defendant’s conduct’ is present. It ensures that a defendant will not be held liable for the plaintiff’s injuries where they ‘may very well be due to factors unconnected to the defendant and not the fault of anyone’: Snell v. Farrell, at p. 327, per Sopinka J.

However, in special circumstances, the law has recognized exceptions to the basic ‘but for’ test, and applied a ‘material contribution’ test. Broadly speaking, the cases in which the ‘material contribution’ test is properly applied involve two requirements.

First, it must be impossible for the plaintiff to prove that the defendant’s negligence caused the plaintiff’s injury using the ‘but for’ test. The impossibility must be due to factors that are outside of the plaintiff’s control; for example,



current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the 'but for' test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a 'but for' approach.

These two requirements are helpful in defining the situations in which an exception to the 'but for' approach ought to be permitted. Without dealing exhaustively with the jurisprudence, a few examples may assist in demonstrating the twin principles just asserted.

*One situation requiring an exception to the 'but for' test is the situation where it is impossible to say which of two tortious sources caused the injury, as where two shots are carelessly fired at the victim, but it is impossible to say which shot injured him: *Cook v. Lewis*, [1951] S.C.R. 830. Provided that it is established that each of the defendants carelessly or negligently created an unreasonable risk of that type of injury that the plaintiff in fact suffered (i.e. carelessly or negligently fired a shot that could have caused the injury), a material contribution test may be appropriately applied.*

*A second situation requiring an exception to the 'but for' test may be where it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act or omission, thus breaking the 'but for' chain of causation. For example, although there was no need to rely on the 'material contribution' test in *Walker Estate v. York Finch Hospital*, this Court indicated that it could be used where it was impossible to prove that the donor whose tainted blood infected the plaintiff would not have given blood if the defendant had properly warned him against donating blood. Once again, the impossibility of establishing causation and the element of injury-related risk created by the defendant are central.*

In this case, the Court of Appeal erred in failing to recognize that the basic test for causation remains the 'but for' test. It further erred in applying the material contribution test in circumstances where its use was neither necessary nor justified.

Process

Although the plaintiff initiates the process, and elects the forum, parties, and causes of action pleaded, the defendant should avail itself of every opportunity to control the process to its advantage. This involves an intimate knowledge of the applicable Rules of Civil Procedure, and



using these Rules to the defendant's advantage. I am not advocating an obstructionist approach to litigation. However, there are many procedural steps which a defendant can take to improve its position. Some of these steps will be discussed below.

Strategy

Strategy is more than the application of process. It is taking a case and conducting a factual assessment and legal analysis and then conducting a risk analysis. Fundamentally, there are only two issues: liability and damages. However, a defendant should consider many other factors, such as:

- Sympathy for the plaintiff, especially in catastrophic injury cases
- Credibility of the witnesses
- Availability of reliable evidence
- Adverse publicity
- Uncertainty of success within the legal system
- Cost of litigation
- Insurance coverage

In dealing with the issue of liability, the defendant should undertake an analysis with respect to the requisite duty of care, foreseeability, causation and statutory immunity defences.

In dealing with the issue of damages, there are a number of factors to consider, including mitigation, remediation versus diminution of value, and betterment.

III. NOTICE OF CLAIM

When a claim is made against a municipality, it goes to the clerk, who is the official receiver of all municipal communications. In most municipalities the clerk is not involved in the risk management or insurance process, and simply moves paper around. When it comes to suing the provincial government there is a specific process prescribed by the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27 or similar legislation. This paper will not deal with the process involved in such claims.

In my experience, most municipalities leave it to the clerk to pass on notice of the claim to the appropriate person, be it the insurer, adjuster, municipal solicitor, or a department head, with little regard to the implications of the claim, and what if any strategy needs to be adopted with respect to the claim.

Similarly, when an insurer or adjuster processes the claim, little regard is paid to developing an initial strategy in response to the claim. Other than an adjuster making a routine investigation of the claim, there is little communication between the insurer and the municipality on the processing of a claim. This compartmentalized approach can lead to significant flaws in responding to a claim.

One example of how the process is flawed is that an adjuster is not bound by the Rules of Civil Procedure. He does not conduct an investigation with a view to producing all relevant documents, whether favourable or unfavourable to the defendant. The adjuster's job is to report the claim, provide essential information to the insurer to determine whether there is a duty to defend and indemnify and assist in setting up a reserve. Once the matter goes to litigation, the insurer or adjuster will refer the file to legal counsel for the insurer. Most legal counsel are outside solicitors specializing in insurance defence work. Many are not experienced municipal

solicitors. By the time legal counsel is involved, significant time may have passed with respect to the claim, with little effort having been made to look at the legal issues involving liability or laying off liability on third parties.

To compound the problem, many plaintiffs or counsel acting for potential plaintiffs will obtain a great deal of documentary information pursuant to a freedom of information request pursuant to MFIPPA or FIPPA. It is not unusual for a defence lawyer to see in the plaintiff's affidavit of documents productions from his own client, which are not in his possession or he would have treated as privileged documents.

