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**GOVERNMENT LIABILITY AND IMMUNITY
FROM PERSONAL INJURY CLAIMS**
1996 Warren M. Anderson Legislative Breakfast Series

APRIL 16, 1996



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FROM PERSONAL INJURY CLAIMS**

*A monograph of the presentation delivered at the 1996
Warren M. Anderson Legislative Breakfast Series*

APRIL 16, 1996

**Professor Michael Hutter
Albany Law School**

**The Garden Room
Empire State Plaza
Albany, N.Y.**

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WARREN M. ANDERSON

Warren M. Anderson is a distinguished alumnus of Albany Law School, and an active member of the Government Law Center Advisory Committee. Having served in the New York State Senate for thirty-five years, he is perhaps best known for his leadership during his tenure as President Pro Tem and Majority Leader from 1973 to 1988.

Warren Anderson began his legal career as an Assistant County Attorney in Broome. He then joined the law firm of Hinman, Howard & Kattell where he is currently practicing law. Throughout his career he has received numerous honors and awards.

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In furtherance of its mission to serve as a resource to government at all levels in the resolution of specific problems, the Government Law Center is pleased to present the fifth annual Warren M. Anderson Breakfast Seminar Series. Monthly breakfast programs will feature distinguished professors who will address the legal aspects of a variety of policy issues pending before the Legislature. The seminars are designed to provide access to current legal information on a given topic. The Government Law Center welcomes your suggestions for future programs.

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GOVERNMENT LIABILITY AND IMMUNITY FROM PERSONAL INJURY CLAIMS

Presentation by --
Professor Michael Hutter *

My topic is municipal liability and immunity but really it's a more narrow topic--the real topic is in the form of a rhetorical question, namely are we being overrun by excessive verdicts. When I say we, I mean municipalities of the state, as well as the citizens of the state. Are we being overrun by excessive verdicts and, if so, what can we do about it? What controls can we put on this measure? This is not a recent concern, nor is it a partisan concern. The concern dates back at least to 1990 with some of the pioneering work done by Peter Sherwood, a former solicitor general of the State who later became corporate counsel to the City of New York. This work was initiated under the auspices of Mayor Dinkins, and is continued now by Mayor Giuliani. It started with program bills by Governor Cuomo, and its continued with program bills by Governor Pataki. In sum, there is concern out there and it's not just a Newt Gingrich type anti-lawyer issue. This is an issue I think that all thoughtful New Yorkers have been concerned about over the last several years.

Most of us had our New Year holiday disturbed a little bit by the publication of Comptroller Hevesi's report concerning the most recent compilation of monetary judgments paid out by the City of New York concerning fiscal '94. In his report, he announced that \$275 million had been spent in fiscal year 1994 by the City of New York on personal injury judgments. Ninety percent dealt with policemen, housing, road crews, snow removal and the like; 10% had to do with other things. Keep in mind that that figure did not include the New York City Transit's liability figures nor the New York City housing figures. This is specifically New York City. Obviously New York City is very large with a lot of people, and a lot can go wrong. Maybe \$275 million, when you look at it in a vacuum, doesn't mean much. If you take the sum of \$275 million, that roughly turns out to be about \$40 per capita of New York City residents being spent on personal injury judgments alone. If you look at the City of Chicago--not the same size, but still a relatively large city--the figure was ten times less than New York City. Whether New York City is a special problem or other cities are doing something better, it's obviously a very large concern.

Looking back at some other year's figures compiled by Comptroller Hevesi and then Peter Sherwood: in 1992, \$200 million was spent in personal injury verdicts; 1991, \$182 million. From 1979 up through 1993, there was a 700% increase in payouts. In other words, the progression is getting higher every year and it is proceeding in an astronomical geometric manner.

*Michael Hutter is a professor of law at Albany Law School. He served as the Executive Director of the NYS Law Revision Commission from 1979-1984.

