

**From:** [Laura Moy](#)  
**To:** ["magpolicy@ontario.ca"](mailto:magpolicy@ontario.ca)  
**Subject:** Consultation regarding Joint and Several Liability  
**Date:** September 27, 2019 4:16:00 PM  
**Attachments:** [Copy of Summary Spreadsheet.xlsx](#)  
[Copy of JSL - Claims Summary.xlsx](#)

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Dear Attorney General:

Re: Consultation regarding Joint and Several Liability

Thank you for the invitation to submit comments on Joint and Several Liability and for outlining broad questions that you would like to hear more about from local municipalities, along with specific examples and facts.

The following is offered in response to the questions laid out in your letter of July 12, 2019.

**Describe the nature of the problem as you see it.**

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 (JSL) 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.

It is impossible to quantify the effect of the "1% Rule" on insurance settlements; however, it is clear from case law, the 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.

**What are the problems that you need addressed to benefit your municipality?**

*Is it increasing premiums? Rising deductibles?*

The Town of Tecumseh has a full suite of coverage, including liability insurance. Frank

Cowan is the Town's main insurer and retains HUB International as its Broker. The Town maintains deductibles ranging from \$10,000 to \$25,000 on its policies.

In 2018, the Town undertook a competitive request for proposal process for risk services and various insurance policies. There was also focus on a corporate risk management strategy with the targeted outcomes of reducing claims and strengthening the Town's loss run report.

The Town meets annually with the underwriter to review the account and discuss ongoing initiatives as well as the Town's risk strategy.

The Town receives direct feedback on any risk the underwriter identifies in the portfolio.

Also at this meeting the state of the market is discussed. As the markets changes the Town maintains a close watch on the premiums to determine the most effective strategy for renewal.

To the specific question as to how the base premiums are established for municipal accounts, the Attorney General would need to address this question directly with the insurance companies who are better positioned to respond relative to their municipal clients.

To gain some additional insight into the significance of JSL to the Town, we requested input from our insurer, Frank Cowan who directed us to their recent publication "Escalating Cost Municipal Claims" which sites JSL as one of the "Drivers of Escalating Claims Costs."

<https://www.frankcowan.com/centre-of-excellence/view/escalating-cost-of-municipal-claims>

Attached is a summary of

- Municipal insurance premiums paid for past 10 years including annual percentage increase
- A comparison to another insurance premium – we used Desjardins premiums for the management group (coverage has not changed past 10 years) – adjusted to eliminate impact of staffing changes – as the comparator including 10 years' worth of premiums and annual percentage increase
- Ratio of insurance premiums to claims payouts (represented as Insurance premiums / Claims payouts fraction)

With respect to "insurance cycles" we do see spikes in annual increases for both premiums, however not necessarily at the same time.

Being *unfairly named in lawsuits*?

To date, the Town's has had a relatively good claims and settlement history and overall risk management culture. (See attached claims history) That said, the financial risk to the Town is magnified as a result of the existing JSL laws, and the annual cost of the Town's insurance premium reflects this risk.

Severe injuries are most common in road maintenance cases. People that become injured in road accidents, bring actions against the at fault driver of the vehicle as well as the municipality, alleging poor road maintenance or design.

Due to the high value of severe injuries, the limits of insurance on the vehicle are generally not enough to satisfy the judgment. Therefore, due to joint and several liability the municipality's insurer must pay the balance, even if it is only 1% liable.

As indicated earlier, 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.

le: The Town was named in a claim by a number of family members who lost a grandmother, mother, daughter and sister as a result of being impaled by a fallen tree limb. The tree was planted on private property but had grown such that it had begun to encroach onto municipal property. The Town's insurer settled with the family to limit the possible exposure to the Town and the potential significant legal costs that could be incurred in defending the action.

*Feeling that you cannot offer certain services because of the liability risk?*

In planning any event, due care is taken to limit the risk of liability on the Town.

The Town has hosted an annual Corn Festival for over 40 years, in partnership with number of area community groups. One of the community groups organized a 'beer tent' at the Festival up until recent years. The funds raised by the 'beer tent' helped to support local community events and activities. All participants were properly trained and security measures taken to limit any risk. The tent ceased following an event that occurred in another area municipality wherein a young woman was killed in a motor vehicle accident after leaving a community event which served alcohol. The event organizers along with the municipality were named in the law suit that followed by the family.

The Town has adopted an Outdoor Special Events Policy which designates certain parks for the purpose of hosting Special Events and establishes guidelines to help ensure these events are carried out safely. Alcohol related events are restricted to certain facilities and are regulated under a Municipal Alcohol Policy.

### **What solutions do you propose?**

Plaintiffs are the beneficiaries of JSL as it provides a higher degree of certainty in collecting their damages they are awarded in a judgement.

Alternative solutions that could be explored to the Attorney General's office to preserve protections to the plaintiff without shifting an unreasonable burden to municipalities, are offered as follows:

1. Elimination: This solution would see the elimination of Joint and Several Liability by legislative means.

2. **Damage Caps:** Modifying JSL through the introduction of a cap to the degree to which any party's liability can vary from their assessed share through the judgment (i.e. "Multiplier Model").
3. **Threshold:** Leave JSL as is, but introduce a clearly defined monetary cap upon Municipal payouts in certain JSL situations (thereby providing the insurance industry greater certainty on municipal risk in JSL situations) Municipalities are affected by claims whereby they are brought into an action with the expectation of being a contributing party to a settlement, yet their exposure to liability is little or nil, but with the expectation of being a contributing party in the settlement. This solution would see a revised system with a liability threshold which would create fair and valuable relief to municipalities, such as when in which JSL is only applied to matters where a defendant's liability is greater than an established threshold. Any assessment below the threshold would be applied on a proportionate basis.
4. **Insurance premiums:** Ensure that all parties have reasonable coverage for the associated risks (ie: review of automobile driver insurance policy minimums) Under Financial Services Commission (FSCO) rules, the minimum Third Party Liability coverage for automobile insurance in Ontario is \$200,000. This solution would see increasing the limits for automobile coverage in the Province of Ontario. This would ensure that parties involved in serious vehicle accidents have reasonable coverage for most losses. Failing to do this often results in claims against municipalities to "make up the shortfall".
5. **Fund:** Establish a fund, or expand on an existing fund, that would be available to support plaintiffs in cases where defendants are not capable providing for their assessed share of damages. The existing Motor Vehicle Accident Claims Fund for Provincial Gas Tax funding may be worth further evaluating as part of this solution.

Once again thank you for the opportunity to participate in the consultation on JSL. We would welcome any further discussion on this concerning matter to all local municipalities.

Yours truly,

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