Executive summary:

For over a decade, Ontario municipalities have been voicing concerns that the cost of insurance has been increasing at an unsustainable rate and has primarily blamed the legal doctrine of joint and several liability as a primary culprit of this increase (AMO Municipal Liability Reform Working Group 2010). This is a pressing question, since the current situation has led many municipalities cutting back on services or raising taxes in order to pay for their increasing insurance premiums.

This paper will consist of a survey of the current Canadian legal regime with regards to Canadian tort law as it applies to municipalities, possible tort-law based reforms that could lower insurance costs for municipalities as wells as their possible effects on the broader public, as well an examination of non-tort law-based methods for lowering insurance costs. Finally, there is a list of recommendations based on various time frames including short-term (less than one year), mid-term (one to five years) and long-term (more than ten years).

Insurance markets

Currently insurance prices are increasing at high rates. In Northwestern Ontario they are surpassing twenty percent on average per annum. There are multiple structural reasons for this increase. The publicly available data shows that the increased frequency and severity of natural disasters caused in large part by climate change has forced a reckoning in how insurance companies evaluate risk and therefore insurance premiums.

Joint and Several Liability

While the current legal regime of joint and several liability leaves much to be desired, especially with regards to municipalities that often find themselves in the unenviable position of being the only solvent defendant in a tort action - so call "deep pockets syndrome". However, the law and the courts also recognize that the art of politics forces municipalities to balance many competing objectives and requirements with limited resources. Therefore, they are granted many defenses from torts that are unavailable to equivalent private defendants when assessing their duty of care towards the public. These range from liability shields if minimum maintenance standards are met, a cap on non-economic damages, shortened reporting periods and mandatory bench trials. This paper also examines four suggested reforms to Ontario's tort liability regime: The Saskatchewan model, the multiplier model for road authority cases, full proportional liability, and proportional liability under a liability threshold.

Various investigations into reforming joint and several liability shows that changing the system would create second and third order effects that need to be considered. This report looks to other avenues to lower insurance prices.

More mandatory coverage:

A substantial portion of municipal liability comes from road authority cases. As these cases tend to award substantial awards, municipalities feel that they are unfairly

targeted by litigation due to the perception of having deep pockets. An increase in mandatory coverage in the minimum insurance standards would help close this gap and transfer the liability to the proximate cause of road authority cases - the drivers rather than the municipality in which it happened.

Risk Pools and Mutual Insurance

Risk pools entail similarly situated municipalities bulk-buying insurance to gain efficiencies of scale in insurance. This benefits smaller municipalities by giving them access to economies of scale but offers few incentives for larger municipalities to join such a scheme voluntarily.

A strategy that has been used in multiple jurisdictions such as local councils (municipality equivalents) in the UK and Australia to effectively lower insurance costs has been to form risk pools and mutual insurance schemes. Mutual insurance schemes work best in situations where similarly situated entities can use their acquired knowledge and experience to mitigate risks where possible as well as work together to share their risks where they can't be avoided. The members of the mutual contribute a set amount of money to the scheme and pay claims against the entities in the pool from this sum. At the end of the year, any remaining money can be rolled over to help cover the next year's premiums or be used the increase the size of the pool.

The Belgian Model

Lastly, this report also finds that while more complicated, expanding mutual insurance into a fully fledged Belgian model could be a suitable long-term goal. The Belgian model envisions a scheme similar to the Belgian municipal insurance scheme Ethias which combines a mutual insurance scheme for municipalities and other insurance lines as well as an investment arm that acts in a manner similar to the Caise de Depot du Québec that uses their capital to drive economic development as well as mitigating risks.

Introduction

For over a decade, Ontario municipalities have been voicing concerns that the cost of insurance has been increasing at an unsustainable rate and has primarily blamed the legal doctrine of joint and several liability as a primary culprit of this increase (AMO Municipal Liability Reform Working Group 2010). This paper will consist of a survey of the current Canadian legal regime with regards to Canadian tort law as it applies to municipalities, possible tort-law based reforms that could lower insurance costs for municipalities as wells as their possible effects on the broader public, as well an examination of non-tort law-based methods for lowering insurance costs. Finally, there's a list of recommendations based on various time frames such as quick win (less than one year), mid-term (one to five years) and long-term (more than ten years).

Lay of the Land

The question of insurance pricing is a complex question, for there are a multitude of factors that can influence the premiums paid by the buyer of the insurance policy. A successful insurance company must be able to accurately predict risk from historical data. Due to the complexities of the world, property and casualty insurance rates[1] are often based on fact specific factors and therefore make cross-jurisdiction comparisons much harder.

