

14-48443 *lc*

Court File No. ~~6465113~~

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

JODI GAWRYLASH, MICHAEL GAWRYLASH, KAY GAWRYLASH  
and CHRIS GAWRYLASH

Plaintiffs

and

JAMES M CONNELLY, THE CITY OF HAMILTON,  
THE DOMINION OF CANADA GENERAL INSURANCE COMPANY  
and JOHN DOE

#48443  
DEFENCE NOTICE-REG  
Defendants

144.00

**STATEMENT OF DEFENCE AND CROSSCLAIM  
OF THE DEFENDANT,  
CITY OF HAMILTON**

1. This Defendant, City of Hamilton, admits the allegations contained in paragraph 3 of the Statement of Claim.
2. This Defendant denies the allegations contained in paragraphs 1, 4 (in part), 10, 14, 11, 15, 16, 17, 18 and 20 of the Statement of Claim.
3. This Defendant has insufficient or no knowledge in respect of the allegations contained in paragraphs 2, 5, 6, 7, 8 and 19 of the Statement of Claim.
4. This Defendant specifically denies that the collision of December 3, 2011, was caused or contributed as a result of any negligence, breach of duty or want of care on its part, or the part of its agents or employees.

5. This Defendant states that it is a municipal corporation, incorporated pursuant to the laws of the Province of Ontario and the *Municipal Act 2001*, S.O. 2001, c.25, as amended.

6. This Defendant denies that the Plaintiffs have suffered any loss or damages as alleged in the Statement of Claim and puts them to the strict proof thereof.

7. In the alternative, this Defendant states that the injuries and damages claimed are excessive and too remote in law to be recoverable, and that the Plaintiffs have failed to mitigate their damages.

8. This Defendant pleads that if the Plaintiffs have sustained injuries as a result of the collision on December 3<sup>rd</sup>, 2011, which is not admitted but specifically denied, that such injuries and damages arose solely as a result of the negligence of the Plaintiff, Jodi Gawrylash. The particulars of the negligence of this Plaintiff include, but are not limited to, the following:

- (a) she failed to keep any or any adequate lookout;
- (b) she was driving at a high rate of speed having regard to the road, weather and traffic conditions, and the fact that she was entering an on-ramp;
- (c) she was travelling in excess of the posted speed limit and/or at a speed that was unsafe given the conditions at the time;
- (d) she was travelling in excess of the ramp speed limit;
- (e) she failed to keep her motor vehicle under proper control;

- (f) she was operating a motor vehicle when she was under the influence of alcohol and/or drugs;
- (g) she was operating his motor vehicle when her ability to do so was greatly reduced by physical exhaustion and/or fatigue;
- (h) at the time of the accident, she was distracted by the use of a cellular telephone, texting, dialing, eating, drinking or other activity which she ought not to have been performing while operating a motor vehicle;
- (i) she was eating, drinking or distracted and not paying appropriate or proper attention to the highway and traffic;
- (j) she was an incompetent driver on the occasion in question, lacking in reasonable skill and self-command and should not have been operating a motor vehicle;
- (k) she was following too closely to Connelly vehicle or John Doe vehicle than was reasonable and prudent, having regard to the conditions;
- (l) she failed to adjust her speed for the weather conditions, road conditions and appropriate ramp speed;
- (m) she failed to reduce her speed when she saw or ought to have seen that if she continued on her course, a collision would occur;
- (n) she created a situation of danger and was the author of her own misfortune;

- (o) she failed to make use of safety devices in her motor vehicle including headlights and horn;
- (p) she failed to apply her brakes properly or at all;
- (q) she failed to take reasonable steps to avoid a collision and/or over-steered or over-corrected when attempting to avoid another vehicle;
- (r) her vehicle had defective brakes, lights, tires, steering equipment or other defects;
- (s) she failed to take reasonable care for her own safety;
- (t) she operated a motor vehicle when she knew or ought to have known that it was not in a fit and proper mechanical condition;
- (u) she created a situation of danger and perpetrated the collision;
- (v) she continued to operate a motor vehicle when she knew or ought to have known that she was not fit to drive;
- (w) she failed to wear a seatbelt;
- (x) she had the last opportunity to avoid a collision and failed to do so; and
- (y) such further particulars of negligence as to be provided by this Defendant.

9. In the alternative, this Defendant states that if the Plaintiffs have sustained injuries as a result of the collision on December 3<sup>rd</sup>, 2011, which is not admitted but specifically denied, this Defendant pleads that such injuries and damages were caused

or contributed as a result of the negligence of the co-Defendants, James M. Connelly and/or John Doe. This Defendant pleads and relies upon the allegations of negligence as against these co-Defendants as set out at paragraph 12 of the Statement of Claim.

