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Disjointed – A Look at Joint and Several Liability

By Insurance Bureau of Canada

The legal doctrine of joint and several liability has been the subject of numerous studies in recent years. Law commissions and provincial governments from British Columbia to Manitoba to Ontario have examined whether to amend, abolish or modify the so-called "1% rule."

Joint and several liability is a common law principle holding that those who have combined to cause a single indivisible loss are each liable to the injured person for the full amount of the damage suffered. A defendant, who may be only 1% at fault, can be obligated to pay the plaintiff's entire judgment, particularly in cases where the other defendant (s) is unable to meet a court-ordered award.

In all, 11 common law jurisdictions in Canada have "joint and several" language contained in their contributory negligence legislation. In addition to Ontario, other jurisdictions with the joint and several rule in their statutes include Alberta, B.C., Manitoba, New Brunswick, P.E.I., Nova Scotia, Newfoundland and Labrador, Northwest Territories, Yukon and Nunavut.

In Ontario, the joint and several provisions of the Negligence Act, indicate: "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."

Ontario is a particularly relevant example; it is the latest province to review joint and several liability through stakeholder consultations. In February 2014, the Ontario legislature unanimously passed a motion calling on the provincial government to implement a "comprehensive, long-term solution to reform joint and several liability insurance for municipalities by no later than June 2014." The motion, introduced by PC MPP Randy Pettapiece, was supported by IBC, insurance brokers and more than 200 municipalities. .

Over the years, the application of joint and several liability under the Negligence Act has been an area of concern to commercial establishments, municipalities and their insurance companies.

Joint and several liability encourages plaintiffs and their legal counsel to name large establishments in lawsuits, even when their responsibility for a loss is questionable or marginal at best. For example, often, municipalities are perceived to have significant financial assets and sufficient insurance to cover an entire tort award. Consequently, this practice generates frivolous cases, drives up settlements and ultimately puts pressure on insurance prices.

According to the Association of Municipalities of Ontario (AMO), for several years the cost of municipal insurance has been rising at a disproportionate rate compared to inflation and all other municipal expenditures. The AMO noted in a 2011 study that municipality liability premiums increased 22% from 2007 to 2011. The report predicts that, unless change is made, insurance-related costs will increase further to $180 million by 2015, an additional 16%.

Rising severity of liability exposure forces many municipalities, especially smaller ones, to eliminate public services, such as community events, in an attempt to manage and limit potential liability exposures and lower insurance costs. Joint and several liability affects smaller municipalities to a disproportionate degree as they are less capable of spreading the losses within their tax base.

Because of the high and rising liability exposure, the market capacity for municipal insurance has been retracting. In fact, over the past several years a number of insurance companies have entered and then exited the market after experiencing the high risks involved in providing liability coverage to municipalities.

"In the past two years, (we) have paid out (for files that were resolved or closed) approximately $94 million for settlements or judgments for large claims against municipalities, of which approximately 25% represents payments as a result of the application of joint and several liability," according to a document published in April 2013 by Frank Cowan Company, a Canadian Managing General Agent representing municipalities across the country. "This percentage has been steadily increasing, making it problematic for municipalities to obtain reasonably priced insurance for their risks."

While there are many legal examples of joint and several liability, Frank Cowan Company cites one particular case to demonstrate the doctrine's consequences on municipalities.

In Deering v. Scugog (2010) ONSC 5502, a young, inexperienced driver with a G2 license was driving on a rural road with no centerline. The driver approached a steep hill and perceived the vehicle traveling towards her was on her side of the road. She took evasive action, which caused her to lose control of the car, strike a culvert and flip over, resulting in severe injuries to the driver and her sister. A centerline was not required on the road according to the Ontario Manual of Uniform Traffic Control.

The accident occurred on a boundary road with shared jurisdiction between the municipalities of Scugog and Oshawa. Both municipalities were sued, shared the liability and the payment.

According to Frank Cowan Company: "This case has cost the municipalities, and therefore (their) taxpayers and their insurers, more than $20 million. If joint and several liability were not a factor, the cost would have been $16 million. If a reasonable assessment of 25% liability on the municipalities had been made in a non-joint and several liability scenario, the cost would have been $6 million to the municipalities, taxpayers and their insurers."

