



The Case for Joint and Several Liability Reform in Ontario

***Presented by the AMO
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Association of
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200 University Avenue, Suite 801
Toronto, ON M5H 3C6 Canada
Tel: 416-971-9856 Fax: 416-971-6191
email: amo@amo.on.ca
website: www.amo.on.ca

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Executive Summary

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...”

Also known as the 1% rule, the joint and several provisions may oblige a defendant, which is only 1% at fault, to pay the plaintiff’s entire judgment particularly in cases where the other defendant is unable to meet a court ordered award. As “deep pocket” defendants with seemingly limitless public resources at their disposal through the power of taxation, municipalities have often become the targets of litigation when other defendants do not have the means to pay high damage awards.

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.

Municipalities exist to connect people to their community and the social and recreational opportunities which advance the development of a community. In this paper, there are many examples from across the province where municipalities have scaled back on what they offer as an unfortunate side effect of this litigious era. At what cost will this continue? It is time to find a reasonable balance and follow the lead of so many other jurisdictions which have pursued joint and several liability reform. In fact various forms of proportionate liability have now been enacted by all of Ontario’s competing Great Lakes states as well as 38 other states south of the border.¹

1 Chartered Accountants of Ontario <http://www.casforchange.ca/LE/index.aspx>

It should be explicitly noted that for all of its faults, joint and several liability does ensure that plaintiffs are not left empty handed. This paper in no way intends for aggrieved parties to be denied justice or damages through the courts, rather that the inequity of how much “deep pocket” defendants like municipalities are paying for both in and out of court settlements be addressed.

This paper reveals that the origin of joint and several liability has never been an explicit legislated intent of common law jurisdictions. Rather the law has evolved over hundreds of years by default as the result of the combined effect of technical and often primitive concepts of tort law. Since the industrial era, many support mechanisms have been provided by modern societies which did not exist when joint and several liability principles first originated. Today in Ontario, the following exist: accident benefit schemes for those injured in automobile accidents, universal healthcare, employers benefit plans, private disability insurance, new home and title insurance, and workers compensation schemes for those injured on the job. While the legal environment has stayed the same, society has not, and these advances are further proof of the archaic nature of joint and several liability.

Many common law jurisdictions around the world have adopted legal reforms to limit the exposure and restore balance. With other Commonwealth jurisdictions and the vast majority of state governments in the United States having modified the rule of joint and several liability in favour of some form of proportionate liability, it is time for Ontario to do the same.²

Ontario municipalities call on the Government to reform joint and several liability as it exists today, with a particular regard for the impact it has on ‘deep pocket’ property taxpayers and their communities. Ontario municipalities ought not to be insurers of last resort, targeted deliberately in some instances because of joint and several. If this situation is allowed to continue, the scaling back on public services in order to limit liability exposure and insurance costs will only continue.

² Report of the Standing Senate Committee on Banking, Trade and Commerce, Chairman: The Honourable Michael Kirby, *Joint and Several Liability and Professional Defendants – Options Discussion Paper*, October 1997 Part 3, Section C.

Regrettably it will be at the expense of local communities across the province.

Discussion with the Attorney General through the Memorandum of Understanding process and in other forums which lead to reform can help alleviate the effects joint and several liability currently have on Ontario municipalities.

Municipal Implications

Under the current joint and several liability system in Ontario, a defendant whom is found to be only 1% liable for damages caused to the injured party can be burdened with responsibility for paying the entire damage award if the co-defendants lack the ability to pay. This situation has a profound impact on municipalities in particular. As “deep pocket” defendants with seemingly limitless public resources at their disposal through the power of taxation, municipalities have often become the targets of litigation when other defendants do not have the means to pay high damage awards.

According to current legislation; the *Negligence Act*, joint and several liability dictates that damages may be recovered from any of the defendants regardless of their individual share of the liability. For municipalities, as public organizations with “deep pockets”, this often means even a finding of slight or minimal liability can result in responsibility for millions of dollars in damage awards, especially in cases where other liable parties do not have sufficient assets.

The effects of joint and several liability on municipalities are manifest in several areas including claims related to motor vehicle accidents, road safety, building inspections, and facility and event safety. It is a contributing factor in the slow pace Brownfield site redevelopment. The loss of economic activity this could create, particularly with sites located in prime urban areas that are ripe for new development. It has also resulted in increased insurance premiums and in many communities, has caused municipal governments to scale back the scope of the services provided to citizens in an effort to limit liability exposure and the duty of care.

There have been enormous strides in the past few decades to limit liability claims and improve safety including new road standards, playground standards, and pool safety standards. All municipalities have risk management policies to one degree or another and most large municipalities now employ risk managers precisely to increase health and safety and limit liability exposure in the design of facilities, programs, and insurance coverage. Liability is a top of mind consideration for all municipal councils.

There is precedence in Ontario for joint and several liability reform. The car leasing lobby highlighted a particularly expensive court award made in November of 2004 against a car leasing company by the victim of a drunk driver. The August 1997 accident occurred when the car skidded off a county road near Peterborough, Ontario. It exposed the inequity of joint and several liability for car leasing companies. The leasing companies argued to the government that the settlement had put them at a competitive disadvantage to lenders. They also warned that such liability conditions would likely drive some leasing and rental companies to reduce their business in Ontario. As a result, Bill 18 amended the *Compulsory Automobile Insurance Act*, the *Highway Traffic Act* and the *Ontario Insurance Act* to make renters and lessees vicariously liable for the negligence of automobile drivers and capped the maximum liability of owners of rental and leased cars at \$1 million. While Bill 18 has eliminated the owners of leased and rented cars as “deep pocket” defendants, no such restrictions have been imposed to assist municipalities.

Indeed the legal environment of jurisdictions and liability litigation can have a significant impact on economic development. Take for example, the case of American aircraft manufacturers Beech, Piper and Cessna, makers of small personal use aircraft. In 1987, each manufacturer calculated their annual per plane costs for product liability exceeded the cost of raw materials and labour required to make it. This situation and the resulting increase in price for new airplanes led to a dramatic decline in airplane sales and employment despite

stable safety records. From 1977 to 1988, employment in aviation manufacturing declined by 65 percent.³

The above examples illustrate that the legal environment affects commerce. In the first instance, the law was changed to accommodate the fear of a reduction in business and disproportioned liability of Ontario car leasing companies. In the second, airplane manufacturing was scaled back considerably amid a heavy legal responsibility.

In the absence of a change in law, municipalities have instead been scaling back on the provision of public services in order to limit liability exposure just as the makers of small aircraft did. This has become the order of the day for many communities in order to manage risk and the growth of insurance premiums.

