
From: Brouwer, Andrew
Sent: March-05-14 2:21 PM
To: Moor, Linda
Subject: AMO Breaking News - Joint and Several Liability

From: AMO Communications [<mailto:communicate@amo.on.ca>]
Sent: March 4, 2014 6:07 PM
To: Mayor Van Bynen
Subject: AMO Breaking News - Joint and Several Liability

TO THE IMMEDIATE ATTENTION OF THE CLERK AND COUNCIL

March 4, 2014

Legislature Supports Motion on Municipal Liability Reform – More Municipal Action Needed

On February 27, 2014, MPPs from all parties supported a motion calling on the government to reform joint and several liability. Passage of this resolution marks a significant milestone in the municipal campaign for reform. Now that the issue has captured the attention of the Legislature, it is time for your municipality to consider the endorsement of a more detailed legislative solution.

Nearly 200 municipalities supported the motion introduced by Randy Pettapiece, MPP for Perth-Wellington which called on the government to implement a comprehensive, long-term solution no later than June 2014. Many more also wrote to the Attorney General, the Honourable John Gerretsen in response to AMO's February 7, 2014 call for support.

Currently, the Ministry of the Attorney General is consulting municipalities and the legal community on a comprehensive long-term solution. The Ministry describes three options below:

The Saskatchewan model: This modification to joint and several liability was adopted in Saskatchewan in 2004. Under 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. This model would apply to all types of defendants in all types of negligence claims.

The Multiplier model: In road authority cases (auto accident cases in which a municipality is sued for breach of duty to maintain a public road), 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. Because this rule has the potential to result in a seriously injured plaintiff being unable to fully recover, the proposal would be limited to municipalities and to the specific subset of cases that municipalities tell us impose the most significant and unfair burden – road authority cases.

The Combined model: The Saskatchewan model and the Multiplier model could be combined. In a case in which both models would apply – a road authority case involving contributory negligence on the

part of the plaintiff – the Saskatchewan model would be applied first. The Multiplier model would be applied if needed to ensure that the municipality would not be liable for more than two times its proportion of damages.

AMO supports the adopted of the "Combined model" listed above. This places some reasonable limits on the damages that may be recovered from a municipality under limited circumstances. It is a significant incremental step to address a pressing municipal issue.

The Ministry of the Attorney General is seeking your comments by April 16, 2014. We urge all municipalities to express their support for this combined model. This includes municipalities which supported either the Pettapiece motion or AMO's form letter of February 7, 2014.

Below is a draft letter for municipalities to submit to the provincial government by April 16, 2014. Please add your community's voice of support to this solution.

The Honourable Kathleen Wynne
Premier of Ontario
Legislative Building - Room 281
Queen's Park
Toronto ON M7A 1A1

The Honourable John Gerretsen
Attorney General
McMurtry-Scott Building
720 Bay Street – 11th Floor
Toronto ON M7A 2S9

The Honourable Linda Jeffrey
Minister of Municipal Affairs and Housing
777 Bay Street - 17th Floor
Toronto ON M5G 2E5

Dear Premier, Attorney General, MMAH Minister:

[I or we] support the government's consideration and adoption of measures which limit the impact of joint and several liability on municipalities. Specifically, we understand three options are under consideration – the Saskatchewan Model, the Multiplier Model, or a third model which combines both.

I write to you in support of this third Combined Model as described by AMO's March 4, 2014 policy update. We support AMO's advice to the government that such changes would represent a significant incremental step to address a pressing municipal issue. This places some reasonable limits on the damages that may be recovered from a municipality under limited circumstances.

The provisions of the *Negligence Act* have not been updated for decades and the legislation was never intended to place the burden of insurer of last resort on municipalities. It is entirely unfair to ask municipalities to carry the lion's share of a damage award when at minimal fault or to assume responsibility for someone else's mistake.

For this reason, [I or we] support the adoption of the Combined Model under consideration. We strongly encourage the government to immediately proceed with legislation which gives effect to this model.