Due to the fact-specific nature of insurance policies, there's no widely accepted benchmark for insurance rates that are analogous to an index such as the Dow Jones or the TSX composite for stocks or a commodity benchmark such as West Texas Intermediate (WTI) or Western Canadian Select (WCS) for crude oil, let alone an index for municipal insurance. However, what is often reported in trade publications is the total insured loss per year. Since catastrophic loss events play a strong role in determining risks and therefore premiums, an examination of these events is needed. In their 2021 report, the Insurance Bureau of Canada reported catastrophic loss per year – which represents the total of all instances of twenty-five million or more in losses per event. Figure 1 is a graphical representation of these events. This increase in both frequency and severity of catastrophic loss events leads to higher premiums and thus what insurance calls a "hard market". The increase in both frequency and cost of catastrophic loss events such as the Fort McMurray wildfire, is a major driver in changing the actuarial assumptions of risk and therefore forcing insurance companies to re-calculate their rates in the face of a more uncertain future (Grimaldi, et al. 2020). Additionally, events happening in a different country can influence local insurance rates, for natural disasters such as Hurricane Ida put pressure on re-insurance markets, thereby making regular insurance riskier, therefore also increasing premiums (Meckbach 2021).

[1] While rates and premiums may be used interchangeably in common parlance, they are related but distinct elements, since rates measure the risk involved, and premiums are calculated by multiplying the rate by the desired coverage amount.

Furthermore, insurance companies will invest the money received in premiums in between loss events, however, when these loss events are close together or when the returns on bonds are low, the returns are insufficient to help reduce the costs of premiums by an appreciable amount (Meckbach 2021).

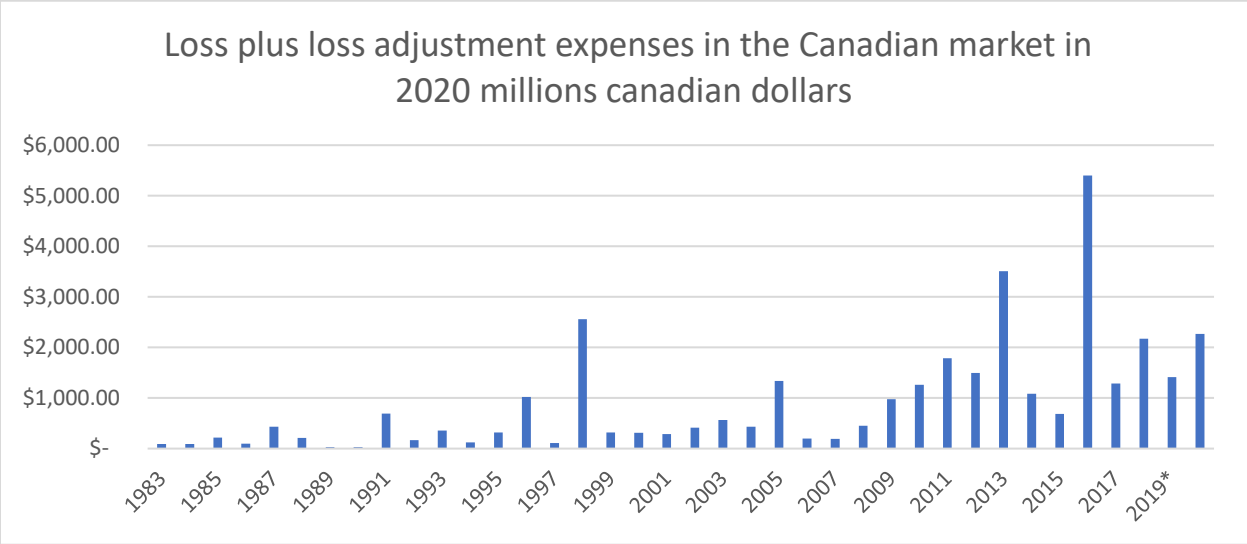

Figure 1 Source: *(Insurance Bureau of Canada 2021)*. Note, claims for 2019 and 2020 are still preliminary and subject to change.

Unsustainability of costs

The data provided in Table 1 shows a large increase in the cost of premiums paid by Northwestern Ontario communities in 2021 compared to 2020, with an average increase of 21.5 percent (NOMA Numbers). Concurrently, the municipality of Black River-Matheson in Northeastern Ontario reported a rise in insurance premiums of one hundred and seven percent (Dunne 2021). A 2011 survey of Ontario municipalities by the Association of Municipalities of Ontario found that smaller communities paid a much larger insurance premium on a per-capita basis than larger communities. Communities with a population under ten thousand residents paid $37.56 per resident whereas communities with a population above seventy-five thousand residents paid $7.71 per resident (Association of Municipalities of Ontario 2011).

A question of Liability

The law of negligence falls under the basket of tort law in Canadian jurisprudence. Torts are civil harms that one party inflicts on another, and the intent of tort law, as the Supreme Court of Canada made clear in it's Cunningham v. Wheeler (1994) decision, is to ensure that the plaintiff is returned - as much as possible - to their previous position. Usually this is done via monetary compensation, however, as the justices wrote in this decision that compensation should be fair to all parties all the while focusing on the plaintiff's actual losses and no more in order to bring the plaintiff as close as possible to their pre-accident condition.