IV. INSURANCE ISSUES

Duty to Report

The purpose of this paper is not to provide a detailed analysis of insurance issues pertaining to claims. However, there are some important considerations that need to be addressed at the outset of any potential or actual claim. The first is that there is a duty to report potential claims promptly. Failure to do so, can result in denial of coverage. The duty to report is a duty owed to all potential insurers. There may be multiple insurers involved in a liability claim, where the alleged negligent act occurred many years ago and the damages incurred were as a result of continuous exposure to an adverse condition.

A second and equally important consideration is that an insured cannot compromise coverage in any way. This would include making admissions of liability or in any other way compromising a potential defence of the claim. Frequently, claims are first reported to politicians who are asked to intercede on behalf of their constituents. Politicians should be counseled to avoid this activity completely. Although politicians and councils can and should be

kept informed on the process of a claim, they should not interfere in the process, unless the claim is uninsured.

Coverage and duty to defend

When a claim is made, there may be allegations that if proven to be true, would invoke coverage, whereas other claims would not. The duty to defend by an insurer is invoked on the basis of the pleadings (or notice given of a claim). In essence, the “duty to defend” arises when the underlying complaint alleges any facts that might fall within the coverage under the policy. It is not necessary to prove that the obligation to indemnify will in fact arise in order to trigger the duty to defend. The mere possibility that a claim within the policy may succeed will suffice. In that regard the duty to defend is much broader than the duty to indemnify.³

Multiple policies

Another issue that frequently arises at the outset is what policy should respond. Are the claims all related to an occurrence under a general liability policy or are they covered under a claims made Errors and Omissions Policy? If the claim relates to property damage the claim would fall under a general liability policy which would typically provide that the insurer pay on behalf of the insured all sums which the insured becomes legally obligated to pay by reason of the liability imposed upon it by law arising directly or indirectly out of:

...property damage or injury to or destruction of property including loss of use thereof and including loss of use of property which has not been physically damaged, injured or destroyed, caused by an accident during the policy period, and including continuous or repeated exposure to conditions which result during the policy period in damage or injury to or destruction of property which is neither expected nor intended by the Insured.

In the event the insured is found liable to the Plaintiff, the following would have to be established on a balance of probabilities in order to conclude that the Plaintiff's claims for damages are covered by the Policy:

- (a) the sums which the insured would be legally obligated to pay to the Plaintiff arise out of property damage or loss of use of property;
- (b) the property damage was caused by an accident;
- (c) the accident took place "during the policy period", including "continuous or repeated exposure to conditions which result during the policy period in damage or injury to or destruction of property which is neither expected nor intended by the Insured".

In the event that it cannot be established when in fact the property damage occurred, the Court will likely apply the continuous exposure theory. Courts have applied the continuous exposure theory where the damage occurred continuously throughout a given period of time.

Under the continuous exposure theory, the property damage is effectively deemed to have occurred from the initial exposure to the time when the damage became manifest to the Plaintiff and, if alerted, the insured. Often the initial exposure date depends on which of the theories put forth by experts is used. If the exposure period covers a number of policies, it is critical that an expert report be obtained to determine the cause of the property damage and the exposure period.

The following charts illustrate how one insurer could have different exposures depending on the initial exposure date and manifestation date. In this case the building was built in 1980 and experienced serious structural problems which became manifest after 1998. The insurer went on coverage in 1997. One theory was that the damage commenced on the initial exposure date and became manifest at different times, depending on the evidence. Another theory is that

although there may have been some minor damage at the initial exposure date, the damage would not have been exposed or significant without another intervening event, namely a broken water pipe.

Using the first theory, if 1980 is used as the initial exposure date the insurer's exposure would depend on the manifestation date, as illustrated by the following chart:

Initial Exposure Date	Manifestation Date	Years Between Exposure and Manifestation	Years of Coverage	Percentage of Damage Covered
Jan. 1, 1980 Jan. 1, 1980	Before January 1, 1997	N/A	0	0%
Jan. 1, 1980	Jan. 1, 1998	18	1	5.6%
Jan. 1, 1980	Jan. 1, 1999	19	2	10.5%
Jan. 1, 1980	Jan. 1, 2000	20	3	15.0%
Jan. 1, 1980	Jan. 1, 2005	25	8	32.0%

However, if the structural problems were only exposed as a result of a broken water pipe, and you accepted that the initial exposure date was the date on which the pipe broke, a considerably different result occurs. The following chart uses an initial exposure date of January 1, 1995, with the insurer going on coverage in 1997:

Initial Exposure Date	Manifestation Date	Years Between Exposure and Manifestation	Years of Coverage	Percentage of Damage Covered
Jan. 1, 1995	Before January 1, 1997	N/A	0	0%
Jan. 1, 1995	Jan. 1, 1998	3	1	33.3%
Jan. 1, 1995	Jan. 1, 1999	4	2	50.0%
Jan. 1, 1995	Jan. 1, 2000	5	3	60.0%
Jan. 1, 1995	Jan. 1, 2005	10	8	80.0%

It is up to the insured (and not the current insurer) to give notice to all of the insurers that may have a duty to respond to a claim. Accordingly, all of the insurance issues should be canvassed at the outset. Thereafter, it is up to the insurers to sort out who will go on the record and how the defence costs and indemnification under the policies are allocated.

