

Joint and Several Liability

The continued increase in damage awards is an alarming trend. Municipalities can protect themselves through diligent risk management practices. However, in serious injury cases, even the best risk managed efforts may not produce the standard of "perfection" that our courts sometimes seem to think is achievable in the real world. As David Boghosian, of the firm, Boghosian and Associates writes,

At common law, damages in negligence and tort are deemed to be the indivisible result of the joint or concurrent action of one or more wrongdoers (this is referred to as the in solidum principle), such that the joint and several liability rule applies in the absence of statutory modification. To be held jointly and severally liable, each defendant must be found to be the effective cause of the entire loss suffered by the plaintiff. Joint and several liability does not increase a defendant's liability; in relation to the plaintiff, each defendant is 100% responsible; however, a result, if one of the defendants is unable to pay the share of damages allotted to them, the other defendant(s) are responsible for the entire loss sustained by the claimant.

The central argument in favour of joint and several liability is fairness to the plaintiff who has suffered the loss and damages. The rationale is that the fact that the actions of another wrongdoer contributed to the same loss should not jeopardize a plaintiff's right to be fully compensated for the damage and that it would be unfair to a plaintiff to shift to the plaintiff from the defendant(s) the risk of a defendant's inability to pay damages.

That risk ought to be borne by the defendant(s) because they have caused the financial or economic loss to the plaintiff.

The principal argument against joint and several liability is also fairness but fairness to defendants. It is argued that it is unfair for a defendant whose degree of fault is minor when compared to that of other defendants to have to fully compensate a plaintiff should the other defendants be insolvent. In theory, the less blameworthy defendants can recover contribution from the more blameworthy defendants; in practice, however, the former, particularly where they are insured professionals or large corporate or government entities, are left to bear the lion's share of liability when other defendants are insolvent or have disappeared.

It is argued that joint and several liability encourages plaintiffs to unfairly target defendants who are known or perceived to be insured or solvent. Plaintiffs decide when, where and whom to sue, therefore, plaintiffs will sue persons who they believe afford the best opportunity for recovery. It has also been suggested that the likelihood of having to pay an entire damages award puts pressure on deep pocket defendants, such as municipalities to avoid protracted, expensive litigation by settling for amounts that may be excessive.

In addition, to incorporating and following diligent risk management practices, municipalities may wish to consider working with the Provincial Government regarding legislation that would restrict municipalities from being held financially responsible for someone else's negligence.