JOINT AND SEVERAL LIABILITY

A Presentation for SPIAO – MAY 2019

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TANDBERG

Conceptual Background

An accident victim's harm is often caused by the joint or concurrent acts of several parties.

Damages in such an instance are considered "*in solidium*", meaning that they are **the indivisible result** of the acts/omissions of the multiple wrongdoers.

The "in solidium" doctrine rests on the principle that where a person is at fault with others for an indivisible loss to a plaintiff, each person at fault will be liable for the whole of the plaintiff's loss.

- At common law “joint” tortfeasors were:

- (a) where one was the principal of or vicariously liable for the other;
- (b) where a duty imposed jointly upon them was not performed; or,
- (c) where there was a concerted effort between them to a common end.

- Parties could not be “joint tortfeasors” unless they had mentally combined together for some purpose.

Where tortfeasors are not “joint” they must necessarily be “several”, meaning that they are “separate” or independent.

There are two kinds of “several” tortfeasors:

1. Several tortfeasors whose acts combine to produce the same damage.
2. Several tortfeasors whose acts cause different damages.

The first kind of several tortfeasor is liable “in solidium”. A classic example of a several tortfeasor held liable for 100% of a plaintiff’s indivisible loss is a road authority, who is not acting “jointly” with a negligent driver/co-defendant, but whose “concurrent” acts/negligence causes that loss.

Historical Purposes of Legislation

- When “Negligence Acts” or “Contributory Negligence Acts” were first passed in Canada, their purpose was primarily to allow the Courts to take into account a Plaintiff’s own contribution to their damage/loss.

- The Courts apportion fault amongst all parties to a lawsuit, including the Plaintiff. (Contributory Negligence)

- An extension of this was to permit co-defendants to claim against each other for “contribution and indemnity”, a right that they did not have at common law before legislative reform occurred.

- The ability of a plaintiff to collect 100% of their damages from any joint or concurrent defendant tortfeasor to whom the court assigns fault, is a common law right based on the “in solidium” principle, that pre-existed negligence statutes.

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- The ability of a defendant to seek and collect contribution and indemnity from their co-defendants, is something that *only* arose under statute in Ontario and other Provinces.

- The law of negligence is a social and economic institution.
- The “innocent plaintiff” concept underpins it, as does the fundamental principle that tort damages are intended to put a plaintiff back into the position they would have been “but for” the accident.
- In the event a defendant cannot or will not pay their apportioned share of damages, then a problem arises:
  - **Is its fairer for the other defendants involved to have to pay the “shortfall”, or for the “innocent plaintiff” to be unable to collect their entire amount damages?**

- The Ontario Legislature, like many others in Canada, has consistently answered the foregoing question in favour of the “innocent plaintiff”, though readily admitting that it is unfair.

- ***Why?***

- - Because it is more socially “acceptable”.
- - Because it is seen as the lesser of two evils.
- - Because it places the burden upon “non-innocent” parties.
- - Because it is not politically popular to attempt to do otherwise, especially where the burden of uncollected damages will inevitably fall upon the taxpayer, through OHIP, Welfare, etc.

Email to insurers
November 1, 2012

I met today with Mr. John Gregory, General Counsel at the Ministry of the Attorney General, Policy and Adjudicative Tribunals Section and his associate Ms. Hayes.

The government appears to have the view that the 1% rule is (for the moment) the best way to spread the risk of loss around, and ensure that innocent victims are looked after following an accident. Make no mistake, the thought that Plaintiffs could end up without compensation is not something that anyone seems willing to discuss. The Supreme Court of Canada, in its decision in *Ingles v. Tutkaluk* in 2000 said "The purpose of a regime which imposes joint and several liability on multiple defendants is to ensure that plaintiffs receive actual compensation for their loss". Apparently, several international law reform commissions have endorsed joint and several liability as the best method of distributing the loss around, to ensure injury victims are not left in the lurch, so to speak. Our sense is that the government simply does not have an alternative (yet) which is politically acceptable, so we remain stuck with the present system for lack of a better alternative which can pass through legislature, especially with a minority government. Taking something away from people is very very hard, even in the best of times.

