

## Joint and Several Liability – Change is Needed

Joint and Several Liability, also known as the 1% rule, is where two or more persons are held liable in respect of the same action. In this article, we will address the background and current day ramification of Joint and Several Liability. In addition, we will talk about its applications and some possible alternatives.

### What is Joint and Several Liability?

Joint and Several Liability calls on all responsible defendants – in an action for tort damages – to fund their portion of those damages. If one defendant cannot fund their portion, the remaining defendants must cover those costs. This law is based on the notion that the innocent Plaintiff should be made whole while the responsible defendants sort out the indemnities between themselves.

This law has evolved out of a judicial and legislative desire to protect the rights of innocent injured Plaintiffs to recover damages in all possible situations.

The notion of protecting the rights of the Plaintiff seems patently fair until one thinks of the impact of this law on a defendant who may bear a small percentage, as little as 1% liability, and must pay all of the damages suffered by the Plaintiff due to one or more of the co-defendants being uninsured, under insured or otherwise unable to pay.

### The Present Day Impact of the 1% Rule

Those astute enough to carry liability insurance with adequate limits to meet their obligations face, along with their Insurers, unwarranted exposures due to this rule. Here is how the rule works:

An owner of an automobile carries \$1M in liability limits. He negligently operates his automobile one day and strikes a child. The accident results in the child being rendered a quadriplegic. Damages are assessed at \$5M. The lawyer for the child sues the driver and the municipality claiming the roadway was poorly designed or maintained. If a Judge finds even a small portion of liability rests with the municipality, say 10%, the driver should pay \$4.5M and the municipality, \$500,000. The driver has only \$1M in liability limits and no other assets. The municipality, through its insurer, will then have to pay \$4M and try to collect from the driver if possible. In reality the municipality will likely not recover from the driver.

While no legal scholar we have canvassed can point to the exact birth of the 1% rule, all agree it occurred some time ago when society was much different. Years ago universal health care did not exist. Disability plans, either personal or through employment, were less generous or non-existent. Automobile Accident Benefit limits were far less robust than today's. We must ask the question then, "With all of the social or private safety nets, has the 1% rule outlived its usefulness?"

A person, business or public entity carrying liability insurance with adequate limits to meet their obligations face, along with their Insurers, unwarranted exposures due to this rule. The finding of 1% liability on an insured defendant may see the entire award paid by that defendant. Insured claims cost therefore increase, driving premiums ever higher.

#### Legislation enacting Joint and Several Liability in Atlantic Canada:

- Newfoundland and Labrador's Contributory Negligence Act, R.S.NL 1990, c.C-33
- New Brunswick's Contributory Negligence Act, R.S.N.B. 1973, c.C-19
- Nova Scotia's Tortfeasors Act, R.S.N.S. 1989, c.471 and Contributory Negligence Act, R.S.N.S. 1989, c.95
- P.E.I.'s Contributory Negligence Act, R.S.P.E.I. 1998, c.C-21

### Some Alternatives

Many jurisdictions in North America have addressed the shortfalls of the 1% rule. Some of these are:

#### Proportionate Liability

In this situation, the percentage liability is assigned to each defendant and is paid by that defendant with no joint and several impacts. Georgia, Illinois, Utah, Florida and Alaska have all enacted this alternative.

#### Claims Against Negligent Construction Contractors

Some states have legislated that a contractor must carry liability limits to a certain level. Previously, municipalities or other subcontractors who were insured often suffered the impact of the 1% rule as the main contractor was out of business and uninsured by the time the lawsuit is commenced.

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### **Qualified Proportionate Liability**

Defendants who are able to pay would help underfunded defendants cover their portion of the damage costs. Arkansas, Oregon and Montana have enacted this change.

### **Percentage Threshold**

The application of this rule limits the liability of any defendant to his/her share unless the liability apportioned exceeds a certain percentage such as 50%. Texas, Minnesota, Pennsylvania, West Virginia and Oregon have adopted this modification.

All of the above viable alternatives leave the successful Plaintiff with some recovery from the liable defendants even where one cannot pay. They serve all parties in a lawsuit equitably.

### **In Conclusion**

In 2009, Frank Cowan Company organized a Committee of concerned stakeholders to address the unfairness of the 1% rule to properly insured entities. The Association of Municipalities of Ontario (AMO) led the study of the law and the authoring of a paper supporting a change to the rule that has been submitted to government. We are continuing our lobbying efforts in the hope of eliciting change in that province. We encourage stakeholders in the Atlantic Provinces to do the same.

**If you have any questions, please contact either Paul Jewett at [paul.jewett@frankcowan.com](mailto:paul.jewett@frankcowan.com), 1-506-860-6951; or Derek Sarluis at [derek.sarluis@frankcowan.com](mailto:derek.sarluis@frankcowan.com), 1-800-265-4000 ext. 261.**