Table 1: Annual increase in insurance premiums for Northwestern Ontario municipalities. Data from NOMA (2021)

Municipality	2020 Cost	2021 Cost	% Change	Note/Potential Cause
Alberton	$32,068.32	$36,569.60	14%	Deductibles increased
Atikokan	$234,931.00	$275,781.00	17%	
Chapple	$36,431.00	$47,406.00	26%	Deductibles doubled
Conmee	$51,822.11	$45,681.18	-11.9%	Lack of claims & renewal date
Dawson	$22,618.96	$26,300.64	16.3%	Deductibles increased
Dorion	$33,119.84	$36,310.60	9.6%	
Dryden	$390,972.00	$448,777.00	14.8%	
Dubreuilville	$50,016.00	$55,606.00	11.2%	
Ear Falls	$91,044.00	$104,730.00	15.0%	Asset additions
Fort Frances	$220,357.68	$261,020.36	18.5%	Airport not included
Gillies	$26,357.88	$30,280.68	14.9%	
Greenstone	$501,569.68	$848,366.80	69.1%	Deductible increased, $5M claims/3YR
Hearst	$212,556.00	$255,929.00	20.4%	Asset additions
Hornepayne	$63,070.00	$102,174.00	62%	Airport & Environmental not included
Ignace			23%	
Kenora	$386,946.44	$445,365.00	24.2%	
La Vallee	$41,746.56	$47,017.41	12.6%	Deductibles increased
Lake of the Woods	$22,341.36	$26,478.56	18.5%	
Machin			16%	
Manitouwadge	$99,100.00	$128,046.00	30%	Deductibles increased
Marathon		$252,530.00	39%	Aviation/cyber excluded, $1.5M claim
Neebing	$68,833.68	$78,954.32	14.7%	Decreased coverage
Nipigon	$84,709.00	$90,714.24	7.1%	
O'Connor	$34,681.00	$38,344.00	10.6%	Helipad excluded
Oliver Paipoonge	$142,534.72	$202,553.08	42.1%	Partially due to claims
Pickle Lake	$80,601.56	$86,486.19	7.3%	
Rainy River	$96,209.56	$109,486.92	13.8%	One claim
Red Lake	$361,399.80	$507,855.80	42%	
Red Rock	$93,788.88	$133,214.72	42.0%	
Scheiber	$85,110.68	$101,217.84	18.9%	No major claims, slip and fall in 2017
Sioux Lookout	$272,301.36	$307,028.20	12.8%	
Sioux Narrow-Nestor Falls	$62,620.00	$70,638.32*	12.8%	No realized loss, cyber excluded
Shuniah	$115,702.74	$122,339.72	5.7%	
Terrace Bay	$72,576.00	$97,061.00	34%	Negotiated - initially 53% increase
Thunder Bay	$2,157,294.60	$2,908,023.87	36%	Cyber excluded
White River	$81,976.00	$93,151.00	13.6%	
		Average	**21.5%**	

From this principle of restitution, Canadian law also inherited from British common law the principle of joint and several liability (*in solidum*). The idea is that the plaintiff is made whole as much as possible, and the defendants are in the best position to determine who else is liable in the tort, and therefore are in the best position to indemnify each other to their level of blame[2] (Law Commission of Ontario 2011).

A common criticism of joint and several liability is that plaintiffs are incentivized to rope-in as many deep pocketed defendants as possible during their litigation – no matter how tangentially involved – in order to ensure that they are fully compensated for their damages (AMO Municipal Liability Reform Working Group 2010, Law Commission of Ontario 2011, Association of Municipalities of Ontario 2011). It is for this reason that the AMO has been asking for the end of joint and several liability for some time with the argument that municipalities are disproportionally affected by joint and several liability and often find themselves as litigation targets and therefore responsible for large sums of money in compensation for torts they are peripherally liable. Furthermore, the most recent examination of this topic was done by the Ministry of the Attorney General in response to a private member's motion from MP Randy Pettapiece (Perth-Wellington) on February 27th, 2014 (Legislative Assembly of Ontario 2014) that sought to amend the Negligence Act to reform the burden imposed on municipalities by joint and several liability. However, after an extensive review, the Ministry of the Attorney General of Ontario chose not to make any changes to the Act due to significant concerns raised, such as the potential burden on injured plaintiffs (Hayes 2014). A summary of the various proposed reform can be seen in Table 2 and an analysis of the recoverable judgements in Appendix A.

With regards to the perception that joint and several liability is a driving factor of insurance and settlement costs, the Law Reform Commission of Saskatchewan (1997) and the Law Commission of Ontario (2011) found that this doctrine has a minimal demonstrated impact on insurance rates.

[2] This is called the 1 precent rule in the literature, under the principle that if there is only one solvent defendant, and they are only peripherally liable in a minimum amount of 1 precent, they are still responsible for the full amount of the judgement under the legal doctrine that the purpose of tort law is to restore the harm done to the plaintiff to the maximum amount possible. While it remains a theoretical possibility, the 2011 Law Commission of Ontario study into Joint and Several Liability was unable to find any empirical evidence of any cases where a defendant who was one percent at fault was liable for one hundred percent of the damages.