Now, looking at that figure of \$275 million, it's important initially to look at the components of that figure, to see what the real problem is. Of that \$275 million, roughly \$75 million was for medical malpractice and specifically obstetrical malpractice cases, basically brain damaged babies that were born in New York City Hospitals. The \$75 million does not really come from pain and suffering, nor from lost earnings. Rather, it comes from the long-term health care that these infants are going to require for the rest of their lives. I don't think anyone is really questioning that amount of money. Fifty million dollars of that figure has to do with lost earnings. Again, I don't think people are really complaining for money being paid if someone's out of work for several months or years. What we're really concerned with here is the approximately \$150 million for what we'd call pain and suffering--the pain that someone has endured because of the negligence of a municipality. I think the figures in New York City would approximate that of all the judgments they are paying out, roughly 50% of all judgments reflect pain and suffering.

Now, the statistical information from other municipalities is not as comprehensively compiled as in New York City. Most of it's anecdotal, but all of us have heard stories about municipalities, whether it's a county or an upstate town, that have had to float a bond to pay a judgment. It's not something that's limited to New York City; it's something throughout the state. It's also important to keep in mind that this is not just a concern for New York alone.

It's also a national concern. The National Center for Government did a study that found, in 1991, approximately \$6 billion was spent throughout the country, in what we'd call litigation costs. That's the combination of judgments paid out, the amount of money necessary to defend these cases, the amount of money to investigate, and the court time. So, we're dealing with obviously a lot of money being spent, not only in New York, but throughout the United States.

To get an idea as to what those judgements can mean for budgets and municipalities, the program and study bill put forth this year contains a figure with respect to some of the money being spent in New York City and where it could also go. That money could be spent to hire 2,400 new police officers or fire fighters. It could be spent to hire 3,000 new teachers. It could be spent to continue 2,600 employees on their benefits and continue with their annual increments and salary increases. So we're dealing with, obviously, a very high budget item. Again, it may not be at the same level in upstate New York towns and cities, but it's certainly something, and proportionately it's a concern.

We are now looking at a situation where everyone agrees that money is being spent extensively on personal injury judgments. I'm not going to make a determination at this point whether that's good or bad, but simply point out that this is becoming a major budgetary concern for all municipalities.

The problem now, in a nutshell, is whether this is a situation brought about by jury verdicts that are totally out of control, or is it a situation that municipalities are becoming more negligent and they're not as safe as they should be? I think the answer is somewhere in between. You can't simply say the whole problem is run away verdicts. There is a general concern that municipalities and maybe even people themselves are becoming less

cautious about their own well-being. Looking at money alone doesn't tell the real story. The problem really is excessive verdicts for pain and suffering. It's not so much that we're concerned about the person who's out of work or the person who needs medical bills paid. I don't think any of the bills introduced during the Cuomo administration or the Pataki administration is disputing that. That is, if you are out of work and injured by the negligence of a municipality, your lost earnings and your medical payments will be recoverable.

What the Legislature has been concerned about over the years is "excessive" pain and suffering verdicts. The question is what do we mean by "excessive." I don't believe anyone's really concerned about the person who might have been injured in an automobile accident and has a \$25,000 pain and suffering claim. What is of concern is the stories that make the front pages of the New York Times: \$10 million for a broken arm; \$20 million for transitory pain; \$40 million for some other injury. Is someone's injury really worth \$40 million, \$10 million and \$5 million? It's important, again, to stress that that's what the concern is, and a lot of the concern is trying to quantify that. The reason for the concern about the excessive verdicts--these \$5 million, \$10 million verdicts--is that they tend to multiply. Last year in New York City, there were approximately 34 verdicts that were in excess of a million dollars. Settlements go about the same way. A lot of them ranged from 5 to 8 figures. While they seem to be sporadic, they can start to set a pattern. Jurors read the papers. They see a trend. They say, "gee, I read about this, that one was worth \$20 million, maybe this one's worth \$20 million." It also starts to become benchmarked. When so and so starts to say, what is a broken bone worth? What is a wrenched back worth? What is transitory pain worth? They'll look at those verdicts. And to many people, the system appears to be a lottery. It is a lottery. We're all paying for it in the sense of extra taxes, reduction of services for one of those persons who will now "strike the lottery" and get \$10 or \$20 million. In a recent study in the Harvard Law Review published last June, the authors analyzed the whole system of tort liability as such a lottery. The concern here is focused on what to do about the excessive verdicts for pain and suffering.