Consider the following examples:

- In 2009, a municipality suspended the issuing road occupancy permits for neighbourhood street parties. Previously 5-10 street parties were held every year. Liability is a main concern.
- The same municipality also used to host municipal Victoria Day fireworks at a private facility that allowed day use and overnight camping. Due to the liability issues associated with holding a public event on private land which permits alcohol, this event was cancelled a number of years ago despite its overwhelming popularity with residents.
- One town's Youth Action Team cancelled a winter snow-tubing trip in light of the recent sports team bus crashes in other provinces involving youth and the liability of transportation.
- One large city has deliberately decided not to provide any supervision of its skateboard parks precisely because of the increased responsibility associated with the duty of care. This is despite the benefits that even minimal supervision may afford skate park users.

³ Robert Martin, "General Aviation Manufacturing" in , *The Liability Maze: The Impact of Liability Law on Safety and Innovation*. Peter W. Huber and Robert E. Litan eds. The Brookings Institution, 1991 Page 483.

- Significant standard changes to playground equipment, including “soft landings” ground preparations, have escalated costs considerably. The result has been a playground replacement cycle that has been extended significantly. In one southwestern community estimates are upwards of 50 years for all playgrounds to be replaced. Due to the overall increase in cost, playground equipment is not being replaced as quickly as it is being removed thus lowering service levels.
- Most municipalities require insurance for all events held by community residents and organizations on town property. Many report increasing their insurance requirements from the previous standard of \$1 million worth of insurance to \$2 million and in some cases \$5 million becoming the new standard. This prohibits many organizations from even considering holding events on municipal property.
- One council has banned “buck and doe” pre-wedding celebrations from their community hall. Township residents must use a neighbouring municipal facility to hold such events out of concern for liability.

Further still, there have been instances of municipalities being sued for negligent building inspections with homeowners not even bothering to name or search for the homebuilders or contractors who are often more responsible for a plaintiff’s loss. Municipalities in these situations are left in the position of seeking out the proper defendants. With the prospect of litigation on the horizon, more often than not many of these corporate entities are dissolved, furthering the public burden by leaving perennial municipalities to foot the bill.

While other Canadian, American, and Australian jurisdictions have responded to the challenge faced by municipalities and implemented legislative protections to restore the legal balance, Ontario has not. Over 60% of surveyed Ontario municipalities have identified joint and several liability to be a major problem for their municipality in recent years. Claims against municipalities have arisen out of facility rentals, roads, traffic accidents, planning, and building inspections. While increases in litigation has not paralleled some U.S. jurisdictions, Ontario

municipalities have nonetheless endured more frequent litigation that often carries significant damage awards. This situation poses policy implications for municipalities which are increasingly challenged in the delivery of public services. The decreasing number of playground structures in Queensland, Australia is the type of policy question Ontarians also may well face.⁴ In light of increasing and unrealistic financial risk, it would be shameful to imagine the withdrawal of public services owing to a legal climate in which public bodies like municipalities become unintended insurers. Imagining a scenario where there are no playground structures amid increasing public policy interest in dealing with issues such as childhood obesity and physical activity levels is not an enviable situation for communities. As Neil Robertson notes:

Municipalities exist to create and maintain communities in which people want to live. They do so by providing public services and regulating activities in the public interest. The members of the community benefit from these services and activities. Yet the current Canadian legal climate seems to place municipalities in the role of involuntary insurer. Courts are finding municipal liability where liability was traditionally denied and apportioning fault on municipalities out of proportion to municipal involvement in the actual wrong. Awards of damages have escalated well beyond inflationary increases. Municipalities are often named as a party to an action because municipalities are perceived as having “deep pockets” so that collection of a judgment is guaranteed where the primary wrongdoer is insolvent or disappears. The municipal defendant may be the only defendant able to pay by the time judgment is rendered.⁵

The evolution of the principle of joint and several liability has had a crippling legal effect on public organizations like municipalities. This paper is designed to provoke a discussion on the type of legal framework that is in the public interest in Ontario. Ontario municipalities call on the government to review the fundamental elements behind the law with a view to bringing about key reforms as many other jurisdictions have done.

⁴ Goldring, John. Civil Liability Reform in Australia: The King of Torts is Dead, 10 Unif. L. Rev. n.s. 447 (2005) at p. 448

⁵ Neil Robertson, “A Question of Balance: Legislative Responses to the Expansion of Municipal Liability.” February 2008, Page 18.

Insurance Implications

In spite of service cuts and efforts to manage risk, municipalities remain popular targets for plaintiffs with a resulting rise in insurance premiums and deductibles. For example, the City of Regina, Saskatchewan saw its insurance premiums and deductibles double from 2001-2004.⁶ The last twenty years has seen dramatically increasing liability exposure for Ontario municipalities as well including some very recent examples. Essex County has renewed its 2010 insurance policy with a 47.5% increase in its premium from the year before, a \$216,738 increase.⁷ Similarly the Town of Amherstburg had a 22% increase in its premiums for 2010.

Essex's insurer, the Frank Cowan Company attributed the majority of the premium increase to liability insurance. Municipalities from across the province are all being faced with very similar circumstances and premium increases. Joint and several liability is listed as a contributing factor by the Frank Cowan Company in its recent report to municipalities explaining premium increases.⁸ Other reasons cited include the growing costs of providing future care for catastrophically injured persons (including a doubling of the frequency of brain injury cases since 2003) and the ease with which class action lawsuits can be certified among others. Claims costs have been increasing at a rate of 6-8% annually, well above the Consumer Price Index.⁹

Other sources point to considerable catastrophic claim award increases as well.¹⁰ According to Blaney McMurtry LLP, catastrophic injury claims generally settle quickly unless there are "deep pocket" defenders. The biggest awards have been against the Ontario Government, the owners of leased cars, and municipalities.¹¹

6 Neil Robertson, "A Question of Balance: Legislative Responses to the Expansion of Municipal Liability." February 2008, Page 20.

7 Gary Rennie, "47.5% county insurance hike called 'highway robbery'", *The Windsor Star*, December 3, 2009.

8 Frank Cowan Company, "Claims Costs are Driving Premiums Up – an analysis of why this is happening." 2009.

9 Ibid. Page 12.

10 Jess Bush and Stephen Moore, "Why catastrophic injury cases are rising in value" *The Lawyers Weekly* Vol. 28, No. 48 (May 1, 2009)

11 Jess Bush and Stephen Moore, "Catastrophic Claims in Ontario" Blaney McMurtry LLP Presentation, Spring 2009

One way of addressing this issue is to raise existing minimum insurance coverage levels for automobile accidents. The current Ontario minimum is \$200,000, just a fraction of the funds necessary to cover catastrophic injury claims and a situation which often compels plaintiffs to seek out those with deep pockets to provide for long-term care.