Table 2: Comparison of Joint and Several Liability Reforms

	JOINT AND SEVERAL LIABILITY	SASKATCHEWAN MODEL	MULTIPLIER MODEL FOR ROAD AUTHORITY CASES	FULL PROPORTIONAL LIABILITY	PROPORTIONAL LIABILITY UNDER A LIABILITY THRESHOLD.
MECHANISM	• Plaintiff can collect from any defendant. If a defendant is insolvent or unavailable, the other defendants are responsible for the full amount.	• Joint and several liability is maintained except for in cases of contributory negligence. • If a defendant is insolvent or unable to pay, the others are obliged to pay a proportion of their share towards the plaintiff.	• Municipal liability would be capped at two times its proportion of damages, even if this means that the plaintiff cannot recover the full damages.	• Municipal liability would be capped at the loss at which they are responsible for.	• This reform would see proportional liability for those who's share of the liability is under a set threshold, and joint and several liability for those who's share of liability is over the set threshold.
SIMPLICITY	• Plaintiff does not have to identify all of the tortfeasors at the time of filling their suit.	• Formula is more complicated than the current system of joint and several liability due to the re-allocation formula. • It does create a ceiling on the liability for a defendant that is substantially less than the liability under joint and several liability. This liability ceiling can reduce uncertainty when negotiating settlements.	• This method does not have a complicated re-allocation formula, and the cap on damages limits theoretical liability. • This liability ceiling can reduce uncertainty when negotiating settlements.	• This method is very simple and does not have a re-allocation mechanism.	• The major complexity of this system would lie with setting the proper threshold.
IS THE PLAINTIFF OR TORTFEASOR FAVOURED?	• The primary purpose of the law is to make the plaintiff whole, irrespective of which	• Under this system, the tortfeasor's liability is capped at their share of the damages, plus	• The tortfeasor is favoured in this approach since a plaintiff in road authority cases would	• The defendant is favoured in this approach since this has the lowest liability for the defendant.	• This depends on where the threshold is located. • Low threshold would favour plaintiffs, and a

	JOINT AND SEVERAL LIABILITY	SASKATCHEWAN MODEL	MULTIPLIER MODEL FOR ROAD AUTHORITY CASES	FULL PROPORTIONAL LIABILITY	PROPORTIONAL LIABILITY UNDER A LIABILITY THRESHOLD.
	party ends up paying for the judgement.	their share of the other defendant's share.	receive less compensation than they would under the present circumstances.		high threshold would favour defendants.
EFFECT ON OTHER GOVERNMENTS AND GOVERNMENT SERVICES	•Promotes the public policy goal that municipalities fulfill their duty of care towards the public. •Using joint and several liability ensures that the tortfeasor rather than social safety net compensates the plaintiff. •Stapleton (1995) finds that shifting the economic shortfall onto the plaintiff and therefore the social safety net is a net economic loss. (in the UK legal context)	•Might weaken the public policy goal regarding municipalities fulfilling their duty of care towards the public without countervailing regulations. •The cap on the liability for tortfeasors in cases of contributory negligence means that the plaintiff is unable to fully recover their damages, and thus may be more reliant on government programs down the road such as ODSP.	•Might weaken the public policy goal regarding municipalities fulfilling their duty of care towards the public without countervailing regulations. •The cap on the liability for tortfeasors in cases of contributory negligence means that the plaintiff is unable to fully recover their damages, and thus may be more reliant on government programs down the road such as ODSP.	•Might weaken the public policy goal regarding municipalities fulfilling their duty of care towards the public without countervailing regulations. •The cap on the liability for tortfeasors in cases of contributory negligence means that the plaintiff is unable to fully recover their damages, and thus may be more reliant on government programs down the road such as ODSP	• Depends on where the threshold is located. • A low threshold would essentially have an outcome similar to the current joint and severability regime except in very peripheral cases • A high threshold would essentially create a regime of proportional liability except for parties that bear considerable blame for the harm. In this case this would be a regime that resembles full proportional liability.
EFFECT ON THE COST OF INSURANCE	•Law Commission of Saskatchewan (1997) and Law Commission of Ontario (2011) find that "deep pockets syndrome" has a small role in determining the price of insurance.	•This would create a ceiling on liability for the insured and reduce the incentives on deep pockets syndrome. •As with the finding of the Law Commission of Saskatchewan (1997) and the Law Commission of Ontario	•This would create a ceiling on liability for the insured and reduce the incentives on deep pockets syndrome. •As with the finding of the Law Commission of Saskatchewan (1997) and the Law Commission of Ontario	•This would create a ceiling on liability for the insured and reduce the incentives on deep pockets syndrome. •As with the finding of the Law Commission of Saskatchewan (1997) and the Law Commission of Ontario	• This would create a ceiling on liability for the insured and reduce the incentives on deep pockets syndrome. • As with the finding of the Law Commission of Saskatchewan (1997) and the Law