V. OCCURRENCE VERSUS CLAIMS MADE POLICIES

Liability policies are occurrence based policies. This means that although the property damage must result from liability imposed upon the insured (e.g. an act of negligence), coverage is triggered when the property damage occurred and not when the negligent act took place. As a result there can be a significant gap between the negligent act and the occurrence and resulting loss.

Errors and Omissions Policies and Environmental Impairment Policies are generally claims made policies. This means that coverage is triggered when the claim is made, not when the negligent act occurred or the damage or loss was suffered. Typically, an Errors and Omissions Policy contains a number of exclusions such as Property Damage. Even though the

negligent act may have been an error and omission, because of the exclusion, it is not the errors and omissions policy that responds to a claim for damages involving property damage.

VI. PRESERVING DOCUMENTATION

Many claims relate to negligent acts that took place many years ago. Prior to January 1, 2004, the discoverability of a claim triggered the limitation period with a 6 year limitation period from discovery. After that date, it is still the discoverability that triggers the limitation period, but now is subject to a 2 year limitation period from discovery, and an ultimate limitation period of 15 years from the date of the negligent act. The Ontario Court of Appeal has recently held that the ultimate limitation period does not begin to run until the new *Limitations Act* came into effect on January 1, 2004, which means ordinary claims are not statute barred until January 1, 2019 at the earliest.⁴

This raises the issue of having to investigate and defend a claim relating to an alleged negligent act many years earlier. Many municipalities, in an effort to be efficient, have adopted a records retention/destruction by-law, destroying most records over a specified number of years, save and except certain designated records. I would submit that insurance policies, construction records and building permit records should clearly be exempt. Also inspection records relating to construction, maintenance and permits should be exempt. It is difficult to prove that the defendant adopted a reasonable standard of care in the absence of any records.

VII. INVESTIGATIONS

When a claim is presented, the first order of business should be to investigate the claim. Most municipalities take a hands off approach to this process, assuming the insurer will do what is necessary to investigate and defend the claim. Critical decisions are often made at the beginning of a lawsuit with respect to strategy, without a full appreciation of the facts. With

abbreviated 2 year limitation periods now in effect, this can be costly. Without a proper investigation, defendants may fail to identify third parties to lay off liability until after the limitation period has expired.

Although investigations should always be conducted by independent persons (adjusters, lawyers), nevertheless, the insured should be an important contributor to this process. The municipality or government agency that is being sued is in the best position to put the record together and offer assistance in evaluating the claim. I have found that an early (pre-pleadings meeting) with knowledgeable staff persons is extremely helpful in identifying the issues.

One technique that I use frequently is to advise the client at these preliminary meetings the primary issue is not about determining fault, but to get at the relevant facts. I try to focus on the particular problem that led to the lawsuit to help unscramble the issues. This may lead to a variety of strategies.

Another reason for legal counsel to get involved at an early stage of a claim in order to invoke solicitor client privilege or litigation privilege. It is not unusual for a potential plaintiff to solicit information from the municipality or government agency before advancing a claim. It is more difficult to claim litigation privilege over internal documents in these circumstances. I have seen memos from staff persons to superiors admitting mistakes or proposing defensive action.

VIII. IS FIXING THE PROBLEM AN ADMISSION OF LIABILITY?

The test for liability is whether you fell below the requisite standard of care, regardless of whether you made it better. Making it better does not mean you fell below a requisite standard of care. However, post accident conduct may be relevant and admissible. It will then be up to the

trier of fact to determine if the pre-condition fell below the requisite standard of care. Admitting the evidence at trial is not an admission of negligence.

IX. SHOULD YOU WARN THE PLAINTIFF ABOUT MISSING A LIMITATION PERIOD?

With the shortened limitation periods now in effect, there is an increasing chance that a potential plaintiff will miss a limitation period. The plaintiff could be lulled into a false sense of security when dealing directly with the municipality or its representatives. It is not unusual for politicians or senior staff persons to get involved and make representations that the matter is being investigated and that someone will contact the plaintiff. What happens if nothing happens and the limitation period expires?

An insurer has no legal duty to advise a party of an expired limitation period. However, a party cannot rely on an expired limitation period if by words or conduct, the other party expected the limitation period to have been waived.⁵ The courts have also held that ongoing negotiations do not constitute a waiver of a limitation period, when they are no more than normal dealings between the parties.⁶

If the party is relying on waiver of a limitation period, it must meet the test for promissory estoppel:

The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.⁷

Accordingly, in cases involving potential claims, it is important that the defendants and their representatives do not make statements or conduct themselves in such a manner so as to

raise the defence of promissory estoppel in the case of a missed limitation period, including any admissions of liability or representations concerning the advancing of a claim.