Recent insurance reforms announced by the Minister of Finance on November 2, 2009 will seek to redefine catastrophic brain injuries and will exclude injuries sustained on municipally operated public transit systems where no collision has taken place. These reforms should limit municipal exposure to frivolous claims. However the government has also indicated it is considering a reduction in the cap for non-catastrophic claims from \$200,000 to \$50,000 putting even more pressure on “deep pocket” municipalities. Before the government’s proposed reforms are enacted, consultation with municipalities and consideration of the issues raised in this paper must be taken into account.

Australia experienced an insurance crisis in 2001 which included the collapse of one of the country’s major insurance companies, and contributed to, among other things, a “sharp increase in claims” made against local councils (municipalities).¹² The Australian Government has stated that it will be seeking the agreement of state governments, to “introduce proportionate liability in some instances to replace the rule of joint and several liability.”¹³ While premium increases in Ontario will likely thwart any such collapse from occurring here, such increases are increasingly unsustainable for municipalities to bear without legal reform.

¹² Australian Parliament, Senate, Economics References Committee, “A review of public liability and professional indemnity insurance”, (Canberra : The Committee, c2002) Chapter 3, paragraph 3.5

¹³ Ibid. Chapter 3, paragraph 3.61

Case Studies

A 2009 settlement by an Ontario Township

A single vehicle accident occurred on an Ontario township road which was under construction. The driver was impaired and speeding while overtaking another vehicle where the pavement turned to gravel. The driver lost control of the vehicle and was killed. His passenger suffered a catastrophic brain injury. Neither was wearing a seatbelt.

The township was named in the legal action because it was responsible for the road construction. While the township did not meet standards with respect to signage warning of construction ahead, the actions of the driver (who was impaired, speeding, and not wearing a seat belt) almost wholly contributed to the extent of the injuries sustained.

The claim settled for \$9.39 million of which the driver's insurer contributed \$2.67 million. The remaining \$6.72 million was paid by the township's insurer due to the application of joint and several liability.

Pre-trial settlement with an Eastern Ontario municipality, 2007

An 11-year-old boy on rollerblades skated through an intersection chasing a friend who was riding a bicycle. Thieves had removed a stop sign for traffic in his direction. The rollerblader was struck by the intoxicated driver of a vehicle which had the right of way. The liability limits carried by the automobile owner were \$1,000,000.

The vehicle owner/operator and the City were sued. The child sustained severe brain damage which would require he have 24 hour care for the rest of his life. The allegations against the City were that the stop sign was missing and should not have been and that overgrown bushes obscured the sightlines at the intersection.

The investigation revealed that the City had a reasonable system of inspecting signage; the last regular inspection documented the sign was in place and in good repair. The sightlines were investigated by defense experts and found to be reasonable in all the circumstances.

The matter proceeded to pre-trial in the spring of 2007. The pre-trial judge gave a strong indication that some liability would be found against the City, as the sightlines were not perfect. The trial went on, as the Plaintiff's demands were excessive.

During the second week of trial the sitting judge ordered a mid-trial pre-trial. The mid trial judge again strongly suggested liability on the City. The liability was estimated at 25%. Damages were settled at \$8,300,000. The claim against the City was settled for \$6,375,000 as the limits on the automobile were insufficient.

Damages that should have calculated to \$2,000,000 increased to \$6,375,000 solely due to the impact of joint and several liability.

Ingles v. Tutkaluk Construction Ltd, 2000

A contractor was hired for a basement renovation requiring a building permit in the City of Toronto. The contractor convinced the client to start construction of the underpinnings beneath the existing foundation. The foundation was finished before the permit was issued and the building inspector visited.

The inspector did not go ahead with an examination of the underpinnings because of weather. Instead, he took the word of the contractor that the underpinnings conformed to the building code, which was later found to be false. The underpinnings failed and resulted in the basement flooding. The contractor and the City of Toronto were jointly sued and damages of \$49,368.80 were awarded, split equally between the two.

The City argued in appeal that the client was also at fault for accepting the start of renovations before a building permit was issued, and therefore that their duty of care was not applicable. The Supreme Court of Canada found that the City's duty of care still applied, but that 6% of the damages were re-apportioned to the homeowner. The City of Toronto was the only defendant to appear at the trial and because of the Negligence Act, paid Tutkaluk Construction's share of the award as well.

1999 settlement against a Southwestern Ontario Region

A motor vehicle accident in January 1999 resulted in severe injuries to a passenger in the at fault vehicle. The driver had lost control on slippery road conditions and hit an oncoming vehicle in the other lane. Damages were assessed at \$5 million. The at fault driver's insurer paid \$500,000. The not at fault driver was assessed partial liability for failing to take evasive action; their insurer contributed \$500,000. The city was unable to provide sufficient winter maintenance records to eliminate any question of liability. Its insurer contributed \$4.1 million to the settlement and the city paid defense costs of \$347,882.

New v. City of Moose Jaw and Mitchell, 2004¹⁴

In 1990, 4 year old Jennifer New walked with her two older sisters to her first day of school. While crossing a busy intersection Jennifer was struck by a car and is now a quadriplegic.

A lawsuit proceeded to trial once she had reached the age of majority against the City of Moose Jaw, Saskatchewan; the former Chief of Police; and the driver. Each was found liable with 45% apportioned to the City, 35% to the driver, and 20% to the Chief of Police. The City was found responsible because it might have prevented the accident if it had installed a crosswalk and likewise for the Police Chief if a school patrol had been present.

Damages exceeding \$16 million including interest were awarded. Despite being found responsible for \$5.6 million worth of damages, the driver was only covered by \$200,000 of insurance. The balance of the award was paid by the municipality - not for causing the injury, but for failing to prevent the accident caused by driver.

¹⁴ Neil Robertson, "A Question of Balance: Legislative Responses to the Expansion of Municipal Liability." February 2008, Page 20.