	JOINT AND SEVERAL LIABILITY	SASKATCHEWAN MODEL	MULTIPLIER MODEL FOR ROAD AUTHORITY CASES	FULL PROPORTIONAL LIABILITY	PROPORTIONAL LIABILITY UNDER A LIABILITY THRESHOLD.
		(2011), deep pockets syndrome plays a minor part in setting insurance premiums.	(2011), deep pockets syndrome plays a minor part in setting insurance premiums.	(2011), deep pockets syndrome plays a minor part in setting insurance premiums.	Commission of Ontario (2011), deep pockets syndrome plays a minor part in setting insurance premiums.
OTHER REMARKS	• Supported by every major law organization (Ontario Bar Association [OBA], The Advocates' Society [AS], Ontario Trial Lawyer's Association [OTLA], The County and District Law Presidents' Association [CDLPA]). • The Law Commission of Ontario examined the question of Joint and Several Liability in 2011 (with a primary focus on auditors, but general theme also applies to municipalities).	• Works in Saskatchewan due to no-fault insurance. The interplay with Ontario's at fault insurance would be much larger on plaintiffs. • Would need other changes in Ontario's Negligence Act • Contributory negligent plaintiffs have not caused harm to others, so should they be treated like defendants? • Poses questions as to why municipalities have a different liability allocation than other government associated entities such as but not limited to Hospitals, Schools, Universities, and Crown Corporation.	• Evidence from the United States shows that cap on damages without concurrent changes in duty of care can lead to worse risk management practices. (Law Commission of Ontario 2011, Born, Karl and Viscusi 2017)	• This system creates the largest liability shield for municipalities of all five methods. • This also has the potential for creating the largest strain on other government services. • Evidence from the United States shows that cap on damages without concurrent changes in duty of care can lead to worse risk management practices. (Law Commission of Ontario 2011, Born, Karl and Viscusi 2017) • Poses questions as to why municipalities have a different liability allocation than other government associated entities such as but not limited to Hospitals, Schools, Universities, and Crown Corporation	• In many ways, the selected threshold for this legal regime is quite arbitrary. • If the threshold is low, this simply becomes a more complicated version of joint and several liability with extra steps to determine if a peripheral wrong doer falls under or over the joint and several liability thresholds. • Conversely, if the threshold is high, this becomes a more complicated version of full proportional liability with those principally liable under joint and several liability.

The question of Duty of Care

The principal way that municipalities become liable for acts that occur under their jurisdiction is decided on whether they owe a duty of care to the public or an individual at a particular point in time. This was first articulated in the United Kingdom's House of Lords in the case of *Anns v. Merton London Borough Council* (1978), and created the "Anns Test" for determining if the local council had a duty of care towards the owners or occupiers of property. The test is a two-stage test:

- It requires first a sufficient relationship based on reasonable proximity.
- Are there considerations which aught to negate or reduce the scope of duty.

Answering the first question in the affirmative and the second question in the negative indicates that a duty of care exists.

This test was imported into Canadian jurisprudence in the Kamloops v. Nelson (1984) decision of the Supreme Court of Canada. Of special interest to municipalities, the Just v. British Columbia decision clarified that core policy decisions (that is to say actions that are based on public policy considerations such as economic, social and political considerations) done in good faith are exempt from negligence liability since the government's legislative and executive functions can't be overruled by the judicial branch (1989). For example, the Province of Ontario codified the core policy decision for road maintenance under Ontario Regulation 239/02, and therefore shielding municipalities from liability if they maintain their roads in a reasonable state of repair (Government of Ontario 2018).

The standard for reasonableness was further clarified with respects to the law in Giuliani v. Halton (Municipality) (2011) that held that reasonably forceasble circumstances (in this case snow in the weather forcast) can create a duty of care (with respect to pre-positioning road clearence crews for efficient removal of snow). Furthermore, Fordham v. Dutton-Dunwich (Municipality) (2014) held that municipalities only have a "[…] duty to prevent or remedy conditions on its roads that create an unreasonable risk of harm for ordinary drivers exercising reasonable care. In other words, a municipality's standard of care is measured by the 'ordinary reasonable driver'," but does not "extend to making its roads safer for negligent drivers."

However, it should also be noted that this duty of care also does not extend to activities that are dangerous on their face. The case of Eric Winters v Corporation of Haldimand County (2013, 2015) centred around Eric Winters a teenager who climbed into a tree in a municipal park in the Haldimand County and was rendered paraplegic by falling out of the tree. The Court's found that climbing a tree is an inherently dangerous activity, and that it would be unreasonable to put signs prohibiting climbing a tree and then patrolling the park for compliance. In the words of the judgement, "[…] The County does not have limitless resources. It ought not to be obliged to manifestly forbid all activities which, with hindsight, might prove to be dangerous. There has to be a reasonable limit to such prohibitions on human activity."