10. This Defendant states that it did not receive written notice of the claim within the prescribed time period under s.44(10) of the *Municipal Act, 2001* S.O. 2001, c. 25, as amended and as such, the within proceeding is statute barred.

11. This Defendant states that all roadways within its jurisdiction, including the area at issue in this proceeding, were at all material times, in a safe condition for persons travelling on these roadways and exercising reasonable care for their own safety.

12. This Defendant specifically denies that it is responsible for any alleged design deficiencies. This Defendant pleads that the section of the Red Hill Valley Parkway at issue in this proceeding was designed by Philips Engineering Ltd., a firm specializing in the provision of engineering services for municipal roads and highways.

13. This Defendant pleads and relies upon the terms and provisions of its contract with Philips Engineering Ltd., as well as the stamped engineering drawings prepared by Philips Engineering Ltd.

14. This Defendant specifically denies the allegations contained in paragraph 11 of the Statement of Claim. This Defendant states that it employed a system of inspection and maintenance of highways within its jurisdiction, including the King Street on ramp from the Red Hill Valley Parkway, which was reasonable given all of the circumstances.

15. This Defendant states that the roadways and intersections in question were constructed, designed, signed, inspected and maintained in accordance with reasonable practices and the applicable standards at the material time.

16. This Defendant states that at all material times, it complied with its duties under the *Municipal Act, 2001*, S.O. 2001, c.25, and any regulations and amendments thereto.

17. This Defendant pleads that the Plaintiff is statute barred from bringing an action as against the City of Hamilton in connection with the presence, absence of insufficiency of any wall, fence, rail or barrier along any highway. This Defendant specifically pleads and relies upon section 44(8) of the *Municipal Act, 2001*, S.O. 2001, c.45, as amended.

18. This Defendant states that it complied with the inspection and maintenance requirements in accordance with the Minimum Maintenance Standards for Municipal Highways as set out in O. Reg. 239/02. Accordingly, there can be no finding of liability against the municipality pursuant to subsection 44(3)(c) of the *Municipal Act, 2001*, S.O. 2001, c.25, as amended.

19. This Defendant states that, at all material times, it had a proper program of monitoring, inspecting and repairing its roadways. This Defendant pleads that it took reasonable steps to prevent the alleged default from arising and as such, cannot be found liable for any failure to keep the highway in a reasonable state of repair pursuant to section 44(3)(a) of the *Municipal Act 2001*, S.O. 2001, c.25, as amended.

20. Further or in the alternative, this Defendant states that it did not know and could not reasonably have been expected to have known about the state of repair of the highway. This Defendant pleads and relies upon subsections 44(3)(b) of the *Municipal Act, 2001*, S.O. 2001, c.25, as amended.

21. This Defendant pleads that it met all applicable standards with regard to maintenance of the area in question, including the Minimum Maintenance Standards. This Defendant pleads and relies upon section 44(3)(c) of the *Municipal Act, 2001*, S.O. 2001, c.25, as amended.

22. This Defendant states that the allegations of negligence plead by the Plaintiffs do not relate to duties or powers for which this Defendant may be held liable. This Defendant states that the condition of the highways, including design, signage and traffic flow systems reflect the results of policy decision(s) exercised in good faith. This Defendant pleads and relies upon section 450 of the *Municipal Act, 2001*, S.O. 2001, c.25, as amended.

23. This Defendant pleads that the Plaintiff, Jodi Gawrylash, failed to use a properly installed and adjusted seatbelt as required by the provisions of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, as amended, in the collision of December 3<sup>rd</sup>, 2011. This Defendant pleads that the Plaintiff's failure to use a properly engaged seatbelt and/or headrest in the collision(s) caused or contributed to her alleged injuries.

24. This Defendant pleads that the alleged injuries of the Plaintiffs, which are not admitted but specifically denied, were caused or contributed to by a pre-existing condition or injury, a condition or injury which arose subsequent to the accident of

December 3<sup>rd</sup>, 2011, and/or a condition or injury which has no causal connection with the motor vehicle accident of December 3<sup>rd</sup>, 2011, as pleaded or otherwise. This Defendant denies that the motor vehicle accident in question contributed, materially or otherwise, to the Plaintiffs' past, present or future medical condition.

25. This Defendant denies that the Plaintiff, Jodi Gawrylash, has sustained permanent serious disfigurement or permanent, serious impairments of an important physical, mental or psychological function as a result of the collision of December 3<sup>rd</sup>, 2011.