Origins of the Principle of Joint and Several Liability

The principle of joint liability - that one of a number of tortfeasors (parties) who contribute to a plaintiff's damages is wholly liable for all such damages – did not originate in 20th Century statutory reforms as many assume; rather it has been a part of the common law for many centuries. Furthermore, it would seem the concept did not enter the common law through the front door based on principled legal analysis or public policy concerns; rather, it did so through the back door, by default, as a result of the combined effect of technical and long outdated rules of pleadings and primitive concepts of tort law long since repudiated. As William Prosser, a leading American torts scholar, wrote in 1937, “once a tort is considered joint, the legal consequences which follow are more or less well defined; but the rules which have developed have no common historical basis, and are not necessarily connected or related.”¹⁵

- **Bar against joinder of defendants**

The common law rules regarding joinder of multiple defendants in the same action were extremely strict. Joinder was only permitted if there was a “common” or “joint” enterprise such that it could be said that “all coming to do an unlawful act, and of one party, the act of one is the act of all of the same parties being present”.¹⁶ In England, where the parties did not act in concert, courts refused to allow joinder, even if the acts of the defendants had the combined effect of causing a single, indivisible injury to the Plaintiff.¹⁷

15 Prosser, W.L., “Joint Torts and Several Liability”, 25 Cal. L. Rev. Vol. 25, No. 4 (1936-1937) 413, p. 443.

16 *Sir John Heydon's Case* (1613), 11 Co. Rep. 5; *Arcedekene (Thomas Le.) and Henry De Bodreugam* (1302), Y.B. Edw. I 30 (106) Rols Ser 1302. In *Arcedekene*, the court allowed the plaintiff to recover his damages from his choice of the multiple defendants, although the concept of joint and several liability was not explicitly referred to nor were any policy considerations justifying that holding discussed. In *Arcedekene*, the plaintiff claimed damages against one defendant, resulting from trespass and an assault on the plaintiff by the defendant and a group of “followers”. The sole named defendant did not personally commit either torts of trespass or assault but appears only to have directed his followers to do so. The judge noted that although the action was brought against one man, “he [the plaintiff] *has his action against each one, and each one is liable to the whole*, and he shall recover his damages against each one severally, if he chooses to sue him.” [emphasis added] This decision has been cited for the proposition that although one man was named as a defendant, the entire mob was jointly and severally liable for the totality of the damages resulting from the trespass and assault, regardless of whether they were part of the assaulting mob or simply stood outside, having organized and encouraged it.

17 *Sadler v. Great Western Ry. Co.*, [1896] E.C. 450 (Eng. C.A.); *Thompson v. London County Council*, [1899] 1 Q.B. 840.

The same rule prevailed in the United States, although some American jurisdictions attempted to overcome the common law rule by statute.¹⁸ The New York Field Code of 1848, copied over the next several decades by a majority of other U.S. states, was passed to overcome this common law impediment by permitting the settlement of all questions connected with a single transaction in a single suit.

- **Bar Against Apportionment of Damages**

Courts at common law refused to permit apportionment of damages for at least two separate and distinct reasons: firstly, they strictly applied the principle of causation that a defendant was liable for all consequences proximately caused by his/her wrongful act no matter how minor the defendant's contribution might have been. Secondly, well into the 20th century, the courts clung to a theory referred to as "indivisible liability", which stipulated that every wrong gave rise to but one cause of action and as such, it was not appropriate to apportion damages. As noted by the American torts scholar, William L. Prosser, the underlying rationale for each of these rules was the belief on the part of common law courts that it was impossible for juries to reasonably divide up the damages amongst defendants in accordance with their respective degrees of fault.¹⁹ The rule against apportionment applied even where independent tortious wrongs combined to cause the same damages suffered by the plaintiff, not just to situations of joint enterprise.

- **Release and Satisfaction**

In England, the rule at common law was that there could only be one judgment in respect of a joint tort. Since the act of each tortfeasor was considered to be the act of all, it was regarded that there was but one cause of action which merged in a single judgment. Accordingly, if judgment was obtained against one of several joint tortfeasors, it barred any later action against any other joint tortfeasor even

¹⁸ Prosser, *supra*, footnote 1, p. 415.

¹⁹ Prosser, *supra*, footnote 1, p. 419.

though the judgment went unsatisfied.²⁰ Even in the case of independent torts leading to the same loss, a release of one tortfeasor by an express document or a deemed release on the basis of payment was held to extinguish the claims against any other tortfeasor who contributed to the damages. Courts in both England and the United States held that a release in favour of one tortfeasor extinguished claims against all other joint tortfeasors even where a release expressly stated the contrary.²¹

- **Impact of the foregoing principles on joint liability**

The foregoing arcane and long discarded rules of pleading and concepts of tort law led to the imposition of joint liability i.e. that any one of a number of tortfeasor was liable for the entire damages sustained, and compelled Plaintiffs to seek out the most substantial tortfeasors against whom execution was most likely to be satisfied. The rules of pleadings permitted efforts at only one tortfeasor but any judgment obtained would be for the entire amount of the damages awarded regardless of the degree of moral responsibility of the one against whom judgment as obtained.²² Joint and several liability was not understood as an independent legal principle distinct from the technical rules of pleadings and notions of tort law, now long since discarded, which gave rise to it. This is revealed by the conspicuous absence of discussion of the concept of joint liability as a distinct legal principle in early consolidations of English common law.²³

20 *Brown v. Wooten* (1600), Cro. Gac. 73; *King v. Hoare* (1844), 13 M & W 494; *Brinsmead v. Harrison* (1872) L.R. 7 CP 547.

21 *Prosser, supra*, footnote 1, pp. 421-424.

22 The term "moral responsibility" is used because the common law refused to recognize the concept of apportionment of liability.

23 See for example, Viner's Abridgments, an early consolidation of English common law dating from the early 1700s.

- **No Contribution Amongst Joint Tortfeasors**

The 1799 case of *Merryweather v. Nixan*²⁴ established the principle that there can be no contribution or indemnity amongst joint tortfeasors. There is no consideration of policy or principles in Lord Kenyon's reasons. The basis of the decision would appear to be slavish adherence to the long-settled notions of "indivisible liability" in respect of the same wrong, proximate cause and the assumed impossibility of jurors fairly apportioning responsibility for a single wrong amongst multiple tortfeasors. Although the *Merryweather* case was one of true joint tortfeasors, the principles in that case were extended both in England and the United States to situations of independent negligence contributing to the same injury.²⁵

- **Reform of the Rule Against Contribution Amongst Joint Tortfeasors**

- i. **England:**

A marked increase in tortious injuries attributed to the increasing prevalence of motor vehicles as well as industrial accidents lead to reform considerations in England, culminating in a 1934 report to parliament of the English Law Revision Committee. That report recommended that the rule in *Merryweather v. Nixan* be overruled by legislation. This would permit contribution amongst joint tortfeasors and to permit tortfeasors against whom a judgment has been obtained to commence an action against another tortfeasor who might also have been responsible for the Plaintiff's injuries to recover that tortfeasor's proportionate share of the damages. The U.K. *Law Reform (Contributory Negligence) Act* of 1945 resulted from the 1934 recommendations of the English Law Revisions Committee.

Nowhere in the report of the English Law Revision Committee of 1934 is there discussion of joint liability in the sense of whether it was fair and just for one defendant to be fixed with liability for the entire damages suffered by a plaintiff regardless of that defendant's particular degree of fault. Rather, the sole focus of the report was the unfairness of a defendant so saddled with 100% of liability not

²⁴ (1799), 8 T.R. 186 (H.L.).