X. LOOKING FOR INDEMNIFICATION, OTHER INSURERS, CO-DEFENDANTS AND THIRD PARTY DEFENDANTS

This is a critical stage in any litigation. A failure to do so may result in missed opportunities to fund a settlement pool or missed limitation periods. Municipalities enter into a myriad of agreements, including subdivision agreements, site plan agreements, development agreements, front-ending agreements, encroachment agreements etc. Also the application process involving various municipal activities may involve an application form that stipulates the terms and conditions applicable to the activity. In some cases, such agreements provide for a complete defence. In other cases, there may be an indemnification clause that allows the municipality to bring in a third party.

In many cases, independent consultants were employed to assist either the defendant or the plaintiff in the activity that led to the claim. These consultants are potential third party defendants.

Frequently, a service provider or contracting party will be asked to add the municipality as a named insured on its policy. This means that the same insurance available to the third party is also available to the municipality. However, if it involves general liability insurance, the policy that should respond is the policy in effect at the time of the occurrence, not the negligent act. Accordingly, an inquiry should be made as to what insurer should be put on notice.

XI. PROTECTED AND UNPROTECTED DEFENDANTS UNDER THE *INSURANCE ACT*

If you are acting with respect to any claim involving a motor vehicle, you need to examine whether you are a protected or unprotected defendant. It is beyond the scope of this paper to look at this issue in detail. For a good guide, I would recommend the Oatley-McLeish Guide to Personal Injury Practice in Motor Vehicle Cases published by Canada Law Book.

Protected defendants include the owner and occupants of an automobile and persons present at the incident. Protected defendants receive preferential treatment with respect to non-pecuniary general damages, past and future income loss, and health care expenses.

For a period of time (under the Bill 59 regime), if an accident was caused by a negligent municipal employee, even though the municipality was a protected defendant as the owner of the vehicle, it was deemed to be an unprotected defendant by virtue of its vicarious liability for the negligence of the employee⁸. This loophole has now been corrected by the Bill 198 amendments to the *Insurance Act*.

Municipalities are also immune from subrogated OHIP claims if it is insured under an automobile policy, even if that policy is not the policy that is obliged to respond to the claim.⁹

XII. APPORTIONMENT OF FAULT BETWEEN PROTECTED AND UNPROTECTED DEFENDANTS

If the defendants are all unprotected, the provisions of the *Negligence Act* apply and the defendants are jointly and severally liable for all damages. If liability is assessed against both protected and unprotected defendants, the provisions of section 267.7 of the *Insurance Act* apply to all heads of damages.

XIII. WORKPLACE SAFETY AND INSURANCE ACT

The WSI permits a worker who is entitled to both benefits under the Act and to bring a tort action against a person who is not a protected defendant, to either claim the benefits or bring such an action. Protected defendants are those employers listed in Schedule 1 and are immune from liability, regardless of whether they are the plaintiff's employer. Unfortunately, municipalities are not Schedule 1 employers in Ontario. However, there are some very important issues for municipalities when causation for the injury is shared by Schedule 1 employers.

Section 29 of the WSI Act provides as follows:

29.(1) *This section applies in the following circumstances:*

1. In an action by or on behalf of a worker employed by a Schedule 1 employer or a survivor of such a worker, any Schedule 1 employer or a director, executive officer or another worker employed by a Schedule 1 employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.

2. In an action by or on behalf of a worker employed by a Schedule 2 employer or a survivor of such a worker, the worker's Schedule 2 employer or a director, executive officer or another worker employed by the employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.

(2) *The employer, director, executive officer or other worker is not liable to pay damages to the worker or his or her survivors or contribute to or indemnify another person who is liable to pay such damages.*

(3) *The court shall determine what portion of the loss or damage was caused by the fault or negligence of the employer, director, executive officer or other worker and shall do so whether or not he, she or it is a party to the action.*

(4) *No damages, contribution or indemnity for the amount determined under subsection (3) to be caused by a person described in that subsection is recoverable in an action.* 1997, c. 16, Sched. A, s. 29.



This provision requires the court to apportion the negligence of the protected defendant, even if not a party to the action, thereby denying the plaintiff those damages that would otherwise be payable by the protected defendant. In turn, the unprotected defendant would receive the benefit of that portion of the liability apportioned to the protected defendant.

An example of the application of this provision would be as follows:

Total damages: \$1,000,000.00

Apportionment of Liability:

Municipality 40%

Schedule 1 Employer #1 30%

Schedule 1 Employer #2 30%

Total damages recoverable by Plaintiff \$400,000.00 against the municipality only.

Unlike a case involving joint tortfeasor liability where there are no protected defendants, the municipality does not become the deep pocket. The municipality should plead the protection of this section of the WSI Act in the appropriate circumstances.

