
REPORT TITLE: Joint and Several Liability Review in Respect of Municipalities

FROM: Gary Kent, CPA, CGA, ICD.D, Chief Financial Officer and Commissioner of Corporate Services

RECOMMENDATION

That the Region of Peel endorses the Association of Municipalities of Ontario (AMO) recommendations regarding the joint and several liability principle in respect of municipalities;

And further, that the Region of Peel call on the Attorney General of Ontario to work with municipal governments to put forward a plan of action to address concerns with joint and several liability before the end of the provincial government's current term so that municipalities can continue to offer high quality services to their communities;

And further, that a copy of this resolution be sent to the Attorney General of Ontario, the Minister of Municipal Affairs and Housing, Peel area MPPs and AMO President for their awareness and support.

REPORT HIGHLIGHTS

- The joint and several liability principle results in increased insurable risk financing costs for municipalities.
- AMO and a number of Ontario municipalities have provided examples of the financial impact they have experienced attributable to the application of the joint and several principle.
- AMO made seven recommendations to the Province, including that the Province adopt a model of full proportionate liability to replace joint and several liability.
- AMO is seeking the support of Ontario municipalities in its continued advocacy to the Ministry of the Attorney General for joint and several liability reform and is encouraging municipalities to pass a resolution that asks the Province to work with AMO resolve this issue before the end of the government's current mandate.
- In January 2022, Attorney General Doug Downey asked his Ministry to convene a Technical Working Group on joint and several liability, which is expected to begin its work in March.

DISCUSSION

1. Background

Municipalities in Ontario provide essential services to their residents and businesses; however, the ability to provide those services can be adversely impacted by rising insurable risk financing costs. One key driver of rising insurable risk financing costs is the legal principle of 'joint and several liability,' which as set out in the Province's *Negligence Act* can

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result in disproportionate liability being placed on municipalities for an incident relative to their responsibility for it.

Specifically, the *Negligence Act* provides that "where damages have been caused or contributed to by the fault or neglect of two or more persons... and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering the loss or damage...." The joint and several liability principle is also known as the 1% rule because regardless of a Court's allocation of liability between two or more defendants, a plaintiff can recover 100% of their awarded damages from any one of the defendants that is found to be at least 1% liable for the damages suffered by a plaintiff.

AMO is seeking the support of Ontario municipalities in its continued advocacy to the Ministry of the Attorney General for joint and several liability reform by encouraging municipalities to adopt a resolution that calls on the Province to work with AMO resolve this issue before the end of the government's current mandate.

The application of the principle is most critical in instances where one of the liable defendants lacks the financial means to pay for their portion of a judgement. For instance, where defendant A is found 10% liable and defendant B is found 90% liable for a plaintiff's damages, if defendant B has no insurance and insufficient financial means to pay its portion of the judgment, the plaintiff can compel defendant A to pay 100% of the awarded damages. defendant A is then left to try to recover the 90% of the payment from defendant B, which is typically a fruitless exercise given the lack of defendant B's financial means. Defendant A is therefore left paying a disproportionate share of a judgment.

While the majority of civil litigation matters do not progress to the point of a judgment being rendered, the joint and several liability principle still puts pressure on municipalities and their insurers to factor the principle into their analysis of claims throughout the litigation process. This can result in similar disproportionate settlements.

The Ontario government has the authority and responsibility for the statutory framework regarding joint and several liability and the ability to amend it. In 2018, Premier Ford indicated that the matter would be reviewed to assist municipalities manage their insurable risks and costs.

On July 12, 2019, following an initial announcement at the annual Rural Ontario Municipalities Association (ROMA) conference earlier that year, Ontario Attorney General Doug Downey wrote to municipalities informing them of consultations on joint and several liability.

As part of those consultations, AMO submitted a paper entitled *Towards a Reasonable Balance – Addressing Growing Municipal Liability and Insurance Costs* in October 2019. (See the Executive Summary of this paper in Appendix II.) The paper proposed a balance approach to the issues and challenges presented by joint and several liability, including implementing full proportionate liability and a cap on economic loss awards. It provided seven straightforward recommendations for actions to deal with this problem.

The Region made its own submission to the Ministry of the Attorney General in September 2019. It highlighted three claims from the previous ten year period (2009-19) where the joint and several liability principle resulted in the Region paying approximately \$3.5 million in damages that should have been paid by other defendants.

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At its January 14, 2021 meeting, Council received a report regarding the municipal insurance landscape which highlighted factors influencing municipal insurable risk financing costs, including the joint and several liability principle.

2. Proposed Direction

AMO has requested that municipal councils support the seven recommendations contained in the AMO 2019 submission and to advocate for Provincial action on this issue. To this end, councils are being encouraged to pass a resolution that asks the Province to work with AMO on a plan for resolution of this issue before the end of the government's current mandate.

AMO's seven recommendations on joint and several liability are:

1. Adopting a model of full proportionate liability to replace joint and several liability.
2. Implementing enhancements to the existing limitations period including the continued applicability of the existing 10-day rule on slip and fall cases given recent judicial interpretations, and whether a 1-year limitation period may be beneficial.
3. Implementing a cap for economic loss awards.
4. Increasing the catastrophic impairment default benefit limit to \$2 million and the third-party liability coverage to \$2 million in government regulated automobile insurance plans.
5. Assessing and implementing additional measures which would support lower premiums or alternatives to the provision of insurance services by other entities such as non-profit insurance reciprocals.
6. Compelling the insurance industry to supply all necessary financial evidence including premiums, claims, and deductible limit changes which shows the fiscal impact of joint and several liability.
7. Establishing a provincial and municipal working group to consider the above and put forward recommendations to the Attorney General.

In January 2022, Attorney General Doug Downey directed his Ministry to convene a Technical Working Group on joint and several liability, which is anticipated to begin work in March. The announcement responds to recent calls by AMO and municipalities for the government to create a plan to address this long-standing challenge before the end of the provincial government's mandate.

RISK CONSIDERATIONS

The advocacy of AMO's recommendations, if successful, would moderate municipalities' insurable risk financing.

There is a risk that plaintiffs and their legal representatives will view a move away from the current joint and several liability framework as negatively affecting their rights to obtain full damage awards. However, this risk could be mitigated by ensuring that plaintiffs are still compensated in a fair and reasonable manner, which are part of AMO's advocacy and recommendations on joint and severability reform. This includes increasing the catastrophic

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impairment default benefit limit to \$2 million and the third-party liability coverage to \$2 million in government-regulated automobile insurance plans.

CONCLUSION

Council's support of AMO in this initiative could result in moderating the Region's insurable risk financing costs should the Ontario government act on some or all of AMO's recommendations.

Regional staff will continue to monitor the issue of joint and several liability and report back to Council as needed.

APPENDICES

Appendix I – AMO Drafted Standard Resolution

Appendix II – Executive Summary of *Towards a Reasonable Balance: Addressing Growing Municipal Liability and Insurance Costs. Submission to the Attorney General of Ontario. October 1, 2019*

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