

Key Takeaways

- Ontario's joint and several liability system results in high municipal insurance costs/settlements for local governments and leaves the public paying the price.
- The previous government reviewed three models that could be implemented in lieu of the current system.
- Reforming the system could save the municipal sector \$27 million in municipal costs (AMO, 2017).

Issue

Through the Ontario *Negligence Act*, the joint and several liability system is fiscally challenging to municipal governments and places disproportionate accountability onto municipalities. The outcome is higher insurance premiums, increased settlements, and potentially reduced services.

The Need for Reform

Under the current system, a plaintiff is able to recover the entire claim for damages from at least one of the several negligent defendants. Often referred to as the “one percent rule”, this system can leave defendants who are found to be as little as 1% at fault required to pay 100% of the damages and be “jointly” liable to the plaintiff. Most claims involve facility rentals, roads, traffic accidents, planning, and building inspections (AMO, 2010).

Regulation 299/02 of the *Municipal Act*, the Minimum Maintenance Standards (MMS) for Municipal Highways, is the closest remedy to the system. The regulation lays out the minimum standards municipalities must adhere to. However, considering that Ontario's accidents benefits are the “richest in the country and amongst the richest in the world” it is evident reforms to joint and several liability are necessary (OGRA, n.d.).

Below are three main issues associated with joint and several liability:

Disproportionate Accountability: Joint and several liability can hold other parties financially liable thereby assigning fault disproportionately. Municipalities often pay all or most of the damages, while defendants who were primarily liable pay a damage not reflective of their degree of fault. While not underscoring the plaintiff's loss, joint and several liability brings about questions of fairness in the municipal context.

Fordham vs. Dutton Dunwich: a 16-year-old driver was in a single vehicle accident when he came to an intersection with a stop sign on a rural road. The driver ignored the stop sign, drove through the intersection at or around 80km/hr, lost control of the vehicle after a bend on the road following the intersection and crashed into a concrete bridge and suffered a serious brain injury. The municipality was found to be 50% at fault due to the municipality failing to put signage for the curve in the road and the hidden hazard of the bridge.

High Insurance Costs: Municipalities are often targeted in the joint and several liability system as they are viewed as ‘deep pocket’ defendants – apparently with immense public resources available through taxation (AMO, 2010). There is also a rise in municipalities settling lawsuits to avoid long-term legal costs (IBC, 2014). In addition to the deep financial liability, municipal insurance premiums have also been dramatically rising over the past 20 years. Since 2007, liability premiums have increased by 22.2% and “are among the fastest growing municipal costs” (AMO, 2011). For example, Essex County saw their insurance costs rise 41% because of one claim (Global News, 2019).

An unnamed eastern Ontario municipality was found to be 25% liable in a case where an intoxicated driver struck an 11-year-old boy who suffered severe brain damage requiring 24-hour care for the rest of his life. The investigation concluded that the city had passed signage tests and sightlines were reasonable. Despite this, the city was found to be 25% liable and the case settled at \$8.3 million in damages. However, the \$2 million owed from the municipality was increased to \$6.375 million due to the impact of joint and several liability (AMO, 2010).

Increasing Burden on the Taxpayer: The public is increasingly bearing the burden as revenues are diverted from public service delivery in lieu of settlements and insurance costs. Moreover, smaller municipalities wear the burden more – in 2011, AMO indicated that per capita insurance costs for smaller communities (populations under 10,000) are \$37.56. This compares to per capita costs in large communities (populations over 75,000) at \$7.71. In real terms, this has meant that one northern community spends more on insurance than its local library (AMO, 2011).

In addition to the financial burden, municipalities have begun to scale back the public services they offer to limit their exposure to risk. For example, many municipalities, including Hamilton and Orangeville, have recently banned tobogganing to limit exposure to potential lawsuits.

Alternative Models for Change

Below is a brief summary of three alternative models reviewed by the previous government in 2014:

Saskatchewan Model: Includes a reallocation provision where if the uncollectable contributions of a defendant is assigned to the remaining parties, it is done so in a way that is proportionate to the degree of fault among the defendants and plaintiff.

Multiplier Model: If one defendant is unable to pay, the municipality's liability would be capped so it does not go beyond two times its proportion of damages and could leave the plaintiff unable to recoup all damages. This model would apply only to road authority cases.

Combined Model: A combination of the 'Saskatchewan model' and the Multiplier model', which places reasonable limits on the damages that may be recovered under certain circumstances. The Saskatchewan model would be applied first with the Multiplier model applying if it needs to be ensured that a municipality does not pay for two times its proportion of damages. AMCTO previously supported this model in 2014.

A Turning Point?

In January 2019, Ontario Premier Doug Ford announced the province would be launching consultations into joint and several liability to "fix what needs fixing". Following this announcement, the Ministry of the Attorney General in July 2019 began consultations to reform the system in July 2019.

References

- Association of Municipalities Ontario. "The Case for Joint and Several Liability in Ontario." 2010.
- Association of Municipalities Ontario. "2011 Municipal Insurance Survey Results." 2011.
- Association of Municipalities Ontario. "Local Share: Imagining a prosperous future for our communities." 2017.
- Court of Appeal for Ontario. "Fordham v. Dutton-Dunwich (Municipality), 2014 ONCA 891". 2014.
- Insurance Bureau of Canada (IBC). "Disjointed – Looking at Joint and Several Liability." 2014.
- Global News. "Ontario to review municipalities' concerns over 'liability chill'." 2019.
- Ontario Good Roads Association. "Reforming Joint and Several Liability." N.d.