So, what do we mean by excessive? What really is a broken arm worth? What is transitory pain worth? Many years ago when I was with the Law Revision Commission, the Commission drafted a bill called the Unjust Conviction Act. It applied to people who have been convicted of a crime they did not commit. They may have spent ten years in jail, let's give them a right of recovery. The questions that were being floated around at that time were whether we put caps on it; how do we value it; and how do we figure out what is it worth to someone who's been convicted and who spends ten years in jail? Can you really convert it into monetary figures? It brought about many discussions that I had with John Feerick, Judah Gribetz, and Cal Finkel, three of the finest minds I've ever been associated with. We would sit down and bring in Jim Yates, Mel Miller's counsel, another excellent mind, trying to figure out what these cases were worth. We would just start with a very simple hypothetical. Assume that you've been injured. You've been hit by an automobile. You've been laid up three weeks. You're out of work for three weeks. What is that worth to you? Can you, yourself, really come up with a figure as to how much that's going to be

worth? You're going to have problems doing that. If you put that then in the context of the jury system, you see that there's going to be a further problem when we ourselves can't really come up with a real, rational way of defining it. It comes down to what Potter Stewart said, "I know it when I see it" as to what an excessive verdict is.

Before we start to talk about some of the suggestions for reforming the system, just a couple of comments as to how we got there. How did we get to the system where we are paying \$275 million? A lot of time can be spent on this topic alone. Let's look at it in only two ways: as the substantive law and the procedural law.

Substantively, it's important to keep in mind that in New York, there's never been any inherent right under the common law or the State Constitution to be able to sue a municipality for your injuries. Traditionally, the notion of sovereign immunity reigned in New York as well as in all jurisdictions. Under sovereign immunity, the view was that the king could do no wrong and that, therefore, you couldn't sue the king. You couldn't sue the municipality for any injury that you sustained because of the municipality's negligence. Underlying this rationale are really four distinct reasons. First was the view that it was more desirable for individuals to suffer a grievous wrong than to have the population pay for that through taxes and reduction of services. It was a judgment reached by common law. The concern, further, was that this would lead to a multiplicity of law suits in our courts, and we didn't want a situation where perhaps more worthwhile suits would lay fallow and not be acted on. Finally, the fear was that we would have municipalities worrying all the time about lawsuits. We didn't want that. What it came down to is sovereign immunity because of the fear of crushing liability. The result for many, many years in New York was that you could not recover at all if you were injured by reason of the clear negligence and even intentional acts of a sovereign. Private bills were the only way to get compensation.

The modern era of tort liability started in 1939 with the enactment of the Court of Claims Act. In Section 8 of that Act, the legislature abolished sovereign immunity for the state. People started sitting down and looking at the system and they saw that a fundamental principle of corrective justice was to compensate someone for his or her injury. We shouldn't allow someone to injure someone else and walk away with it. And the question asked, rhetorically, is why should this principle be anything different, or operate any differently, when the tortfeasor is a municipality? If a driver, a private citizen injured you in an automobile, you have a full right to sue. Why should it be any different if an employee of the City of New York or the City of Buffalo was driving that vehicle? In view of the recognition that such a question couldn't really be answered, the Legislature abolished sovereign immunity.