In a nutshell, the government has no appetite to do away entirely with the 1% rule, but *might* consider a compromise such as making an exception and banishing the 1% rule for claims against municipalities in lawsuits involving highway maintenance. It is clear that it will be far more politically palatable to do a smaller reform, than wholesale abolition of joint and several liability. However, there will likely have to be some kind of compromise or crisis which leads to even this small reform.

We suggested that Mr. Gregory contact you, to provide your thoughts and experience of late in respect of insuring municipalities, and the impact which joint and several liability has on your bottom line. They seem to understand the problem clearly, but need data to back it up.

The ability of municipalities to insure themselves against liability claims and thereby spread the risk, is a fundamental point to be addressed by insurers. Evidence which suggests that this ability is declining would be very helpful in supporting any possible revision to joint and several liability. So, if you have such data, give it to them in spades!

It seems that what Mr. Gregory is looking for is hard data/numbers which show that insurers have had to pay out larger and larger sums, and increase their premiums in recent years, because of claims paid out due to exposure to the 1% rule. The government seems willing to keep information confidential, but what you disclose to him can and will likely be disclosed in the legislature, either in committee or in debate. Perhaps more sensitive information should be shared verbally as opposed to in paper format, but to the extent you can share data, you should consider doing so.

Apparently, the AMO survey from last year was only moderately helpful to the cause, as it only showed that Property insurance rates increased 16% between 2007 - 2011, while Liability insurance increased 21% over the same period. A 5% difference between the two is not viewed as that big a deal… and does not impress the politicians that joint and several liability, especially in motor vehicle claims, is having a significant impact on premiums or insurance costs.

One idea floated (though just an idea, nothing more) is legislation that would force all Ontario municipalities into a single reciprocal. The increased # of insureds would allow the reciprocal, i.e. OMEX, to spread its losses out over many more customers. This will not solve the 1% problem, but could make it more manageable. Whether the government is willing to fight with Cowan and others is another issue entirely.

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Ontario

January 31, 2019

Dear Head of Council:

On Monday at the ROMA conference, Premier Doug Ford announced the Ministry of Municipal Affairs and Housing and the Ministry of the Attorney General intend to launch a consultation on the long-standing issues surrounding joint and several liability.

We have listened to our municipal partners across the province and have heard the concerns about insurance costs and a "liability chill" affecting the delivery of everyday public services.

We want to gather the facts, so we are going to consult with you. We'll need to look at the evidence and develop solutions that make sense for the people and ensure that vulnerable, injured Ontarians are compensated fairly. This will be an honest conversation, and our decisions must be based on hard facts and evidence.

Minister Mulroney and I look forward to these important discussions. Details related to the consultation process and timing will be shared in the near future.

Sincerely,

Steve Clark

Steve Clark
Minister

POSSIBLE ALTERNATIVES

- 1. Adopt a strict “several liability” model, where defendants *only* pay their individual share of assessed liability, even if there is a “shortfall”. (Unlikely to happen, as its considered unfair and inconsistent with the view that the “innocent plaintiff” ought not be penalized)

- 2. Adopt the Saskatchewan Model, where if a plaintiff is held to be contributorily negligent and one of the defendants cannot pay their share of a Judgment, then the “shortfall” is split amongst all of them in proportion to their assessed degree of fault. (Innocent passenger claims not caught!)

- 3. Adopt the “Multiplier Model” where a defendant will only have to pay a maximum of double their assessed share of liability if there is a “shortfall”. (Judges will just hold municipalities no less than 50% at fault to ensure no shortfall).

- **4. Combined Saskatchewan/Multiplier Model**

Combine the two, applying (if applicable) first the Saskatchewan Model and then, depending on the size of the shortfall and the "split", apply as a "cap" to the prorated apportionment of the "shortfall" the Multiplier Model, so that a municipality still never pays more than double its original assessed % of liability. (Note: AMO supported this the last time and its still inapplicable to "innocent passenger claims, but is better than nothing!)

A FURTHER ALTERNATIVE

Leave Joint and Several Liability as-is, but place a clearly defined monetary cap upon municipal payouts in certain Joint and Several liability situations.

e.g. – in any personal injury claim, the maximum dollar amount which a municipality can be ordered to pay in a case involving multiple defendants is capped at $5 million.

- - This has not been proposed by any organization that we are aware of, however underwriters we have spoken to have indicated that it would provide certainty and allow for more reliable calculations of “risk”, and therefore less reluctance to insure municipalities.

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