Sincerely,

Name

cc: AMO

AMO Contact: Matthew Wilson, Senior Advisor, 416-971-9856 Ext. 323 or mwilson@amo.on.ca.

PLEASE NOTE AMO Breaking News will be broadcast to the member municipality's council, administrator and clerk. Recipients of the AMO broadcasts are free to redistribute the AMO broadcasts to other municipal staff as required. We have decided to not add other staff to these broadcast lists in order to ensure accuracy and efficiency in the management of our various broadcast lists.

DISCLAIMER These are final versions of AMO documents. AMO assumes no responsibility for any discrepancies that may have been transmitted with the electronic version. The printed versions of the documents stand as the official record.

Date: February 7, 2014

Recent Developments in Joint and Several Liability – Municipal Action Needed

Two recent developments are worthy of the immediate written support of municipal councils and municipal solicitors.

The first is a private member's resolution introduced by Randy Pettapiece, MPP for Perth-Wellington. It calls on the government to implement comprehensive reform to joint and several liability by June 2014. Debate on this motion is scheduled for February 27, 2014. While a resolution of the Ontario Legislature is not a specific legislative plan, it does capture the spirit of municipal concerns. Mr. Pettapiece has written directly to all councils seeking your support; AMO encourages your reply.

Of immediate significance, the Ministry of the Attorney General has recently written to members of the legal community seeking their input on two specific proposals under consideration. Feedback is due by February 14, 2014. The proposals include a modified version of proportionate liability that applies in cases where a plaintiff is contributorily negligent (the Saskatchewan model). Also under consideration is a limit on awards such that a municipality would never be liable for more than two times its proportion of damages (the Multiplier model). AMO supports the adoption of both of these measures.

This is a positive development for municipalities and a step in the right direction. The adoption of both reforms would be a significant incremental step to addressing a pressing municipal issue. The written support of municipal councils and solicitors is requested. Below is a draft letter for municipalities to submit to the provincial government by February 14, 2014. Please add your voice of support.

As you know, municipal governments have long advocated for liability reform because the legal regime of joint and several liability makes municipalities and property taxpayers an easy target for litigation.

It has been two years since AMO conducted the first ever municipal insurance survey, which found that municipal liability premiums had increased 22 per cent over 5 years and 4 years since AMO presented a comprehensive report detailing municipal challenges to the Attorney General. We have argued for some time that the heavy insurance burden and legal environment is unsustainable for Ontario's communities.

AMO Contact: Matthew Wilson, Senior Advisor, mwilson@amo.on.ca - 416.971.9856 ext. 323.

The Honourable John Gerretsen
Attorney General
McMurtry-Scott Building
720 Bay Street – 11th Floor
Toronto ON M7A 2S9

Dear Attorney General:

[I or we] support the government's consideration and adoption of measures which limit the punishing impact of joint and several liability on municipalities.

The provisions of the *Negligence Act* have not been updated for decades and the legislation was never intended to place the burden of insurer of last resort on municipalities. It is entirely unfair to ask municipalities to carry the lion's share of a damage award when at minimal fault or to assume responsibility for someone else's mistake. Other jurisdictions have recognized the current model of joint and several liability is not sustainable. It is time for Ontario to do the same.

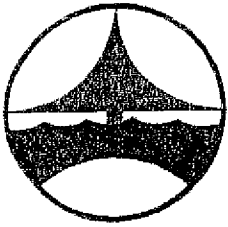
If this situation continues, the scaling back on public services in order to limit liability exposure and insurance costs will only continue. Regrettably, it will be at the expense of the communities we all call home.

For this reason, [I or we] support the adoption of both models under consideration as a significant incremental step to addressing a pressing municipal issue.