26. This Defendant denies that the Plaintiff, Jodi Gawrylash, is entitled to any damages for non-pecuniary loss for which this Defendant is responsible. Further or in the alternative, this Defendant pleads that any damages for non-pecuniary loss shall be reduced by the amount as set out in section 267.5(7) of the *Insurance Act*, R.S.O. 1990, c.1-8, as amended, and section 5.1(1) of Ontario Regulation 381/03, made thereunder.

27. This Defendant pleads entitlement to the benefits of all insurance to the extent of payments made or available thereunder to the Plaintiffs as provided in the provisions of the *Insurance Act*, R.S.O. 1990, c.1-8, as amended. This Defendant pleads that any Judgment rendered herein shall be reduced to the extent of such payments made or available to the Plaintiff in respect of the collision of June 23<sup>rd</sup>, 2011.

28. If the Plaintiffs have suffered injuries and damages, which is not admitted but specifically denied, this Defendant pleads that any award of damages shall be reduced by the appropriate amounts set out in Sections 267.5 and 267.8 of the *Insurance Act*, R.S.O. c.1-8, as amended.



29. This Defendant claims a release from any damages for pecuniary loss which may be awarded to the Plaintiffs to the extent of benefits to which the Plaintiffs are or may be entitled to through statutory accident benefits, under an income continuation benefit plan, under the laws of any jurisdiction or any sick leave plan, as well as reduced by all payments under any medical, surgical, dental, rehabilitation or long term care plan or law. This Defendant pleads and relies upon section 267.8(1) of the *Insurance Act*, R.S.O. 1990, c.1-8, as amended.

30. This Defendant further pleads that it is entitled to be credited to the extent of all collateral benefits and health care expenses received by or available to the Plaintiffs in respect of the collision, and all future collateral benefits, pursuant to section 267.8(4) of the *Insurance Act*, R.S.O. 1990, c.1-8, as amended.

31. This Defendant denies that the Plaintiff, Jodi Gawrylash, has or will suffer any limitation on her ability to live or carry on a normal life, or any loss of enjoyment of life. This Defendant further denies that the Plaintiff will suffer loss of competitive position in the marketplace or any other economic loss for which this Defendant is responsible in law.

32. This Defendant denies that the Plaintiffs, Michael Gawrylash, Kay Gawrylash and Chris Gawrylash, have or will sustain any losses or damages as claimants under the *Family Law Act*, R.S.O. 1990, c. F.3, as amended, and puts them to the strict proof thereof. Further or in the alternative, this Defendant pleads that any awards for non-pecuniary loss under the *Family Law Act*, R.S.O. 1990, c.F.3 shall be reduced by the

amount as prescribed under section 267.5(7)(3) of the *Insurance Act*, R.S.O. 1990, c.I-8, as amended and O. Reg. 381/03, made thereunder.

33. This Defendant pleads and relies upon the provisions of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, as amended, the *Insurance Act*, R.S.O. 1990, c.I-8, as amended, the *Negligence Act*, R.S.O. 1990, c. N.1, as amended, the *Municipal Act, 2001*, S.O. 2001, c. M. 25, as amended, the *Family Law Act*, R.S.O. 1990, c. F.3, as amended and the *Courts of Justice Act*, R.S.O. 1990, c. 43, as amended.

34. This Defendant requests that this action be dismissed with costs payable to the City of Hamilton on a substantial indemnity basis.

### **CROSSCLAIM**

35. The Defendant, City of Hamilton, claims against the Defendants, James R. Connelly and John Doe, for the following:

- (a) contribution and indemnity under for any amounts which the Defendant, City of Hamilton, may be found to be responsible to the Plaintiffs;
- (b) Interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C. 43;
- (c) the costs of the main action, plus all applicable taxes;
- (d) the costs of this Crossclaim, plus all applicable taxes; and,
- (e) Such further and other Relief as to this Honourable Court may seem just.

36. The Defendant, City of Hamilton, repeats and relies upon the allegations contained in the Statement of Defence in support of the Crossclaim.

37. This Defendant pleads that the alleged injuries of the Plaintiff sustained in connection with the accident of December 3, 2011, were solely caused by her own negligence. In the alternative, this Defendant pleads that the alleged injuries of the Plaintiff sustained in connection with the collision were caused or contributed by the negligence of the co-Defendants, James Connelly and John Doe. This Defendant pleads and relies upon the allegations of negligence as against the co-Defendants as set out in the Statement of Claim.

38. This Defendant requests that this Crossclaim be tried with the main action or as directed by the Trial Judge.

June 25, 2014

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JODI GAWRYLASH et al.  
Plaintiffs

-and- JAMES M CONNELLY et al.  
Defendants

14-48443  
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ONTARIO  
SUPERIOR COURT OF JUSTICE  
PROCEEDING COMMENCED AT  
MILTON

**STATEMENT OF DEFENCE AND CROSSCLAIM**

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