Prior to the spring election, the Ontario government had canvassed groups, including Insurance Bureau of Canada (IBC), on potential reforms to joint and several liability. Other organizations, such as the AMO and the Association of Municipal Managers, Clerks and Treasurers of Ontario (AMCTO), have lobbied for some time for changes to the legal doctrine. Meanwhile, groups such as the Ontario Trial Lawyers Association (OTLA) feel there is no need for change.

Other countries, such as the United States, have made changes to joint and several liability rules. Currently, the vast majority of states in the U.S. do not have joint and several liability in their contributory negligence laws. Most have modified the rule to some form of proportionate liability, in

which the liability of each co-defendant is limited to the proportion of the loss or damage for which he or she is found to be actually responsible.

Closer to home, Saskatchewan amended its Contributory Negligence Act in 2005 to address situations where liable defendants cannot fund an award of damages. The Act provides that if a defendant cannot fund its proportion of liability, as found by the Court, the uncollectible amount will be apportioned between all parties, including the plaintiff where the plaintiff is found contributorily negligent.

There is also a level of proportionate liability in British Columbia. In that province, courts have interpreted the wording of the Negligence Act so that a defendant's liability is proportionate if the plaintiff is contributorily negligent and joint and several if the plaintiff is not.

In spring 2014, the Ontario Ministry of the Attorney General put forward two main proposals for considering reform of the issue of joint and several liability for municipalities.

The Saskatchewan Model: "Where there is a shortfall due to one defendant being insolvent and the plaintiff's own negligence contributed to the harm, the shortfall is to be divided among the remaining defendants and the plaintiff in proportion to their fault."

The Multiplier Model: "Where there is a shortfall due to one defendant being insolvent, the municipality would never be liable for more than two times its proportion of damages, even if this means that a plaintiff does not fully recover."

The most appropriate model for addressing the effects of joint and several liability is the multiplier model for all claims arising from the use and operation of motor vehicles. Car collisions account for the largest share of the problem for municipalities.

The multiplier model will ensure that a defendant who only contributed marginally to the loss does not assume significantly disproportionate amount of liability because of a non-contributing defendant. In contrast, a defendant who has been attributed increased fault for the loss will bear increased responsibility for covering the share of a non-contributing defendant than otherwise would be afforded under the Saskatchewan model. For that reason, the multiplier model will provide the plaintiff more of an opportunity to collect the compensation award.

The Saskatchewan model only applies in circumstances where the plaintiff contributed to the loss. The multiplier model's applicability should not be contingent on a finding of contributory negligence. A pre-requisite finding of contributory negligence leaves room for legal counsel and the courts to circumvent the reform by changing the evidentiary threshold for findings of contributory negligence.

Insurance companies in Ontario have experience with similar unintended consequences from tort reform. For example, in 1996, after the government increased the deductible for non-pecuniary awards in motor vehicle collision cases from $10,000 to $15,000, the cost of the average bodily injury claim increased from around $70,000 to $90,000, or almost 30%, within one year, which, in effect, offset the amount of the deductible.

IBC supports any provincial government's effort to relieve municipalities from the inequitable consequences of the application of joint and several liability. We believe the multiplier model is the most appropriate model for addressing the problem.

IBC also supports expanding the reform to include all defendants involved in claims for property damage and bodily injury losses arising from the use and operation of motor vehicles in Ontario. This approach will help minimize the potential shift of liability costs to other defendants that may be associated with focusing the reforms only on municipalities, and will contribute to lowering the cost of auto insurance for consumers.

Unfortunately, in August 2014, Ontario Attorney General Madeleine Meilleur advised attendees at the AMO annual meeting in London that the government has no plans to make changes to the law due to a lack of evidence. However, this year alone one municipality has already seen $300,000 in added costs due to higher premiums. Multiply that dollar figure by the more than 400 municipalities in Ontario and you'll see that cities are facing a real budgetary challenge. We believe that reform of the joint and several liability law would go a long way to relieving this pressure.