

Clause No. 7 in Report No. 4 of the Committee of the Whole was adopted, without amendment, by the Council of The Regional Municipality of York at its meeting on February 20, 2014.

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RESOLUTION ON JOINT AND SEVERAL LIABILITY REFORM

Committee of the Whole recommends:

- 1. Receipt of the following communications:**
 - a. Randy Pettapiece, MPP, Perth-Wellington, dated January 13, 2014**
 - b. Association of Municipalities of Ontario, dated February 7, 2014**
- 2. Receipt of the report dated January 29, 2014 from the Regional Solicitor.**
- 3. Regional Council request the Regional Chair to send a letter to the Attorney General in support of measures which limit the impact of joint and several liability on municipalities.**

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 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.

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



Randy Pettapiece, MPP
Perth-Wellington

Queen's Park
Toronto, Ontario

January 13, 2014

Denis Kelly
Clerk
Regional Municipality of York
17250 Yonge St
Newmarket, ON L3Y 6Z1



Dear Mr. Kelly:

Re: Resolution on Joint and Several Liability

Rising municipal insurance premiums must be reined in. For years, municipalities have asked the province to address joint and several liability, which is the primary contributor to rising premiums. Municipalities, often targeted as insurers of last resort, can be on the hook for massive damage awards even if they are deemed just one percent responsible.

We are told that 38 U.S. states have enacted some form of proportionate liability, and that other jurisdictions are also pursuing reform. Municipalities have said that we in Ontario cannot afford to wait any longer. I agree. As a former member of a municipal council, I fully appreciate the impact of rapidly rising insurance premiums. 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.

Municipalities have heard many promises for discussion, including former Premier Dalton McGuinty's commitment at the 2011 AMO conference. But the time for discussion is over. We need to impress upon the government, in a constructive way, that it must take meaningful action. Recently I introduced the following 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 2014, addressing the alarming rise in insurance premiums due to rising litigation and claim costs.

Because this issue affects municipalities across the province, I believe there is good reason for all MPPs, regardless of party affiliation, to support my resolution. I also believe it is important that the government act by June, before the legislature breaks for the summer.

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If your municipality supports the intent of my resolution, I would encourage you to consider passing a formal resolution to support it. If your Council decides to proceed in this way, I would appreciate receiving a copy of your resolution as soon as possible. Debate on this resolution is scheduled for February 27, 2014.

If you have any feedback on this issue, or if you require any additional information, please don't hesitate to contact me at 519-272-0660 or by email: randy.pettapiececo@pc.ola.org.

Thank you very much for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Randy Pettapiece". The signature is written in a cursive style with a large, sweeping initial "R".

Randy Pettapiece, MPP
Perth-Wellington

RP:sy

From: AMO Communications [<mailto:communicate@amo.on.ca>]
Sent: Friday, February 07, 2014 02:50 PM
To: Kelly, Denis
Subject: Joint and Several Liability - Municipal Action Needed

TO THE IMMEDIATE ATTENTION OF THE CLERK AND COUNCIL

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

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