However, if in the same circumstances, one of the defendants is a Schedule 2 Employer, the joint tortfeasor principle will apply to those damages assessed to unprotected defendants:

Total Damages: \$1,000,000.00

Municipality: 40%

Schedule 1 Employer: 30%

Schedule 2 Employer: 30%

The municipality and the Schedule 2 employer are jointly and severally liable for damages totaling \$700,000.00.

XIV. WHEN SHOULD THE DEFENDANT MITIGATE DAMAGES (AS OPPOSED TO THE PLAINTIFF)?

If a defendant is facing a large loss, which the defendant is unable to mitigate, but the plaintiff has the ability to reduce the amount of damages by taking pro-active measures, consideration should be given to a different type of strategy.

The traditional view of mitigation is to plead the plaintiff's failure to mitigate. That of course is a valid defence strategy, but not effective if the plaintiff does not have the financial ability to rectify serious deficiencies. The defendant, in the appropriate case, may wish to enter into a financing arrangement with the plaintiff, without admitting liability, to rectify the problem in order to minimize damages. A good example where this approach was used is *YRCC No. 772 vs. Richmond Hill et al.*¹⁰ In that case, the municipality was the deep pocket defendant in a \$51,000,000 lawsuit relating to a luxury high-rise condominium building which had been found to be structurally unsafe. The remediation costs amounted to approximately \$6,000,000, whereas a failure to remediate would have resulted in a total loss approaching the amount claimed. The municipality only had insurance coverage for \$10,000,000. The municipality entered into a financing agreement with the condominium corporation to assist in the remediation in exchange for an assignment of the proceeds of litigation. Ultimately, the municipality was repaid in full and all of the defendants contributed proportionate amounts based on their insurance coverage.

Another area for concern arises from damage claims based on remediation which far exceed the diminution of value as a result of the deficiency. The law is that damages should be limited to the lesser of the diminution in value or the cost of repair. Unfortunately, since *Tridan*

Developments v. Shell Canada,¹¹ stigma damages have taken on new meaning, and diminution of value claims are becoming more creative and more quantitatively demanding.

One of the difficulties in building code litigation is that the diminution in value is often determined by the cost of rectification. This would not be the case if the code deficiencies were patent as opposed to latent and there is no duty to disclose them to a potential purchaser. In that case, the diminution in value approach may be more favourable than the remediation approach. Another example where the diminution in value approach would be more favourable would be where the total demolition and resulting property value would be less than the cost of remediation. It is advisable to take an early look at damages in any significant case in order to develop the appropriate litigation strategy and hire the right experts.

XV. THE IMPORTANCE OF PLEADINGS

Pleadings are the introduction to every lawsuit. It is the first thing that the opposing party, the opposing lawyer and the judge trying the case will read. The rules of pleadings are simple and straight forward, but often ignored. A good pleading can give a party a significant advantage for the following reasons:

1. It can present the facts in a way that best suits your defence. Often plaintiffs will ignore facts that are not helpful to their case. By pleading these facts succinctly, rather than pleading the standard generic defence, can illuminate the weakness of the plaintiff's case.
2. It will provide credibility to your client's position.
3. It will avoid preliminary attacks, such as demands for particulars, Rule 21 and summary judgment motions.
4. It will define the scope of your documentary productions.

5. It will define the scope of your examinations for discovery.
6. It allows you to control the agenda when it comes to issues.
7. It will induce a weak party to settle.

XVI. PRE-EMPTIVE STRIKES

The first pre-emptive strike to consider is whether the statement of claim contains sufficient particulars in order to plead a proper defence. The Rules of Civil Procedure allow for a Demand for Particulars to be served. It should never be used as a delaying tactic, but as a strategy to produce a better statement of defence and define the issues and limit the scope of the claim. Furthermore, demanding particulars may well expose a plaintiff to the weakness of its case.

A more aggressive strategy is to move under Rule 21 of the Ontario Rules of Civil Procedure to strike a pleading as disclosing no reasonable cause of action or under Rule 20 for summary judgment on the basis that there is no genuine issue for trial

The strategies used in either procedure are distinctly different. In the case of a Rule 21 motion the moving party cannot introduce evidence. It is restricted to legal arguments which assume that the facts pleaded are true, but that it is plain and obvious that the pleadings disclose no reasonable cause of action. In the case of a Rule 20 summary judgment motion, affidavit evidence is permitted and cross-examinations can be held. Thus the factual underpinning for the plaintiff's claim can be examined by the court.

Without any doubt, the Rule 21 motion is more expeditious but should be used with some caution. It was recently successfully used by the Province of Ontario to end a class action related to damages suffered as a result of the West Nile Virus ("WNV"). The Ontario Court of Appeal in a decision released on November 3, 2006¹² reversed the decision of the Divisional Court

which in turn had upheld a decision by the Superior Court motion judge in refusing to strike the statement of claim against the Province of Ontario. The litigation was one of 40 similar actions brought by Ontario residents who contracted the WNV in 2002.