²⁵ *Prosser, supra*, footnote 1, pp. 425-427.

to be able to recover from other tortfeasors whom also shared responsibility. It is speculated that consideration of the former principle did not form part of the report because it was so bound up in the aforementioned technical rules of pleading and concepts of tort law. These concepts were still very much a part of English common law, where legislation permitting actions for contribution and indemnity by one tortfeasor against another represented a discreet and workable half-measure which partially overcame the manifest inequity flowing from the common law principles then in effect.

ii. Canada:

Following passage of the U.K. *Law Reform Act* in 1945, Canadian common law jurisdictions adopted similar legislative reforms. These statutes remain in force in largely the same form as originally passed.²⁶

iii. United States:

Concurrently with legislative reform in England, the concept of joint liability and the absence of a right of contribution amongst joint tortfeasors came under critical scrutiny in the United States. Unlike in England, however, where a narrow focus and commensurately measured legislative response was taken, a more robust debate about the merits of joint liability was undertaken in the United States, fueled in part by the writings of a number of the leading tort law scholars of the day.

James Fleming Jr., the leading American torts scholar of the 20th century, offered support for joint and severable liability based on the theory of 'efficient risk distribution' and compensation. Most of Fleming's theory centred on the attribution

²⁶ The similar positions of the respective provinces and territories can be found in: British Columbia's *Negligence Act*, R.S.B.C. 1996, c.333; Alberta's *Contributory Negligence Act*, R.S.A. 2000, c. C-27; Saskatchewan's *Contributory Negligence Act*, R.S.S. 1978, c. C-31; Manitoba's *Tortfeasors and Contributory Negligence Act*, C.C.S.M. c. T90; Ontario's *Negligence Act*, R.S.O 1996, c.N.1; Nova Scotia's *Contributory Negligence Act*, R.S.N.S. 1989, c. 95; New Brunswick's *Contributory Negligence Act*, R.S.N.B.1973, c. C-19; P.E.I.'s *Contributory Negligence Act*, R.S.P.E.I. 1988, c. C-21; Newfoundland and Labrador's *Contributory Negligence Act*, R.S.N.L. 1990, c. C-33; The Northwest Territories' *Contributory Negligence Act*, R.S.N.W.T. 1988, c. C-18; Yukon Territory's *Contributory Negligence Act*, R.S.Y. 2002, c. 42; Nunavut's *Contributory Negligence Act*, R.S.N.W.T. 1988, c. C-18. The Canadian government has ousted joint and several liability in the *Canadian Business Corporations Act*, and there is a current push to carry these reforms to a wider breadth of legislation; see 'reforms' below.

of liability for defective products to companies due to their ability to distribute losses widely to consumers, a theory which applies generally to deep pocket defendants not just in the product liability area. Fleming observed that the ability of plaintiff to choose a target for full recovery from multiple tortfeasors “severs an important social function because larger and richer defendants are in a better position to distribute losses broadly.”²⁷ “Fleming viewed accidents as inevitable consequences of productive activity and he conceived the principal function of tort law to be not the resolution of disputes, rule definition or the expression of moral values, but compensation of the injured.”²⁸ Thus, Fleming saw joint and severable liability as the most efficient means by which a plaintiff could be restored (the most important thing in his view) and the loss distributed widely throughout society.

This same view was also articulated by Priest, who noted that compensation of victims was simply an enterprise cost which came with the territory of being an entity that had control over others²⁹.

In 1941, Fleming wrote: “[m]y major proposition is simply this: An existing rule of law which has some tendency to effect loss distribution over a large segment of society [i.e. joint and several liability rules] ought not to give way to a rule which will bring about a less effective distribution unless there is a very good reason for it.”³⁰

Hence, the motivation behind allowing plaintiffs to recover entirely from ‘deep pocketed’ corporate defendants in Fleming’s mind was that they can distribute the risk more broadly. For example, corporations can affect price increases, municipalities can hike taxes and insurance companies can increase premiums.

On the other hand, joint and several liability arguably undermines another fundamental theory of risk distribution recognized by Fleming himself, that being: “it is always better to divide a loss among a hundred individuals than to put it on

27 Fleming James, Jr., Contribution among Tort Feasors in the Field of Accident Litigation (Speech), 9 Utah B. Bull. 208 (1939).

28 Priest, George L., “Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law”, 14 J. Legal Stud. 461 (1985), p.470.

29 *Ibid*, p. 466.

30 Fleming James, Jr., Contribution among Joint Tort Feasors: A Pragmatic Criticism, 54 Harv. L. Rev. 1156(1941), p. 1556.

any one.”³¹ Although the modern joint and severable liability regime formally allows for apportionment among defendants, the stark reality is that Fleming’s ‘efficient risk distribution’ is not being achieved with unqualified joint and severable liability, as many tortfeasors will not be saddled with any of the damages assessed in favour of the Plaintiff under that regime.

Another theory used to justify joint and severable liability was the ‘affirmative obligation’ theory put forward by Bohlen. He argued that since potential liability “is imposed only on those who have voluntarily assumed a position or relation from which they benefit from actions of the victim that put the victim at risk”,³² each defendant is voluntarily exposing themselves to the risk. Or, more simply, *caveat emptor*: you knew this was the rule going in and you took this chance; sorry about your luck.

Although this can be seen as a reflection of current market enterprise, what is not considered by Bohlen is that attribution of damages to deep pocketed defendants can also have the effect of crippling of business growth due to massive exposure to liability. If business shies away from endeavors because that endeavor entails an excessive amount of “voluntarily assumed risk”, progress will be significantly curtailed. A good illustration of this principle in the non-business realm is the decreasing number of public playgrounds in Queensland, Australia. The exposure to increased levels of voluntarily assumed risk has meant that some local councils have not replaced some aging public playgrounds. Do we want this kind of maximum accountability in Ontario at this expense?

In spite of the views of a number of the leading tort scholars of the day supporting joint liability on social policy bases, most U.S. jurisdictions declined to follow the discrete changes to the law adopted in England, choosing instead to enact restrictions on the concept of joint liability.³³

³¹ *Ibid*, p. 471

³² Francis H. Bohlen, *The Basis of Affirmative Obligations in the Law of Torts* (pts. I-3), 53 Am. L. Reg. 209, 273, 337 (1905), at p. 273.

³³ See Section 4c, *infra*.