Sincerely,

Name

cc: The Honourable Kathleen Wynne, Premier of Ontario
The Honourable Linda Jeffrey, Minister of Municipal Affairs and Housing



TOWN OF GEORGINA

26557 Civic Centre Rd., Keswick, Ontario L4P 3G1

February 12, 2014

Right Honourable Kathleen Wynne,
Premier of Ontario,
Legislative Building,
Room 281,
Queen's Park,
Toronto, Ontario M7A 1A1

Right Honourable Premier:

Re: Joint and Several Liability Insurance Reform

Please be advised that Council for the Corporation of the Town of Georgina considered correspondence from Randy Pettapiece, MPP for Perth-Wellington, requesting support of his position with regard to rising municipal insurance premiums. Town Council passed the following motion:

WHEREAS under the current joint and several liability provision, if two or more defendants are responsible for a loss, each is potentially liable for the full amount of the loss. If one defendant is absent or insolvent and cannot pay, the other defendant has to cover their costs. The main alternative to this provision is a system of proportionate liability. Under this provision a defendant would only be liable for a share of the total loss, relative to their responsibility in causing the loss;

AND WHEREAS the joint and several liability provision frequently allocates risk to municipal governments who are usually considered to be the "deepest pockets" in a dispute. If the defendant has become insolvent, the joint and several liability provision means that the plaintiff may recover all of their costs from the municipal government;

AND WHEREAS for many years, municipalities have petitioned the province to address joint and several liability reform, which is the primary contributor to rising premiums;

AND WHEREAS municipalities may be held responsible for massive damage awards even if they are deemed just one percent responsible;

AND WHEREAS municipalities cannot afford to wait any longer for insurance reform policies as it is unfair and unrealistic for the provincial government to allow this situation to continue — especially as it affects small and rural municipalities, which can least afford to pay out these judgments;

AND WHEREAS Randy Pettapiece, MPP for Perth Wellington, has circulated correspondence to the Town of Georgina dated January 13, 2014 requesting action of support by the Council for joint and several liability insurance reform;

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NOW THEREFORE BE IT RESOLVED that the Council of the Corporation of the Town of Georgina supports implementing a comprehensive, long term solution to reform joint and several liability insurance for municipalities by no later than June 2014 by addressing the alarming rise in insurance premiums due to rising litigation and claims costs;

AND FURTHER that copies of this resolution of support be forwarded to the Right Honourable Kathleen Wynne, Premier of Ontario; the Honourable John Gerretsen, Attorney General; Randy Pettapiece, MPP for Perth-Wellington; the Honourable Peter Van Loan, MP; Julia Munroe, MPP for York-Simcoe; the Association of Municipalities of Ontario; the Association of Municipal Managers, Clerks and Treasurers of Ontario; the Regional Municipality of York and all local municipalities within the Region of York.

AND THAT the Director of Administrative Services and Treasurer request a representative of the Association of Municipalities of Ontario to make a presentation to Town Council.

Accordingly, we respectfully request your consideration of the rapidly rising insurance premiums by implementing a long term solution to reform joint and several liability insurance for municipalities.