When the legislature abolished sovereign immunity, it then placed all actions against the state in the Court of Claims which is non-jury. All bench trials are heard before Court of Claims judges. Three things happened judicially through the Court of Appeals that brought us up to the present system. First, in the landmark *Bernadine v. City of New York* case, the New York Court of Appeals construed Section 8 which abolished state immunity as granting immunity to all municipalities. In essence, if all municipalities trace their power to the state

and if you abolish liability for the state then by necessity you abolish immunity for all municipalities. The legislature never talked about that, but that's how the Court of Appeals construed the statute.

Secondly, the Court then started in the 1940's a series of exceptions to that liability. In the first major case, it established a rule of only providing an immunity for failure to perform a governmental function. In other words, the Court of Appeals created what's called a governmental/proprietary distinction. There will be no liability for government acting as a government, but there will be liability if the government is acting in a proprietary sense. Governmental immunity, then, was really for those activities which are peculiar to government: providing police protection, fire protection, building codes and the like. There is no liability in those situations unless there was what we call a special duty. With proprietary things such as providing transportation services and garbage pickup, there would be full liability. There is still a huge scope of immunity out there. What's interesting is that from 1946 up through the 1990's the Court of Appeals has had a distinct dissenting view on that, starting with Judge Desmond running through Judge Keating, on through Judge Sol Wachtler. All three have bitterly railed against this interpretation saying that it is nothing but judicial legislation; the idea of the statute was always to abolish immunity totally. That view has not prevailed, so we do have this large scale immunity that's out there. The second immunity that the Court of Appeals created was immunity for the performance of a discretionary act, drawing a distinction between acts of planning and acts of implementation. The famous case on this point involved the City of Buffalo and installation of a light at an intersection. No light was installed. It appeared to be in hindsight a very poor choice. The Court of Appeals said no liability. That was a purely discretionary act and so long as those discretionary acts are done in good faith, we're not going to have any liability at all. There will be liability in implementation if you install a traffic light and it didn't function. That's different. So what we have then, even with this \$275 million in judgements, is the notion that there still is a lot of immunity out there.

Procedurally, one must also look at how we got into this situation of \$275 million in municipal liability. We start out with jury *voir dire*. Lawyers who defend cities and municipalities say that we have to question jurors fully to figure out if they are partial, or are they simply going to view the state and the municipalities as a gold mine and a deep pocket. For years, lawyers used that right to get rid of jurors who showed partiality. Such questioning has in effect been abolished now with the new jury selection rules that were enacted and promulgated by the judicial conference at the instigation of Chief Judge Kaye. Most municipal lawyers are very troubled by the fact that they feel that they don't have the right to get rid of jurors who show clear partiality for plaintiffs. At the same point, a lot of plaintiffs' lawyers will tell you it doesn't give them the ability upstate to get rid of people who seem to be more inclined to go with the State. In other words, we have a system imposed upon our municipal liability system which may not have taken fully into account the demands of a trial practice, but rather was driven by the demands of "let's move our cases quickly."

The trial itself, through the evolution of various evidentiary rules, presents situations which lead to high pain and suffering verdicts with respect to injured plaintiffs. For example, now the jury is going to have the time and the opportunity to see the plaintiff. The Court of Appeals several years ago sanctioned a procedure where you can introduce a plaintiff as an exhibit. A brain-damaged worker who was seriously injured, had no bodily function, couldn't do anything but really utter sounds, and was incompetent to testify as a witness, was permitted to be displayed to the jury as an exhibit. That generated the largest jury verdict ever in New York history--\$186 million. We also now have "day in the life" films where attorneys can show vignettes of how this person is suffering.

We then have summations, where the plaintiff's lawyer urges juries to be generous, tempered by defense counsel suggestions to be reasonable.

What the jury then decides it on is the *Pattern Jury Instructions* that is followed by every state judge at the trial level. No one will deviate from it because you are inviting reversal. I will read from this to give you a better idea of where we get verdicts of \$150 million from this language:

"If you decide for plaintiff on the question of liability, you must include in your verdict an award of money towards the injury you find the plaintiff suffered and for conscious pain and suffering. Conscious pain and suffering means pain and suffering of which there was some level of awareness by plaintiff. Plaintiff is entitled to recover a sum of money which will justly and fairly compensate him or her for the injury and for the conscious pain and suffering."

