

Tutton: A Step In the Right Direction, But Tread Carefully

by J. Murray Davison, Q.C.

Particularly for municipalities operating transit systems, the trial decision in *Tutton v. Pickering (Town)* was their worst nightmare. In that case, Justice Lack permitted a plaintiff who was injured by the negligence of a municipal work crew to avoid the application of the relevant no-fault legislation (OMPP) and obtain judgment against the Town of Pickering as their employer, using the principle of vicarious liability. On December 15th, 1999, the Ontario Court of Appeal overturned the trial decision, citing Section 266(5) of the legislation, which was interpreted as extending a separate immunity to the employer municipality. Section 266(5) provides that in a proceeding where a plaintiff cannot recover against the owner, occupants or persons present at the incident because of the operation of Sub-section (1), "a defendant is not liable for damages caused by any person who is excluded from liability because of the operation of Sub-section (1) and is not liable to contribute or indemnify in respect of such damages". The Court examined the overall purpose of the legislation in reaching its decision on the interpretation of Section 266(5), which resulted in dismissal of the claim based on vicarious liability.

Now the nightmare is over. Or is it? There remains for consideration the question of whether the same result is likely in cases under Bills 164 and 59. In the case of Bill 164, the answer appears to be in the affirmative, at least in part. In that legislation, the counterpart to the OMPP Section 266(5) is Sub-section 267.1(7):

If, in the absence of subsection (1), the owner of an automobile, an occupant of an automobile or a person present at the incident would have been jointly and severally liable for damages for pecuniary loss with one or more other persons who are not relieved of liability by subsection (1), the other persons are liable for those damages only to the extent that they are at fault or negligent in respect of those damages.

Although not as clearly worded as the OMPP provision, it is our opinion that it should still apply to claims based solely upon an employer's vicarious liability, at least with respect to pecuniary damages; however, Bill 164 contains a separate threshold for non-pecuniary damages and the complicated wording of that part of the legislation (Sub-section 267.1(10)) is different from the two provisions referred to above and it is arguable on the wording of the section that a plaintiff can side-step the non-pecuniary damage threshold based upon vicarious liability, although this would be plainly contrary to the intent of the legislation.

The applicable provision of the existing Bill 59 is almost identical to Sub-section 267.1(10) of Bill 164, leaving open the very real possibility that plaintiffs might be able to evade the application of Bill 59's damage reduction mechanisms and use the vicarious liability argument to obtain a judgment against the driver's employer.

See *Tutton v. Pickering (Town)* (1999), 182 D.L.R. (4th) 160 (Ont. C.A.)

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