Concerns Leading to Change

In the early 1900's, defendants were winning cases by arguing that if any concurrent tortfeasor could be 100% responsible (because without them, the end harm would not have resulted), the contributory negligence of a plaintiff also meant 100% responsibility for his or her own injuries notwithstanding the presence of negligence of others that contributed to the plaintiff's harm (similarly due to their involvement in the chain of causation). Prosser commented:³⁴

the period of development of contributory negligence [as a complete defense; an extension of common law 'indivisible liability'] was that of the industrial revolution, and there is reason to think that the courts found in this defense, along with the concepts of duty and proximate cause, a convenient instrument of control over the jury, by which the liabilities of rapidly growing industry were curbed and kept within bounds.

When this boom of protectionism associated with the industrial revolution ended, apportionment legislation began to be adopted. This legislation abrogated the concept of "indivisible liability" and allowed for its division among tortfeasors and also recovery for a plaintiff who contributed to his/her own harm. Prosser commented on the problems that apportionment legislation was intended to address as follows:³⁵

The attack upon [indivisible liability] has been founded upon the obvious injustice of a rule which visits the entire loss caused by the fault of two parties on one of them alone. No one ever has succeeded in justifying that as a policy, and no one ever will. Its outrageousness became especially apparent in the cases of injuries to employees, where a momentary lapse of caution after a lifetime of care in the face of the employer's negligence might wreck a man's life and leave him uncompensated as a charge upon society; and the demand for some modification of the rule became an integral part of the movement which finally led to the workmen's compensation acts.

In addition, scholars have observed that apportionment legislation was introduced in the mid-1900's because "the pressure of the increasing automobile accident rate compelled consideration of the problem of the uncompensated victim"³⁶,

³⁴ Prosser, William L. *Comparative Negligence* 1952, 1 51 Mich. L. Rev. 465, p. 468.

³⁵ *Ibid.* p. 469.

³⁶ *Ibid.*, at p. 466.

again a reflection of an increasingly plaintiff-friendly society. That is, drivers are often partially to blame for their injury and apportionment legislation permitted them to recover for the percentage which the defendant added to their harm.

“During the war, when gasoline rationing reduced the accident rate, the agitation [for apportionment legislation] fell off; but when the slaughter on the highways resumed and accelerated, it has been revived in full vigor. A conservative prophet would have no difficulty in predicting the adoption of damage apportionment acts in several additional [jurisdictions] within the next few years.”³⁷

Although apportionment legislation originated to increase the ability of plaintiffs to recover in employment and vehicle accident claims, the elimination of ‘indivisible liability’ also pointed to the inequity associated with joint liability. Just as the inherent unfairness of denying a plaintiff any recovery on the basis that they were found partially, even 1%, at fault for their own injuries, so too did a critical examination of “indivisible liability” lead many to question the fairness of saddling a defendant found partially responsible, even 1%, for a plaintiff’s injuries to be burdened with responsibility for paying the entire damage award.

Ontario’s joint and several liability regime remains squarely based in its fundamental underlying assumption of joint liability on the outdated and disparaged notion of “indivisible liability”. For that reason alone, the ongoing status of this concept in our law requires serious scrutiny based on contemporary social, moral and economic values to determine if, stripped away from its now disgraced foundations, it maintains ongoing relevancy.

Apart from the lack of any defensible theoretical underpinning or public policy reasons for the introduction of joint liability into the law, there are numerous economic and social concerns arising from the operation of joint and several liability:

³⁷ *Ibid* p.467

- i) The economic environment has undergone significant change which joint and several liability in relation to economic loss fails to reflect. As has been noted:

“The legal and economic environments have changed since the inception of joint and several liability. Changing attitudes toward litigation, the increasing complexity of business operations and transactions, the increased size and sophistication of corporations and financial institutions and the trend toward the globalization of corporate clients, financial operations and transactions and professional firms have created a situation in which exposure to liability has increased and the magnitude of potential claims against professionals has risen dramatically.”³⁸

- ii) Joint and several liability encourages plaintiffs to target so-called “deep pocket” defendants who are generally insured. The obvious result of this is an exponential rise in insurance claims, a corresponding rise in the cost of insurance and the unavailability of insurance at all in some cases, effectively crippling risk-exposed defendants. Precisely this situation led to the notorious Australian “insurance crisis” which was a major motivation behind a review of joint and several liability in Australia.
- iii) The burden on defendants is exacerbated because 100% liable defendants are likely to be further burdened by expensive litigation in an effort to distribute the damage award in accordance with the court assessed apportionment of liability.
- iv) Historically, tort law has strived to fully compensate for personal injury while the recognition of a duty of care arising out of pure economic loss has been a matter of debate. Law reform, as in the *Canada Business Corporations Act*, has recognized this by modifying joint and several liability in situations of pure economic loss.

38 Report of the Standing Senate Committee on Banking, Trade and Commerce, Chairman: The Honourable Michael Kirby, *Joint and Several Liability and Professional Defendants*, March 1998, Part II, p.4; Canadian Bar Association, *Professional Liability*, Submission in Response to Senate Committee on Banking, Trade and Commerce, Options Discussion Paper, November 1997, p. 4.

- v) Federal Bill S-11 received Royal Assent in 2001 and modernized *the Canada Business Corporations Act (CBCA)* and the *Canada Cooperatives Act (Cooperatives Act)* to establish a regime of modified proportionate liability for the accounting profession. It responded to issues raised by the Canadian Institute of Chartered Accountants for two of the same reasons municipalities are targeted: “deep pocket” defendants known to be insured or solvent and subject to insurance liability premiums as a result.
- vi) Although there is a wide variety of liability reforms in various jurisdictions, Canada is doubtlessly lagging behind in these reforms, compounding these problems in an international marketplace.
- vii) Liability of municipalities in relation to negligent construction: when a building is negligently built, a municipal inspector (who are very often not engineers) is charged with approving the final plans and construction. This gives rise to a portion of fault attributed to the municipality. When joint and several liability is in place, the primarily at-fault construction firm is typically operating under a one-time-use, numbered corporation with no assets, leaving the municipality to foot the entire bill. The harshness of joint and several liability in cases of construction negligence is well illustrated by the notorious ‘leaky condo’ cases in Western Canada, as exemplified in the British Columbia Superior Court decision, *Strata Plan NW 3341 v. Canlan Ice Sports Corp.*³⁹ In that case, damages were apportioned between the project developer, designer, contractor and the municipality (the municipality being attributed the smallest share of liability). Due to insufficient funds and out of court deals made by all of the other parties, the municipality was left responsible for 100% of the settlement and in excess of \$3 million in damages despite its minimal contribution to the harm. This situation has been recognized and mitigated in some Australian provinces, as noted elsewhere in this paper.
- viii) Civil liability risk is a serious barrier to redevelopment of brownfield sites within municipal boundaries. (See section below.)

³⁹ [2001] B.C.J. No. 1723 (S.C.J.).