Sincerely,
FOR THE TOWN OF GEORGINA,


Carolyn Lance
Council Services Coordinator

cc: The Honourable John Gerretsen, Ministry of the Attorney General, McMurtry-Scott Building, 720 Bay Street, 11th Floor, Toronto M7A 2S9
Randy Pettapiece, MPP for Perth-Wellington, 55 Lorne Avenue East, Stratford N5A 6S4
The Honourable Peter Van Loan, MP, 45 Grist Mill Road, Unit 10, Holland Landing L9N 1M7
Julia Munro, MPP for York-Simcoe, 45 Grist Mill Road, Unit 8, Holland Landing L9N 1M7
The Association of Municipalities of Ontario (AMO), 200 University Ave, Ste 801, Toronto M5H 3C6
The Association of Municipal Manager, Clerks and Treasurers (AMCTO), 2680 Skymark Ave, Ste 610, Mississauga L4W 5L6
Denis Kelly, Regional Clerk, Regional Municipality of York, 17250 Yonge Street, Newmarket L3Y 6Z1
Winanne Grant, CAO, Town of Georgina
Rebecca Mathewson, Director of Administrative Services and Treasurer, Town of Georgina
John Leach, Town Clerk, Town of Aurora, 100 John West Way, Box 1000, Aurora L4G 6J1
Fernando Lamanna, Town Clerk, Town of East Gwillimbury, 19000 Leslie Street, Sharon L0G 1V0
Kathryn Smyth, Clerk, Township of King, 2075 King Road, King City L7B 1A1
Kimberley Kitteringham, Clerk, Town of Markham, 101 Town Centre Blvd, Markham L3R 9W3
Andrew Brouwer, Town Clerk, Town of Newmarket, P.O.Box 328, Newmarket L3Y 4X7
Donna McLarty, Town Clerk, Town of Richmond Hill, 225 East Beaver Creek Rd, Richmond Hill L4B 3P4
Jeffrey Abrams, City Clerk, City of Vaughan, 2141 Major Mackenzie Drive, Vaughan L6A 1T1
Michele Kennedy, Clerk, Town of Whitchurch-Stouffville, 111 Sandiford Dr, Stouffville L4A 0Z8



February 12, 2014

The Honourable Kathleen Wynne
Premier of Ontario
Queen's Park, Room 281
111 Wellesley Street W
Toronto, ON M7A 1A1

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RE: JOINT AND SEVERAL LIABILITIES INSURANCE
REFORM FOR MUNICIPALITIES (13.0)

Dear Ms. Wynne:

This will confirm that at a meeting held on February 11, 2014, Council of the City of Markham adopted the following resolution:

"Whereas 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"; and,

Whereas while fault may be apportioned among parties to litigation, a defendant who is only 1% responsible for damages may be required to satisfy the entire judgment, regardless of the size of the judgment or apportionment of responsibility; and,

Whereas municipalities are frequently the targets of litigation due, in part, to a perception that they have more resources, in fact "deep pockets", to satisfy judgments that other defendants do not; and,

Whereas recent case law suggests that courts are frequently assigning significant liability to municipalities in circumstances where the plaintiff has been clearly at fault (excessive speeds, driver negligence, drinking while driving, failure to obey stop signs); and,

Whereas the Association of Municipalities of Ontario (AMO) has determined through a survey done two years ago that premiums for municipality liability insurance had risen 22 percent over five years; and,

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Whereas Randy Pettapiece, MPP Perth-Wellington, has proposed a private member's resolution in the Ontario Legislature, to be debated on February 27, 2014, as follows:

"That, in the opinion of this House, the government should protect taxpayers from higher property taxes by implementing a comprehensive, long-term solution to reform joint and several liability insurance for municipalities by no later than June 2014, addressing the alarming rise in insurance premiums due to rising litigation and claim costs."; and,

Whereas the Attorney General is consulting on reforms to joint and several liability, which would limit the amount payable by a municipality where the municipality has been found to be contributorily negligent, which should have a corresponding impact on liability insurance premiums;

Now therefore be it resolved:

- 1) That the City of Markham supports the private member's resolution proposed by Randy Pettapiece, MPP Perth-Wellington, to the Government of Ontario as set out below:
"That, in the opinion of this House, the government should protect taxpayers from higher property taxes by implementing a comprehensive, long-term solution to reform joint and several liability insurance for municipalities by no later than June 2014, addressing the alarming rise in insurance premiums due to rising litigation and claim costs."; and,
- 2) That the City of Markham supports the proposals to limit joint and several liability for municipalities currently under consideration by the Attorney General of Ontario; and further,
- 3) That this resolution be forwarded to the Premier of Ontario, Association of Municipalities of Ontario (AMO), Area Members of Provincial Parliament, Randy Pettapiece MPP Perth-Wellington, York Region municipalities and the Insurance Bureau of Canada.