In a unanimous decision of the court written by Mr. Justice Sharpe, the Ontario Court of Appeal struck the amended statement of claim in a Rule 21 motion (that it is plain and obvious that the pleadings disclose no reasonable cause of action).

The decision is important for a number of reasons:

1. it provides new hope for pre-emptive strikes, such as a motion pursuant to Rule 21;
2. it reinforces the test set out by the Supreme Court of Canada in *Cooper*¹³ and *Edwards*¹⁴ to determine whether the Province owes a private law duty of care;
3. discretionary statutory powers, to be exercised in the general public interest, do not give rise to a private law duty sufficient to ground an action in negligence; and
4. the adoption of the *West Nile Virus: Surveillance and Prevention in Ontario, 2001* did not engage the province at the operational level, attracting private law duties for negligent implementation.

(For a more detailed discussion of this case see: “Ontario Court of Appeal Ends West Nile Virus Litigation”, (2006-7) 8 Mun. L.R. Mgt. 27)

Both lower courts had refused to strike the statement of claim. The Divisional Court had noted that the threshold for resisting a Rule 21 motion was quite low and that it was primarily a mechanism to be used for preventing abuses of process. It was stated that even a germ or scintilla of a cause of action will suffice to maintain a claim. This approach would obviously rule out a pre-emptive strike, especially if the plaintiff’s lawyer is creative in his pleading or pleads a novel cause of action.

Although the Court of Appeal agreed with the general tests to be applied in Rule 21 motions, namely that:

1. it is plain, obvious, and beyond doubt that the plaintiff could not succeed;
2. the claim must be read generously with allowance for inadequacies due to drafting deficiencies; and
3. the claim should not be dismissed simply because it is novel,

the court also noted that the question of whether Ontario owes the plaintiffs a *prima facie* duty of care is a question of law that can be decided on a Rule 21 motion.

If you cannot succeed on a Rule 21 motion without the introduction of evidence, a summary judgment motion is available. However, it is much more expensive process and could attract cost sanctions if unsuccessful.

The test used by the courts in assessing a motion for summary judgment under Rule 20 appears settled. As outlined in *Hercules Management Ltd. v. Ernst & Young*, (1997) 2 S.C.R. 165 (S.C.C.), a court must be satisfied that no genuine issue of material fact exists that would require a trial. Further, once the moving party has shown this to be the case, the respondent must establish that their case has a real chance of success in order to avoid having the claim dismissed.

XVII. DISCOVERY

The production rules in Ontario are extensive. There is an obligation to disclose all relevant documents, whether helpful or harmful to your client's position. In most cases, documentary discovery is critical. Documents tell a story. Documents can be put in chronological order. Documents are not subject to faulty memory. In other words, documents can make or break a case.

It is my practice to put together a documents brief as a first stage in any litigation. I use a software program to date and identify all documents, number them in random order, state the source, state the recipient, and give a brief description. I then use the program to list them chronologically and put my document book or books together in chronological order. When I then go through the document books, the documents are telling me a story.

When I receive the opposing party's documents, I will add them to my program. As a result, I will end up with an integrated chronology that will be common to both parties.

Before conducting examinations for discovery, I will insist on full productions from the opposing parties. I will not commence discoveries, until I am fully familiar with the complete documentary record. I will also prepare a chronology of key events and documents to assist me in creating a road map for discovery.

The purpose for discovery is to:

- Know what case you have to meet
- Obtain helpful admissions
- Narrow the issues
- Identify documents to avoid formal proof at trial
- Facilitate settlement

The party examining can specify who he wishes to discover (in the case of a municipality or corporation). To avoid numerous undertakings, I prefer to "negotiate" the most suitable witnesses for discovery. Most counsel agree on this approach. Notwithstanding, I always want to ensure that the person I am examining is the best person for the purpose of meeting the above noted objectives. It may not necessarily be the person proffered by your opponent.

It is often very difficult to get a witness to understand your questions, let alone get a responsive answer, in the absence of some aid, such as a diagram, map or other document. In preparation for discovery, I often use such aids, even if they are not production documents. In some cases, I will have the client, or an expert or other qualified person prepare such a document for that very purpose. Frequently, such documents become the dominant focus of the case throughout discovery, mediation, pre-trial and even trial.

An often neglected rule is that if a party discovers that an answer given by the witness produced on behalf of that party was incorrect, incomplete or no longer correct or complete, that party may provide a correction or more complete answer in writing to all of the other parties.¹⁵ This privilege belongs to the party (not the witness), and therefore can be used by a municipality or government to correct or complete answers given by their own witnesses. This rule has been used by corporate defendants when the party examined on behalf of the corporate defendant was hostile to the corporation.¹⁶

XVIII. THE USE OF EXPERTS

Ordinarily, witnesses are excluded from offering opinion evidence at trial, unless they are qualified as an expert. The admissibility of expert evidence is dependent on four criteria:¹⁷

- a) relevance
- b) necessity in assisting the trier of fact
- c) the absence of an exclusionary rule
- d) a properly qualified expert

Subject to the common law and procedural requirements dealing with the delivery of expert reports, there are many strategic advantages that can be gained by the use of experts.