The "Americanisation" of Canadian law

Some aspects of the practice of Canadian law borrow heavily from both it's historic roots in the British system of Common Law and the American Legal system due to geographic proximity and the practice of many Canadian jurists pursuing higher legal education in American universities. In their respective law review articles Linden (2002) and Klar (2010) find that Canada has adapted a middle-way with regards to their law of torts with respect to the Commonwealth and American traditions. As the Honourable Justice Linden mentioned in his paper, "[…] Canadian tort law has become a hybrid with U.K. roots, U.S. branches, and Canadian leaves sprouting on every branch".

As such, many aspects of "tort reform" that are often proposed in the United States are already found in Canadian law as a way of avoiding many of the excesses of American law (Klar 2010). For example, due to the federated nature of Canadian courts and the lower level of political polarization of Canadian courts, there is much less incentives in Canada to engage in forum shopping – that is to say strategically choosing where to file a lawsuit in order to maximise one's chance of a favourable court ruling. Furthermore, the rules and procedures of Canadian courts offer more limited opportunities for questioning a hostile witness under oath. Unlike American courts, Canadian courts only allow one attempt at "examining for discovery" per witness, as well as limiting the time and scope of this process (Vesely 2013).

Vesely also mentions that Canadian courts award lower awards for Punitive and Compensatory damages. Justice Dickson's decision for the Court in Andrews v. Grand & Toy Alberta Ltd. (1978) to put a cap on "pain and suffering" awards in Canada, under the theory that there isn't a medium of exchange that adequately measures the pain, suffering and the loss of function. Nevertheless, the majority opinion also held that a sufficient upper limit for *reasonable compensation* was in the neighbourhood of one hundred thousand dollars[3].

With immediate relevance to municipalities and joint and several liability the cost shifting and loser pay's principle – that is to say that the loser of a legal action has to pay for the reasonable costs of the winner – has a gatekeeping function for reducing the number of frivolous lawsuits that get filed in Ontario courts (Law Commission of Ontario 2011).

Other Solutions

The 2014 investigation by the Ministry of the Attorney General into joint and several liability found that changing the rule of joint and several liability would not be in the public interest. The 2014 investigation found that the changes in joint and several liability would have a minimal impact on insurance costs and would place burdens on injured plaintiffs (Hayes 2014). The evidence reviewed here is congruent with this conclusion. There are other avenues available for lowering insurance costs, and here we will

[3] This value is assessed annually, and as per Laurie v Her Majesty the Queen in Right of Alberta (2021) currently sits at $365,000 dollars.

examine the creation of risk pools, mutual insurance, the Belgian model of municipal insurance and increases in mandatory coverage for auto insurance.

Risk Pools and Mutual Insurance

Risk Pooling

One way to lower insurance costs is for regions to buy insurance together as a group in order to use efficiency of scale to pool their risks[4] and use buying power to lower insurance premiums. Waterloo region has pooled their insurance, it's three cities and four townships, and as a larger entity the Region was able to negotiate better coverage and obtain lower rates than they could as individuals. However, since this scheme mostly helps smaller municipalities as large municipalities have little to gain in this scheme, there is difficulty in having regions create new groups voluntarily (Dunne 2021).

Mutual Insurance

Unfortunately, the risk pool approach is predicated on there being a robust insurance market for Ontario municipalities. Australia faced a situation in 1992 where many communities found themselves without insurance or found their insurance unaffordable after the withdrawal of private insurance firms in the Australian market (Victorian Auditor-General Office 2018). In response, the government of the State of Victoria mandated the creation of a mutual insurance scheme under the name of Civic Mutual Plus - now currently known under the name of Liability Mutual Insurance (LMI) – to be run under the governance of the Mutual Association of Victoria.

The LMI works as a mutual indemnification scheme with reinsurance. In other words, the subscribing local councils mutually indemnify themselves from a pool of funds collected by LMI, with reinsurance for liabilities above a set monetary threshold. A recent Auditor-General's report analysing the value for money of the mutual insurance scheme shows that this scheme has provided price stability for liability insurance over a 25-year timeframe, managed to reduce costs by about 10-15 percent, and provided much higher coverage for minimal extra cost compared to equivalent private insurance (Victorian Auditor-General Office 2018).

Historically, the United Kingdom used mutual insurance via Municipal Mutual Insurance Limited, where at one point it controled ninety to ninety -five percent of the municipal insurance market in the UK. However, this scheme collapsed in 1992, and many municipalities were still repaying levies on those losses into 2018 (Marrs 2018). In order to find a more affordable alternative to the public insurance market, local councils in the London area of the UK re-instituted a mutual scheme with the Local Government

[4] This is based on the principle that all things being equal, a larger pool of participants in an insurance scheme lowers the variability of claims from year to year and thus lower their risk of running out of assets to cover their claims (American Academy of Actuaries 2007).

Mutual. In the first few years of this new scheme, savings have been realized by members (Local Government Mutual 2021).

Both of these two mutual schemes achieve lower prices by being non-profit entities and by focusing on a narrow segment of a market, they can better recognize potential risks and therefore share best practices to mitigate risk and tailor coverage (Victorian Auditor-General Office 2018).