Yours sincerely,



Kimberley Kitteringham
City Clerk

Copy to: Randy Pettapiece, MPP, Perth-Wellington
York Region MPP's
York Region Municipalities
Don Forgeron, President & CEO, Insurance Bureau of Canada
Association of Municipalities in Ontario (AMO)

THE REGIONAL MUNICIPALITY OF YORK

Committee of the Whole
Finance and Administration
February 13, 2014
Report of the
Regional Solicitor

RESOLUTION ON JOINT AND SEVERAL LIABILITY REFORM

1. RECOMMENDATIONS

It is recommended that:

1. Council support the Private Member's resolution of Randy Pettapiece, MPP, Perth-Wellington in the Ontario Legislature for reform of the joint and several liability regime.
2. The Regional Clerk circulate a copy of Council's resolution to Randy Pettapiece, MPP, the Premier of Ontario, Minister of Finance, York Region MPP's and the Association of Municipalities of Ontario ("AMO").

2. PURPOSE

This report recommends that Council support a Private Member's resolution in the Ontario Legislature for reform of the joint and several liability regime for municipalities no later than June 2014.

3. BACKGROUND

The *Negligence Act* establishes joint and several liability which is also referred to as the "1% Rule"

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..." This is generally referred to as joint and several liability or the "1% Rule", because liability for damages is apportioned among parties and may be recovered from a defendant who is only 1% responsible if the other defendants are unable to pay their portion of the damages.

Because of the operation of the 1% Rule, municipalities have often become the targets of litigation when other defendants do not have the means to pay high damage awards, as they are "deep pocket" defendants with resources at their disposal through

taxation. In recent years, courts have apportioned an increasing percentage of liability against municipalities despite clear findings of fault against plaintiffs and other defendants, no doubt the result of the “deep pockets” status of municipalities.

4. ANALYSIS AND OPTIONS

The Region and other Ontario municipalities have faced large damage awards in recent years even when the municipality’s actual liability was minimal

Over the past five years, two cases involving motor vehicle accidents on Regional roads resulted in liability being apportioned to the Region under the 1% Rule. In one case involving a single vehicle accident, the Region and its roads contractor were each found to be 25% liable for the fatal accident despite the court’s finding that the driver lost control of his vehicle while driving at twice the posted limit. The decision was however overturned on appeal. Had the decision not been overturned, the Region would have been liable for \$850,000 in damages. In a second case involving a collision between two vehicles, the court found the second driver 50% liable but apportioned the remaining 50% (\$1 million) in damages to the Region despite finding that the driver had been speeding and not driving according to the winter conditions. Had the driver (or his insurance) not paid his portion of damages, the Region would have been held liable for the full \$2 million.

Other municipalities have recently faced even more onerous judgments. In the case of *Deering v. Scugog (Township) and City of Oshawa* (2012), the plaintiffs were rendered quadriplegic following a single vehicle accident in which the driver lost control and veered into a ditch. The driver claimed that the municipalities were at fault for the design of the road, whereas the municipalities argued that the accident was due to driver error. The trial judge found that the driver was not paying attention to her speed and that she was “essentially oblivious” to the need for caution when driving at night on a rural road. Despite these findings, the court apportioned liability one-third to the driver and two-thirds to the municipal Defendants, with an award in excess of \$20 million.

A similar award was issued against the County of Brant in 2013. A young, inexperienced driver was critically injured after failing to negotiate a curve on a rural road in winter conditions. Despite finding fault in the driver for speeding and failing to drive to the conditions, the court apportioned 55% of the damages to the municipality for failing to warn drivers of the severity of the curve in the road.

In *Fordham et al v. Municipality of Dutton-Dunwich*, (2012) a sixteen year old driver was injured after he failed to stop at a stop sign and crashed into a concrete abutment on the other side of the intersection. The trial judge concluded that the driver was not seat-belted, was drinking in the vehicle and failed to obey a clearly marked stop sign. However, the plaintiff argued that the municipality was at fault due to the “unusual” design of the intersection and failure to warn drivers about the unusual design. The trial

judge apportioned liability 50% to the driver and 50% (\$5.5 million) to the municipality, notwithstanding the evidence of driver error including consuming alcohol while driving. The decision is currently under appeal.