Some of these include:

- Producing demonstrative evidence to assist your case
- Making your case more understandable to the trier of fact
- Defining the issues
- Promote settlement
- Anchoring your case
- Making your case more credible and persuasive
- Assisting the trier of fact in reaching the right conclusions

Of course, not having the right expert or not producing an effective expert report can be harmful. Accordingly, care should be taken to ensure that an expert is qualified in the area for which he is providing an opinion, and that the report is properly written.

Lawyers need to be the gate keepers for ensuring that the report is properly written. The expert should never become an obvious advocate for your cause. His report should be objective and based on the facts. He should refrain from language such as “I feel that so and so”. Rather he should say: Based on facts so and so, it is my opinion that etc. Counsel should always carefully vet any expert’s report to ensure that it is properly written and will be admissible at trial and not subject to impeachment. This means that it should not be based on junk science, but based on reliable science or experience.

In order to retain litigation privilege over the expert’s file, the expert should be retained by legal counsel. However, once the report is produced, the litigation privilege over the expert’s file may be lost. Therefore care should be taken to ensure that the retainer letter instructing the

expert is limited to providing a factual background for the opinion sought and does not resort to suggesting the result. I also request that all prior drafts of the report are destroyed prior to producing a final report.

I do not believe in hoarding an expert report. The Rules of Civil Procedure (Ontario) require disclosure of the findings, opinions and conclusions of the expert, unless the party who retained the expert claims litigation privilege over the report and undertakes not to call the expert as a witness at trial.¹⁸ However, even before discovery I often agree to exchange expert reports for the purpose of settlement or to scope the issues. When I do so at that stage I will produce the report on a without prejudice basis with the following qualification:

We have agreed that we will exchange the [named reports] at this time on a without prejudice basis to the rights of the parties and shall only be utilized in connection with settlement discussions. It is understood and agreed that the reports cannot be reproduced, distributed, copied or referred to in these proceedings, except with the prior permission of counsel for the respective party. The opinions of the author of the report are subject to change and no expert shall be examined or cross-examined on the opinions contained in this report, unless the report is subsequently produced by counsel for the parties in these proceedings in accordance with the Rules of Civil Procedure.

XIX. ANCHORING

I touched on this subject in dealing with experts. This is an advocacy concept that requires some discussion. Anchors are reference points from which judgments are made. To illustrate the point, a US study has found that people evaluating offers to settle are more likely to accept a \$12,000.00 settlement offer if the opening offer was \$2,000 as opposed to \$10,000.00.¹⁹ If anchoring can influence a result, the lack of anchoring can create uncertainty. Anchors are not limited to numerical concepts. They can be used in many ways:

- By a key exhibit
- By the use of demonstrative evidence

- By the use of settlement offers
- By creating an issues list

I submit that a well prepared exhibit can focus the entire case around that one exhibit. Everyone needs a reference point, including judges. If it is your reference point rather than your opponents, you have a definite advantage over the outcome.

Another example of an anchor can be in a case involving complicated facts that can best be illustrated through an exhibit. Most legal conclusions depend on the judge's understanding of the facts. If he misunderstands the facts, he will draw the wrong legal conclusions. I will often start my submissions by referring to a key exhibit and expanding my arguments from there. The exhibit will become the anchor for my case and hopefully for a successful result.

XX. VOLUNTARY MEDIATION AND SETTLEMENT CONFERENCES

In the appropriate case where the issues are complex and there are multiple parties, there is a real advantage to conducting voluntary mediations or settlement conferences before discovery. This approach allows the parties to conduct a without prejudice assessment of the case before considerable funds and resources are committed to the litigation process. It may help focus the parties on solutions rather than on fault.

XXI. SETTLEMENT STRATEGIES

There are numerous settlement strategies available to a party including:

- Offers to settle
- Offers to contribute
- Mary Carter and Pieringer agreements

This paper is not intended to canvass this subject in detail. However, with respect to strategy, there are a number of points to be made. An offer to settle can be a powerful tool in

limiting costs. If a defendant beats its offer to settle at trial, the plaintiff will be awarded partial indemnity costs to the date of the offer, and nothing thereafter. However, offers to settle should be balanced against the tips on anchoring. A high offer to settle may increase the plaintiff's expectations and make the case more difficult to settle at a reasonable number. Given the fact that a high percentage of cases settle before trial, I would advocate that Rule 49 offers for the purpose of protecting the defendant from adverse cost consequences should only be used when it is clear that the plaintiff is not likely to settle and proceed to trial. Until then, offers to settle should reflect a negotiating strategy which best suits the parties.

Example #1 where liability is in issue:

Plaintiff brings a flooding claim based on nuisance and negligence, where the municipality has statutory immunity for nuisance and the negligence will be difficult to prove. The plaintiff has suffered \$100,000.00 in damages. It is a subrogated claim.