And that's it. There are no further specifics as to how you're to do it. You basically have a very vague charge to do justice and perhaps it's not surprising when jurors hear that and they come up with verdicts of \$10 and \$15 million.

There is trial level review to set aside a verdict as excessive. There is the appellate level. Most of that is going to depend upon the standard of whether it deviates materially from what would be otherwise reasonable. Here the judges have the ability to look at past verdicts, but past verdicts are somewhat incomplete. You don't always have the complete knowledge. There is a case pending now in the Supreme Court--in fact, it's going to be argued tomorrow--where the Supreme Court is being asked to abolish the practice of reduction of jury verdicts as an unconstitutional infringement upon the 7th Amendment. The American Trial Lawyers Association has put in an amicus brief saying essentially, when a jury speaks on damages, that's it. There can be none of this appellate review or trial court review. Obviously, if that is accepted by the Supreme Court, a key way of stopping excessive verdicts may be prevented. We may even have more trouble in New York and other jurisdictions, depending upon the outcome of this case.

Are we really surprised that we do have these excessive verdicts in the system that we have? Now no one is really talking about looking at the system. Rather, what we're looking at are some implementations apart from that system. I'll go through a couple of the options that have been explored. The first is, do we repeal section 8 in the sense of maybe

going back to the notion of sovereign immunity? No one has any desire to go back to the pre-1939 situation. I think that everyone realizes that if someone's been injured, that person should be compensated. The question is fair and reasonable compensation.

Do we then abolish, perhaps, awards for pain and suffering? It's interesting that the American Law Institute (ALI) several years ago in doing a study of the American tort system studied this issue and reviewed the arguments for and against the abolition of pain and suffering awards. After an exhaustive review, the ALI found the case for pain and suffering to be "uneasy." But nonetheless, it recommended that it be retained. No one in New York has advocated any abolition of pain and suffering and no jurisdiction in the United States, at least that I'm aware of, has abolished pain and suffering awards.

Rather, what the thrust has been, and this is the third alternative, is to put caps on verdicts. The study bill put forth by Assemblyman Pordum contains a cap of \$250,000 for non-economic loss, but no cap on compensatory loss, which is really a cap at \$250,000 for pain and suffering. And at last count, there are 38 states that have caps. Of those 38 states, 37 cap both economic and non-economic losses. If you've been out of work for two or three years--too bad--the limit is \$250,000. All the bills that have been put forth in New York do not have caps on non-economic loss, it's only the caps on pain and suffering. The only other state that has this is West Virginia. What are the concerns about caps because it seems like a very easy solution to get rid of those excessive verdicts? Apart from why we choose \$250,000, the first concern is that unless these caps are indexed, over the years, they result in a decline in your basic court recovery. Secondly, they arbitrarily prevent full recovery for pain and suffering for the most severely injured people, while those who are not severely injured will always get their full compensation. Third, they don't always eliminate the large variations in verdicts. Yes, you're going to have it in smaller numbers between \$1,000 and \$250,000. You're still going to have arbitrary results between verdicts, between what's an arm worth here versus what's an arm worth there. And lastly, which is surprising in Comptroller Hevesi's study, is that the savings while large are not all that substantial if you cap verdicts at \$250,000. Comptroller Hevesi hypothesized and said that if "we had that for 1994, the City of New York would have only saved about \$40 million." Now, that figure is substantial, but that's not the huge amount that people are looking to save. I think there's also a constitutional problem with respect to the imposition of caps. Most of the jurisdictions that have ruled on this have found them to be Constitutional. In the State of New York--with our own Constitution and Court of Appeals--it's a fair bet that the Court would condemn caps, finding them to be unconstitutional. That's just my opinion. There's no real track record on this point. While caps do have a surface appeal, they may not be the right way to go.