These cases demonstrate not only to significant exposure created by the 1% Rule, but also the growing tendency of courts in Ontario to apportion a liability to municipalities despite clear evidence of fault by other parties.

The “1% Rule” impacts damage awards, as well as insurance settlements and premiums

It is impossible to quantify the effect of the “1% Rule” on insurance settlements; however, it is clear from the examples set out above that courts are more likely to assign increased liability to municipalities despite clear fault on the part of plaintiffs. As a result of such awards, the 1% Rule influences insurers to settle in order to minimize the risk of proceeding to a trial where the joint and several liability issue will greatly impact the insurer’s exposure. The decisions to settle these claims results in payment of larger damages than would be warranted by strictly proportional liability.

AMO has long proposed reform regarding the issue of joint and several liability

In April 2010, AMO presented a white paper in which they opined, in part:

“Joint and several liability is problematic not only because of the disproportioned burden on municipalities that are awarded by courts. It is also the immeasurable impact of propelling municipalities to settle out of court to avoid protracted and expensive litigation for amounts that may be excessive, or certainly represent a greater percentage than their degree of fault.”

As recently as August, 2013, AMO posted additional information on its website advising that municipalities are now paying \$35 million more in insurance premiums than they were four years ago and AMO continues to urge the Province to reform this regime.

AMO is seeking a proportionate liability regime which has been successfully adopted in other jurisdictions, including Saskatchewan and 38 states in the United States.

A Private Member’s resolution seeks reform of the joint and several liability regime for municipalities no later than June 2014

MPP Randy Pettapiece (PC) recently introduced a Private Member’s resolution in the Ontario Legislature:

“That, in the opinion of this House, the government should protect taxpayers from higher property taxes by implementing a comprehensive, long-term solution to reform joint and several liability insurance for municipalities by no later than June

RESOLUTION ON JOINT AND SEVERAL LIABILITY REFORM

2014, addressing the alarming rise in insurance premiums due to rising litigation and claim costs.”

Debate on the resolution is scheduled for February 27, 2014. Mr. Pettapiece is seeking support from all parties and all municipalities in Ontario as the issue of joint and several liability affects all municipalities in the Province. Many municipal councils in Ontario have already passed resolutions in support of Mr. Pettapiece.

Link to key Council-approved plans

The Strategic Plan calls for prudent financial management of the Region’s resources and a favourable reform of the joint and several liability regime would assist the Region in maintaining sound fiscal management by creating more stability in insurance costs.

5. FINANCIAL IMPLICATIONS

Reform to the joint and several legal regime will protect against rising costs

Without reform to the joint and several liability regime, it is likely that municipalities can expect to see continuing escalation of insurance costs. If joint and several liability is replaced with proportionate liability, the Region would likely see a reduction in the number of claims and awards where the Region’s liability is minimal, thereby reducing insurance costs. As well, proportionate liability would make equitable settlement more likely as the advantage in forcing a municipality to trial so as to tie the municipality to the 1% Rule would no longer exist.

6. LOCAL MUNICIPAL IMPACT

The local municipalities would enjoy the same benefits of other municipalities in the event of favourable reform to the joint and several legal regime.

7. CONCLUSION

Staff recommend a resolution in support of the Private Member’s resolution in the Ontario Legislature of Randy Pettapiece, MPP, Perth-Wellington.

RESOLUTION ON JOINT AND SEVERAL LIABILITY REFORM

For more information on this report, please contact Dan Kuzmyk, ext. 71401 or Tina Gardiner ext. 71656.

Recommended by:

Approved For Submission by:

Joy Hulton
Regional Solicitor

Bruce Macgregor
Chief Administrative Officer

January 29, 2014

jc

#5357571