Belgian Model

The Belgian model is based on the Belgian state-owned insurance and investment company Ethias. This company was founded in 1919 as a mutual insurance for municipal and provincial governments against fire, lightning, and explosions under the original name of "Société Mutuelle des Administrations Publiques" (SMAP). Today Ethias SA is the main holding company that is owned by the Belgian federal government, Wallon Region, Flemish Region and EthiasCo, which is a wholly owned insurance mutual. In an effort at diversification in order to reduce risk and improve returns, Ethias has adopted different lines of business such as:

- Ethias Services: Consulting company that specialises in pension insurance
- Ethias Patrimoine: Real estate acquisition and management company
- Ethias Sustainable Investment Fund
- The NRB Group: A Information Technology holding company

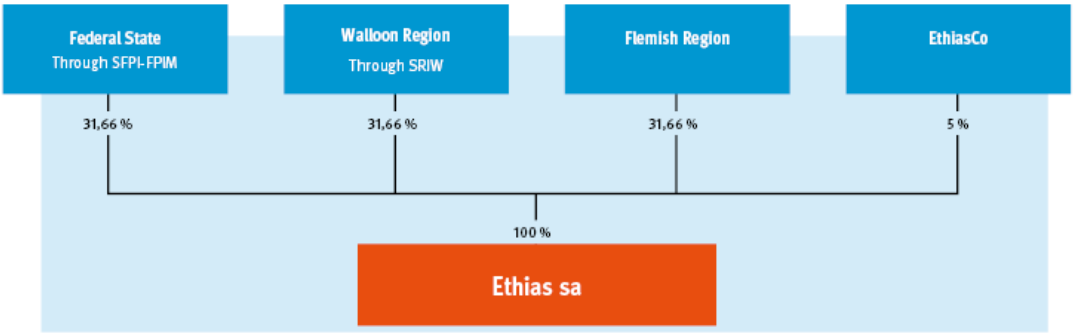

Figure 2: Ownership of Ethias SA. Ethias has 4 ownership groups, the Federal state, the Wallon and Flemish regions and the EthiasCo https://www.ethias.be/corporate/fr/a-propos-d-ethias/notre-groupe/structure-et-filiales.html

The diversification of Ethias makes this a more complicated program than a mutual, however, the extra lines of insurance, if properly managed, diversify the risk, and thus lower premiums.

More mandatory coverage for auto insurance

A problem that was pointed out by the AMO is that municipalities often find themselves as the insurer of last resort due to deep pockets syndrome. A potential quick win for municipalities could be found in deepening the more proximate pocket by increasing mandatory third-party liability coverage standards in Ontario automobile insurance plans. However, this would run contrary to the Government's stated position of wanting lower automobile insurance prices in Ontario and to approach the Canadian average for insurance prices (Insurance Bureau of Canada 2015, Marshall 2017). At the same time, the Marshall report found that Ontario has one of the largest value gaps with regards to insurance premiums and value for money with regards to medical care (Marshall 2017). Reducing this gap could also go far in reducing insurance costs in Ontario.

Recommendations

The Law Commission of Ontario's 2011 examination of the problem of joint and several liability focused on auditors, but didn't find any rational for changing the system, and that changes would probably create a net negative for society as a whole. Similarly, during the 2014 investigation into the possible reform of joint and several liability, many esteemed law societies (Ontario Bar Association, The Advocates' Society, the Ontario Trial Lawyer's Association, the County and District Law Presidents' Association) recommend against changes to joint and several liability. They highlighted the lack of evidence that Joint and Several liability was a primary driver of insurance costs, would shift the cost of taking care of injured plaintiffs from the tortfeasor to the plaintiff or government programs such as OHIP and ODSP would be under greater strain to help people with catastrophic injuries that would otherwise be compensated by the current system. That being said, the provincial government has greater resources at their disposal than municipalities and would have to anticipate secondary effects of substantive changes to the Negligence Act with regards to joint and several liability.

Furthermore, the Ontario Trial Lawyer's Association and the County and District Law Presidents' Association highlight that municipalities have extra protections to limit their liability that are unavailable to other defendants such as minimum maintenance standards, policy decision shields, shortened notice requirements and mandatory bench trials (Hayes 2014). Nothing that was examined here disproves this notion. Furthermore, as previously mentioned, many of the aspects of American tort reforms are already standard practice in Canadian courts (such as loser pays, capping non-economic damages, short filing periods).

Increase mandatory 3rd party liability for car insurance (Quick win)

As mentioned earlier and in various municipal submissions to the Ministry of the Attorney General, actions arising from car accidents is a leading source of liability for municipalities. Increasing third party liability for car insurance will help reduce the liability coverage gap on municipal roads. The advantage of this approach is that it could be relatively quick to implement, as observed in the changes in mandatory coverage of insurance rates in Ontario in 2016. While this would align the incentives of

municipalities and drivers for creating safer roads as well as creating more proximity between the source of liability and the means for covering said liability, this approach would go against recent Government of Ontario policies for lowering automobile insurance costs.