What are some other options? In a rather provocative article by Oscar Chase, a professor of law at Brooklyn Law School, published in the fall issue of the Hofstra Law Review, he said that with respect to pain and suffering verdicts we need to provide more guidance to juries. Let's try to really define the criterion and how the jury should apply this. He, himself, admitted that this may be a hopeless task for two reasons. It may not be

possible to really give guidance, and how do we really assure that juries will follow it? But he at least made the effort, and it's the first effort that I have seen, to take the lead in really trying to refine the system. He doesn't want to reinvent the wheel. He doesn't want to go back and abolish everything. Instead he suggests we convene plaintiffs' lawyers and defense lawyers to try to come up with some better jury instructions than what we have in that pattern jury instruction, which is in essence no instruction whatsoever.

The other alternative that's been bantered about substantially and mainly at the instigation of Peter Sherwood, is let's take all municipality lawsuits out of the system and put them in the Court of Claims. This, of course, would require a constitutional amendment for municipalities. What's interesting is that this issue is not new. This was done initially around 1800 in the State of New York at a time when the Erie Canal was being built by private concerns. The people who were putting the money into the canal were concerned that when property was being seized by eminent domain along the Hudson River and the Mohawk River, juries were awarding what they considered outrageous sums for the value of the land. To prevent that, they got the New York State Legislature to pass a bill putting these cases to be decided by non-jury trials. There was no Court of Claims back then, but there is some historical support for this argument that maybe we should put these in the Court of Claims and take away the jury trial. If you look at the Court of Claims, the experience over the last couple of years is that verdicts do not appear to be excessive. There are multi-million dollar verdicts in the court of claims--no doubt about it. The recent AIDS verdict out of Utica is an example. Most of that had to do with compensatory loss. But I don't think you see verdicts of \$10 and \$20 million for what people would consider to be insignificant injury. There are concerns, though. For starters, the Court of Claims as presently structured is not ready to handle the huge influx of cases. If you're looking at what we call the "A" judges, the 18 judges who just hear actions against the State, they're overworked as it is. If you now bring in all actions brought against the City of New York, Buffalo, Albany, and so on, into the Court of Claims, obviously they will need help. Where are those judges going to come from? Well, the simple answer may be to get the Office of Court Administration to transfer the Rockefeller drug judges, the "B" judges, in to hear these civil cases. They're Court of Claims judges and they could easily hear this, but they've been chosen for their experience in criminal law. Who can stand in for these judges? Well, then you move the Supreme Court judges who've been freed up from hearing municipal cases and put them to hear the criminal cases. Most of them don't have the criminal law background. It may be weakening our system as it is. The other alternative is to name more Court of Claims judges, and keep the system as it currently exists. That, of course, raises some serious political issues, including the expense. Further, when you start bringing in judges who do not come out of an atmosphere of traditionally hearing non-jury cases and only tort cases against the state, there is a danger in these judges now being caught up in handing out excessive verdicts as well. A study brought forth two years ago by two Cornell law professors--they did an exhaustive study of the federal system of verdicts involving jury trials and nonjury trials--found that plaintiffs did

better before judges than they did before juries not only in the sense of getting a favorable verdict in finding liability, but also damages. I believe that what the study was trying to prove was: don't always count on judges doing the politically correct thing, i.e., reducing verdicts or giving low verdicts. So, it may be that putting cases in the Court of Claims (or non-jury cases) is not the panacea that people perceive it to be. Also, of course, there's a serious constitutional question. Many people would think that the constitutional question was resolved in the *Montgomery v. Daniels* case where the Court of Appeals upheld the no-fault system, but putting all municipal cases into the Court of Claims does present some other constitutional issues.