First offer at the close of pleadings: Dismissal without costs

Second Offer following discovery and after you have been able to assess the allegations of negligence: \$10,000.00 to reflect recovery for costs incurred but nothing for damages

Third offer if case does not settle after a pre-trial: Raise the offer to \$15,000.00. Although the risk of losing at trial may be 50%, it is not advantageous to raise the offer to \$50,000.00 for the following reasons:

1. if the plaintiff is successful he will recover \$100,000 plus PJI and costs, even if the offer is \$50,000.00;
2. a nominal increase in the offer to settle will make the plaintiff realize that the defendant is confident of its position, and will only pay nominal damages.

3. The plaintiff may well respond with an offer in the range of \$25,000.00 to \$50,000.00 if he wishes to eliminate the risk of trial.
4. If the defendant had increased its offer to \$50,000.00 a typical plaintiff will assume that the defendant is anxious to settle and respond with an offer for \$75,000.00.

Example #2 where liability is not in issue, but the quantum of damages is in issue:

This is a personal injury claim (not related to an automobile) and the plaintiff is claiming non-pecuniary damages for pain and suffering in the amount of \$100,000 and \$500,000 for pecuniary damages including past and future loss of income. The defendant believes the claims are exaggerated and that there is no real loss of future income for a prolonged period of time. The defendant has assessed the non-pecuniary damages at \$20,000, and the pecuniary damages at \$100,000.00.

No offer to settle prior to discovery.

First offer to settle after discovery: \$20,000.00 plus partial indemnity costs to reflect the damages for pain and suffering but substantially discounting the loss of income claim. This anchors the case at a low threshold for settlement purposes.

No second offer until an offer received from the plaintiff. Raise the offer only slightly.

If the pre-trial judge recommends settlement in the range of \$100,000 to \$150,000 raise your offer to settle to \$75,000.00.

If the case does not settle before trial, increase your formal offer to settle (at least 7 days before trial) to the amount that you believe the case will be assessed at plus PJI and partial indemnity costs to the date of the offer.

XXII. ADVOCACY SKILLS

A brief word about advocacy skills. An effective advocate can make a significant difference in the outcome of a case. Advocacy is the power of persuasion. It is not limited to persuading a judge on your version of the facts or the law. Most cases settle, and therefore your power to persuade extends to clients, opposing counsel and the opposing parties. You cannot be effective in the latter case by being arrogant, rude, obstructionist, or develop legal constipation. The old adage that flies are trapped by honey and not vinegar is appropriate. This means that a courteous and helpful counsel, who responds to e-mails, correspondence and delivers error free and succinct materials is more likely to gain the respect of opposing counsel and judges than one who is unhelpful, tardy and sloppy.

XXIII. CONCLUSIONS

There is no single strategy that will guarantee a victory in every case. Litigants, litigators and the courts are unpredictable. Counsel acting for public sector defendants should use all available resources and develop flexible strategies which best suit the case at hand. This includes the use of effective pleadings, pre-emptive strikes, organizational skills in managing productions, settlement strategies and good advocacy skills.

¹ *Jordan House Lt. V. Menow*, [1974] S.C.R. 239 at p. 247

² *Resurfice Corp. v. Hanke*, 2007 SCC 7

³ *Nichols v. American Home Insurance Co.*, [1990] 1 S.C.R. 801

⁴ *Park Condominium Corporation No. 382 v. Jay-M Holdings Limited*, 2007 O.N.C.A. 49 (ON C.A.)

⁵ *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50

⁶ *Gilles v. Bourgard*, (1983) 41 O.R. (2d) 107 (C.A.)

⁷ *Maracle*, *supra*

⁸ *Vollick v. Sheard* (2005), 254 D.L.R.(4th) 135 (Ont. C.A.)

⁹ *Georgiou v. Scarborough (City)*, (2002), 217 D.L.R. (4th) 613 (Ont. C.A.), leave to appeal to SCC refused

¹⁰ *YRCC No. 772 vs. Richmond Hill et al.*, [2003] O.J. No. 5072 (Ont. S.C.J.) (QL).

¹¹ *Tridan Developments v. Shell Canada*, (2002), 57 O.R. (3d) 503 (Ont. C.A.).

¹² *Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care)*, 2006 CanLII 37121 (ON C.A.)

¹³ *Cooper v. Hobart*, [2001] 3 S.C.R. 537

¹⁴ *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562

¹⁵ Rules of Civil Procedure (Ontario), Rule 31.09

¹⁶ *Machado v. Pratt & Whitney Canada Inc.*, (1993) 17 C.P.C. (3d) 340 (Ont. master); leave to appeal refused 16 O.R. (3d) 250

¹⁷ *R. v. Mohan* [1994] 2 S.C.R. 9

¹⁸ Rule 31.06

¹⁹ Guthrie, Rachlinski, Wistrich, “Inside the Judicial Mind”, *Cornell Law Review*, May 2001