Brownfields Redevelopment

The concept of “polluter pays” coupled with the exposure to civil joint and several liability when a contaminated site is developed, creates significant obstacles to the redevelopment of brownfield sites. See Imperial Oil Ltd. v. Quebec (Minister of the Environment)⁴⁰ and Imperial Oil Ltd. v. Alberta (Minister of Environment)⁴¹ and Monarch Construction Ltd. v. Axidata Inc.⁴² In order to avoid the potential civil liability, large industrial owners of contaminated property choose to fence these sites and leave them to sit for 30, 50 or 100 years – whatever it takes for legislation to limit their exposure to liability. They are willing to accept their proportionate share of responsibility, however they will not accept responsibility for a future development by a third party that fails to take into account the condition of the lands. In these circumstances, the only way that municipalities can encourage large tracts of land, often located at premium locations within a city, such as waterfront lands, to be developed is for the municipality to offer indemnification and accept responsibility for the risk of a future damages award relating to the contamination.

The owners of brownfield sites see the municipality as the only body that will be in existence and have sufficient assets to provide the protection from liability they require to allow the sites to be developed. A prime example of this is the City of Toronto portlands site acquired from Imperial Oil. While this site was required for purposes of the Toronto Economic Development Corporation (TEDCO), which is and always has been 100% owned by the City of Toronto, the Corporation of the City of Toronto itself was made to take title to the property and provide the necessary indemnifications for the transaction to occur. As the aforementioned decisions indicate, the owners of large contaminated properties cannot accept the exposure to liability for future development given the applicability of joint and several liability.

The National Roundtable on the Environment and the Economy (“NRTEE”) is an independent advisory body made up of leading environmental experts appointed by the Prime Minister to prepare a national brownfield redevelopment strategy. In 2003, NRTEE issued its report entitled “Cleaning Up the Past, Building For the Future”. In respect of brownfield redevelopment, NRTEE found that fiscal and legal barriers often skewed development away from brownfield locations. In addition to the upfront costs of brownfield projects and lack of information about sites, the Report noted, “the most significant market failures preventing redevelopment include: regulatory liability risk and civil liability risk.”⁴³

The report goes on to add that, “Provincial leadership, for example, is needed to resolve many of the challenges generated by liability regimes.”⁴⁴

Complicated and overlapping government regulatory schemes and the absence of Canada-wide coordination were also identified as barriers to brownfield redevelopment. NRTEE called for a limitation on liability by setting out clear, fair and consistent public policies to deal with both regulatory liability risk and civil liability risk, including the risk created by joint and several liability.

40 Imperial Oil Ltd. v. Quebec (Minister of the Environment) [2003] S.C.J. No. 59

41 Imperial Oil Ltd. v. Alberta (Minister of Environment) [2003] A.J. No. 721

42 Monarch Construction Ltd. v. Axidata Inc. [2009] O.J. No. 723

43 National Round Table on the Environment and the Economy, 2003. “Cleaning up the Past, Building the Future: A National Brownfield Redevelopment Strategy for Canada” Page x

44 Ibid. Page 37

In a letter dated September 20, 2006, addressed to the Premier of Ontario and validating the recommendations in the report, these 17 stakeholders indicated that the major barrier to brownfield redevelopment in Ontario is “the existing uncertain liability regime”. This letter was signed by 17 different stakeholders including the Association of Municipalities of Ontario, Canadian Brownfields Network, Canadian Petroleum Products Institute, Canadian Urban Institute, Greater Toronto Homebuilders Association and Seneca College, to name a few.

- ix) Lastly, and perhaps most obviously, is the sacrifice of general fairness and equity associated with imposing the entire burden of a plaintiff's damages on a sole defendant regardless of that defendant's degree of fault simply because other defendants (who are typically the most blameworthy parties) lack the financial means to fund the damage award.

Joint and Several Reform in Common Law Jurisdictions

The concerns discussed earlier in this paper have been considered in various jurisdictions and it seems as though change is in the air. What follows is a review of some of the reforms adopted in other common law jurisdictions which serve as a useful guide for Canadian jurisdictions in considering the merits of the current joint and several liability rules in the current socioeconomic context. Not only is a review of changes instituted in other jurisdictions helpful in informing Ontario's position, they also point to the need for reform in order for Ontario to remain competitive internationally.

Proportionate Liability

i. Canada:

In 1995, Industry Minister John Manley asked the Standing Committee on Banking, Trade, and Commerce to review the *Canadian Business Corporations Act* (“CBCA”) in relation to the liability of auditors. The Canadian Institute of Chartered Accountants (“CICA”) was heard by this committee, which argued for a proportionate liability scheme in relation to negligently issued financial information by an organization. Although the CICA recommended proportionate liability for sophisticated investors, it did not think joint and several should be abolished in the case of unsophisticated investors.

The committee's recommendations culminated in amendments reflected in section 237.2 of the *CBCA*.⁴⁵ This section provides for qualified proportionate liability: that is, sub section (2) allows for increased liability attributed to a defendant in the event of another defendant being insolvent; subsection (3) provides that the uncollectible amount will be evenly distributed between solvent defendants; subsection (4) caps this reallocated amount to an additional 50% of the original liability found against the defendant, limited to cases in which there is no fraud and subject to the court allowing full joint and several liability if the circumstances justify it.⁴⁶ Currently, CICA is seeking to extend proportionate liability to other Acts which impact on its members' liability, including the *Corporate Credit Associations Act*, *Trust and Loan Companies Act*, and the *Insurance Companies Act*. CICA argues that chartered accountants are affected under these statutes just as under the *CBCA* and their liability must be limited in these contexts as well.

ii. Saskatchewan:

In 2005 Saskatchewan amended its *Contributory Negligence Act* 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.

iii. British Columbia:

British Columbia has implemented proportionate liability.

iv. Australia:

Australia has, in several states, abolished joint and several liability with regard to negligent building construction and replaced it with a proportionate liability scheme.⁴⁷ To ensure the ability of plaintiffs to fully recover, this proportionate liability scheme was supplemented with mandatory insurance for Australian

45 *Canadian Business Corporations Act* R.S., 1985, c. C-44, s. 1; 1994, c. 24, s. 1(F), s. 237.3(1);

46 *Supra* note 17, s.237.6(1)

47 "Australia: Proportion Liability – Can you avoid it?" 03 September 2009, Andrew Barclay and Dianna Gu, www.monday.com/australia

construction firms. For example, if one defendant who is 50% liable for the collapse of a building is insolvent when the action is brought, that 50% is not attributed to another defendant (as is the case in a typical joint and several regime such as Canada) but to the insurer of the insolvent defendant.