What else can be done? Well, several miscellaneous things have been broached in Assemblyman Pordum's bill. What about establishing a medical threshold? Before you can sue for pain and suffering, show that you sustained "X" amount of medical bills. The theory being that if you sustain medical bills, that's at least some objective proof that you've sustained some pain and suffering. The bill places a \$5,000 medical threshold. Well, to get \$5,000 in medical bills you obviously have to be very seriously injured, perhaps hospitalized for constant care. In this era in managed care where it's going to be very difficult simply going back and forth to doctors, you're not going to get the doctor to run up the bill. That cap may be too high for someone who's broken an arm and made one visit to the doctor and one follow up visit. It could be a lot of pain and suffering, but the person isn't going to get near the \$5,000 threshold. In the no-fault era back in 1975, there was a \$500 threshold. That was abolished three years later by the Legislature when they found that plaintiffs would simply go to their doctors constantly and run up the bills, and in the pre-managed care era it was very easy to reach that threshold of \$500. I'm not sure that today we would reach the same point. The significance is that again, a cap is not a bad idea. Indexing it to inflation is certainly worthy of some thought.

The other idea, at least with respect to municipalities, is if the plaintiff has been 50% or more responsible for his injury, there should be no liability at all. This, of course, changes comparative negligence in a limited area. Is it worthwhile to do it simply with municipalities? Maybe we should go back to the other system we had with all personal injury actions and abolish joint and several liability totally. Maybe we go a little bit further than our recent changes to CPLR 1001.

Another reform that's been done in other states is not so much tinkering with the system, but looking at it from another perspective. Let's take away the opportunity for these lawsuits. Let's have better training of our municipal employees. Let's try to make some better plans for taking care of the huge potholes and sidewalk problems. We can't expect every sidewalk to be clean. We can't expect to have every pothole removed in a day but let's set some priorities. The State of Florida, for example, has found that with stringent training and oversight of the various public works forces, they've been able to reduce their tort liability case load substantially. Also we have a situation of becoming more aggressive in handling these cases. You've all seen the fraud cases that have been weeded out in the City of New York. Fraud not only upon the lawyers, but upon claimants,

insurance adjusters, even municipalities themselves. An aggressive defense posture should be advocated. Take, for example, the City of Albany's approach. Everyone knows that if you're going to sue the City of Albany, you better have a good case. The City of Albany is not going to lay down and simply pay. They're going to defend the case very aggressively. They will pay in a fair case but people know that no one is going to bring a frivolous action against the City of Albany, because you're not going to get paid for it. Do other municipalities have that reputation? There's no reason why defensive lawyering can't be done very aggressively by municipalities as well.

So, where are we with all this? There are many options out there and which one's going to be best for New York? I don't think I'm in a position to say what's best. There are better minds out there that can consider all of the options. My suggestion is to create a study committee or some sort of commission. The last joint legislative committee to study the problem of municipal liability was in 1959. That led to the enactment of the notice of claim laws, the prior notice laws, and an exhaustive review of the system. They said at that point, they didn't see any need to retrench on immunity granted, although a need for some fine-tuning was identified. It's now been almost 40 years. Maybe it is time in light of the seemingly runaway verdicts to sit down and revisit this. Judge Hancock, retired judge of the Court of Appeals, when he spoke at a Government Law seminar about two years ago on liability talked about the same thing. Maybe it's time to form a committee. If not a joint legislative committee, maybe a blue ribbon committee, made up of defense lawyers, plaintiff lawyers, academics, legislators, and legislative staff members to examine the problem. Is it endemic simply to New York? Is it all over the state? How much are we really spending? What controls can we reasonably put into place? There are a lot of options out there and until someone really sits down and studies this thoroughly, we really won't have much of a way to resolve the problem. The bottom line here is that there is a perception of a problem--no one really wants these \$10 million verdicts for truly trivial injuries--but we don't want to destroy a system that has been working relatively well through now to simply take care of those aberrant cases. We don't want the aberrant cases to become the norm. That's why we need some controls at this point. What shape the controls are going to take, again I'll leave it for the study group to decide.

Thank you very much for your attention.