Risk Pooling (Short to Mid-term)

As is demonstrated by the case of Waterloo region, municipalities forming risk pools to drive efficiencies of scale with regards to procuring insurance has an empirical pedigree. That being said, the province may need to create incentives for these pools to form as they may not immediately benefit larger municipalities.

Mutual insurance (Mid-term)

In multiple jurisdictions examined such as Australia and the United Kingdom, a scheme of mutual insurance with reinsurance for multiple municipalities consistently offered lower insurance rates than comparable individual private insurance contracts. The use of large size to normalize risk and buying power to achieve economies of scale on the reinsurance market are key mechanisms for this strategy.

However, if these associations are fully voluntary, adverse selection may apply and create a negative feedback loop as insurance rates drive more municipalities out the system. They are generally very safe but may fail catastrophically as seen in the cases of the United Kingdom in 1992.

Belgian Model (Long-term)

The Belgian model, as shown by Ethias is the reach option, in that it combines the functions of an insurance mutual but is more diversified and acts as a holding company that is used to drive investment into its jurisdiction – a function that is the bread and butter of the Caisse de Dépôt du Quebec in that this State-run pension fund is also used as an engine of economic development. However, this vastness also means that this model would take a long time to assemble and be able to deliver favourable insurance rates to municipalities.

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Appendix A, Recoverable Judgements

The following case will be used in the 5 allocation formulas for determining the payment to a plaintiff taken from the Law Commission of Ontario's 2011 examination of joint and several liability:

> The plaintiff brings a successful tort action against defendant 1 (D1), 2 (D2) and 3 (D3). The court finds defendants 1 (D1), 2 (D2) and 3 (D3) responsible for 50 percent, 20 percent, and 10 percent of the plaintiff's $100,000 loss, respectively. Furthermore, the court finds that the plaintiff contributed in part to their harm via their negligence and therefore are assigned 20 percent of the blame.
>
> With D1 and D3 as insolvent or otherwise unable to pay any amount towards the award, how much does D2 owe the plaintiff?

Table 3: Analysis of Liability Under Five Methods of Liability.

	Joint and Several Liability	**Saskatchewan Model**	**Multiplier Model for Road Authority Cases**	**Full Proportional Liability**	**Proportional Liability under a liability threshold.**
Mechanism	•Plaintiff can collect from any defendant. If a defendant is insolvent or unavailable, the other defendants are responsible for the full amount. •Defendants indemnify each other to the proportion of their liability	•Joint and several liability is maintained except for in cases contributory negligence. •If a defendant is insolvent or otherwise unable to pay, the others are obliged to pay a proportion of their share towards the plaintiff.	•Municipal liability would be capped at two times its proportion of damages, even if this means that the plaintiff can't recover the full damages.	•Municipal liability would be capped at the loss at which they are responsible for.	• This reform would see proportional liability for those who's share of the liability is under a set threshold, and joint and several liability for those who's share of liability is over the set threshold.
D1 liability =	*Award * liability* $100 000*50% $50 000	*Award * liability* $100 000*50% $50 000	*Award * liability* $100 000*50% $50 000	*Award * liability* $100 000*50% $50 000	*Award * liability* $100 000*50% $50 000
D2 liability =	*Award * liability* $100 000*20% $20 000	*Award * liability* $100 000*20% $20 000	*Award * liability* $100 000*20% $20 000	*Award * liability* $100 000*20% $20 000	*Award * liability* $100 000*20% $20 000
D3 liability =	*Award * liability* $100 000*10%	*Award * liability* $100 000*10%	*Award * liability* $100 000*10%	*Award * liability* $100 000*10%	*Award * liability* $100 000*10%

	Joint and Several Liability	**Saskatchewan Model**	**Multiplier Model for Road Authority Cases**	**Full Proportional Liability**	**Proportional Liability under a liability threshold.**
	$10 000	$10 000	$10 000	$10 000	$10 000
Intitial Plaintiff's award =	Full award – negligence amount $100 000-($100 000*20%) $80 000	Full award – negligence amount $100 000-($100 000*20%) $80 000	Full award – negligence amount $100 000-($100 000*20%) $80 000	Full award – negligence amount $100 000-($100 000*20%) $80 000	Full award – negligence amount $100 000-($100 000*20%) $80 000
D2's share of D1 after re-allocation:	$50 000	D1's award * D2's share $50 000*20% $10 000	0	0	Depends on threshold. If the liability is under the threshold, the allocation follows Full Proportional Liability. Otherwise, the allocation of liability follows Joint and Several Liability.
D2's share of D3 after re-allocation:	$10 000	D3's award * D2's share $10 000*20% $2 000	0	0	
D2's Final Liability	Original liability +D1 Liability +D3 Liability $20 000 +$50 000 +$10 000 $80 000	Original liability +D1 Liability +D3 Liability $20 000 +$10 000 +$ 2 000 $32 000	Original Liability*2 $20 000*2 $40 000	Original Liability $20 000	
Plaintiff's Final Award	$80 000	$32 000	$40 000	$20 000	
Percentage of Joint and Several award to plaintiff	100%	40%	50%	25%	