Despite Australia's reform of joint and several liability with regard to building construction, the 2002 "Ipp report"⁴⁸ recommended "[i]n relation to negligently caused personal injury and death, the doctrine of [joint and several] liability should be maintained and not replaced with proportionate liability".⁴⁹ The reason given for this conclusion is that a plaintiff should not bear the burden of the possibility that one or more defendants is insolvent. The report does not speak to this same inequitable burden being imposed on solvent defendants.

v. United States:

The US torts law treatise, *Restatement of the Law of Torts: Apportionment of Damages*,⁵⁰ published in 2000, canvassed the five joint and several liability models in effect in the various U.S. states⁵¹. These positions are:

vi. Status Quo - Maintenance of Joint and Several Liability

Traditional joint and several position where the onus is on the named defendant to recover his disproportionate loss from the other respective defendants.

vii. Proportionate Liability

Each defendant is liable only in proportion to their respective apportioned share of liability. The onus is on the plaintiff to collect from each individual defendant.

States that have instituted this reform include: Georgia, Illinois, Utah, Florida, and Alaska.

⁴⁸ *Review of the Law of Negligence: Final Report*, David Andrew Ipp for the Commonwealth of Australia, 2002.

⁴⁹ *Ibid* at 12.19; recommendation 44.

⁵⁰ *Restatement of the law, torts--apportionment of liability : proposed final draft* the American Law Institute, St Paul, MN: American Law Institute, c2000.

⁵¹ See Appendix A for a list of reforms by date in the respective States.

viii. Joint and Several Liability with Reallocation

Traditional joint and severable liability is maintained until one defendant is unable to satisfy their portion of the damages. At this point, the portion attributed to the insolvent entity is evenly distributed to the remainder of the parties involved, including the plaintiff. This is similar to the reforms in the *CBCA* expect that the plaintiff is not one of the parties subject to the allocation of the insolvent defendant's short-fall in Canada. States that have implemented this reform include: Arkansas, Oregon, and Montana.

ix. Joint and Severable Liability at a Percentage Threshold

Joint and severable liability applies only when the defendant whom the plaintiff sues is found culpable beyond a set percentage. Once this threshold has been met, the defendant can be held jointly and severably liable for 100% of the damage. Variations of this reform can be seen in many States, including: Texas, with a 50% threshold; West Virginia, with a 30% threshold; Minnesota, with a greater than 50% threshold; Pennsylvania, with a 60% threshold; Oregon, with a 20% threshold.

x. Joint and Severable Liability Based on Type of Damage

Where there is pecuniary damage, defendants remain jointly and severably liable. Where the damage is non-pecuniary, damages are recoverable only proportionately. States which have made this reform include: California, New York, Mississippi, Nevada, and Nebraska. The American Tort Reform Association provides an up to date list of reforms in this area,⁵² a copy of which is attached as a Schedule to this paper. The Schedule indicates that 38 of 50 U.S. jurisdictions have legislatively abolished or reformed the law of joint or several liability to one degree or another.

52 This list can be found online at <http://www.atra.org/issues/index.php?issue=7345&display=bydate>.

New Directions for Ontario

Joint and several liability evolved when society was not provided with publicly funded health care or a social “safety net”. Since that era, various support mechanisms to provide for an aggrieved party’s support have been implemented.

These include but are not limited to:

- Accident Benefit schemes for those injured in automobile accidents,
- Universal healthcare,
- Employers benefit plans,
- Private disability insurance,
- New homebuilders insurance,
- Title Insurance, and
- Workers Compensation.

The need to have a safety net for those suffering injury or property damage has therefore waned. Alternatives to the joint and several provisions need to be debated.

There are many options of reform available. A pure proportionate (several) liability system would allow compensation to an injured plaintiff to the extent that any defendant is found liable. Therefore if a municipality was found 25% liable and another codefendant 75%, but without funds to pay, the municipality would pay only its 25%.

Modified proportionate liability systems exist. In some Australian states the system applies to claims for economic loss while claims for general damages, pain and suffering, remain subject to joint and several liability.

Some jurisdictions in the United States have adopted another modification of proportionate liability. Those systems are premised on a defendant paying only their several liability proportion, up to a percentage. Above that percentage, joint and several liability applies and that defendant then pays 100% if other

codefendants cannot fund their share. The threshold percentage is usually 50%.

The last serious look in Ontario at the issue was a report prepared by Professor Roger Wolff on claims made against public accountants in 1994. The Wolff report recommended to the Government of Ontario a system of proportionate liability.⁵³ Fifteen years later, the Law Commission of Ontario has just begun a new review of proportionate liability as it applies to public accountants. It is time for a similar action as it applies to municipalities.

- **Proportionate Liability**

This system is operating successfully in many States and portions of Australia. A pure proportionate (several) liability system would allow compensation to an injured plaintiff to the extent that any defendant is found liable. Therefore if a municipality was found 25% liable and another codefendant 75%, but without funds to pay, the Municipality would pay only its 25%.

Alternatives or modified proportionate liability system do exist.

In some Australian states the system applies to claims for economic loss while claims for general damages, pain and suffering, remain subject to joint and several liability.

Some jurisdictions in the United States have adopted another modification of proportionate liability. Those systems are premised on a defendant paying only their several liability proportion, up to a percentage. Above that percentage, joint and several liability applies and that defendant then pays 100% if other codefendants cannot fund their share. The threshold percentage is usually 50%.

⁵³ Ibid. Part 3, Section 3, Section G, 3,b.

Conclusion

This paper has demonstrated the effects of joint and several liability on municipalities in some key areas – 1) building inspections, 2) the scaling back of services in response to ‘liability chill’, 3) the slow pace of redeveloping brownfield sites, and 4) motor vehicle and road safety.

This paper has revealed that the origin of joint and several liability has never been an explicit legislated intent of common law jurisdictions. Many common law jurisdictions around the world have adopted legal reforms to limit the exposure and restore balance. In fact various forms of proportionate liability have now been enacted by all of Ontario’s competing Great Lakes states as well as 38 other states south of the border.⁵⁴ The Australian Government has stated that it will be seeking the agreement of state governments, to “introduce proportionate liability in some instances to replace the rule of joint and several liability.”⁵⁵ It is time for Ontario to do the same.

Ontario municipalities call on the Government to reform joint and several liability as it exists today, with a particular regard for the impact it has on ‘deep pocket’ property taxpayers and their communities. Ontario municipalities ought not to be insurers of last resort, targeted deliberately in some instances because of joint and several. If this situation is allowed to continue, 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 local communities across the province.

⁵⁴ Chartered Accountants of Ontario <http://www.casforchange.ca/LE/index.aspx>

⁵⁵ Ibid. Chapter 3, paragraph 3.61