
HALDIMAND COUNTY

Report LSS-05-2023 Insurance Claims in Litigation – 2022

For Consideration by Council in Committee on March 21, 2023



OBJECTIVE:

To advise Council of the status of various claims in litigation as at 2022 year-end.

RECOMMENDATIONS:

1. THAT Report LSS-05-2023 Insurance Claims in Litigation – 2022 be received;
2. AND THAT Memorandum LSS-M02-2023 be received and remain confidential.

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Approved: Craig Manley, MCIP, RPP, Chief Administrative Officer

EXECUTIVE SUMMARY:

Haldimand County receives litigation claims through Small Claims Court applications, as well as Statement of Claims (SOC) issued through the Ontario Superior Court.

Small Claims Court litigations are legal actions where a litigation claim (claim) cannot exceed \$35,000. As this claim value is less than most of the County's deductible values, staff assume the responsibility of defence with applicable costs allocated to the County's Self Insurance Reserve. In 2022, the County was not served any Small Claims Court applications.

SOC are typically higher in value seeking fiscal compensation for such things as bodily injury and private property damage. As required by the County's insurer, once a SOC is received for these types of claims or when the value of the claim is close to or could exceed the County's deductibles, the County notifies the insurer who then assumes the administration function of the litigation matter. The County was served with eight Statements of Claim in 2022.

The litigation process can be lengthy and complex in nature and can often span several years. In the last quarter of 2022, there were 22 claims in various stages of litigation, with six of these claims resolved by year end. Although the County cannot control the number of claims received, staff continue to strive toward ongoing maintenance of infrastructure in accordance with the County's Asset Management Plan; and improving documentation to aid in defence and keep claim and litigation costs to a minimum. Additional information regarding ongoing litigation claims is in the private and confidential memo LSS-M05-023 which accompanies this report.

BACKGROUND:

On an annual basis, staff provide Council with an update on insurance claims that have proceeded to litigation through our external insurer. The litigation claims (claims) that form the basis of this report are

those which have met the threshold and criteria to be administered by the County's external insurer. This report does not include claims that are administered internally through the County's Self Insurance Reserve as they form the subject of separate quarterly reports to Council. The report also excludes litigation related to uninsurable events, for example: civil lawsuits involving non-insurance actions; policy-related claims (procurement issues, property disputes) and employment-related matters (grievances, arbitrations, etc.). These types of legal actions are handled separately through the General Manager, Corporate & Social Services or the Office of the CAO, with advice from the County solicitor.

The goal of sound risk management strategies, including insurance, is to reduce financial uncertainty and make accidental loss manageable when providing the vast municipal operations and services as a single-tier municipality.

In the delivery of these operations and services, Haldimand County is required to comply with a variety of Acts, legislation and regulations. As part of the risk management strategies, various activities occur to ensure compliance through a variety of proactive activities including reporting, staff training, identifying potential areas of loss exposure, solid documentation / records and risk transfer.

Through the General Insurance Program, in exchange for the payment of insurance premiums and as defined by the insurance policies, the insurance company must defend at their cost, any civil action which may at any time, be brought against Haldimand County on account of claims of bodily injury, personal injury, property damage, or wrongful act. Each policy year, the insurer provides the County with a claims protocol and reporting checklist that provides instruction as to when the County is required to report litigation claims.

When the public is of the opinion that the County has not met the duty of care, a claim can be filed against the County. It is important to note that although a claim is filed against the County, this does not mean that the County has done anything wrong or any financial compensation will be provided. The County must be found negligent, meaning that the County failed to do what a reasonably prudent person would do in a given situation; or that the County did not meet a reasonable standard in the duty of care.

Legislation:

There is a multitude of legislation that applies to the complex nature of the services provided by the County; with the greatest and most common areas of exposure residing with roads, sidewalks and bridges.

Roads, Sidewalks & Bridges: In 2022, Haldimand County had approximately 1,525 kms of paved roads, 162 kms of sidewalks and 282 bridges per Asset Management records. Historically, the largest number of litigation claims are attributed to injuries as a result of a motor vehicle accident (MVA) or a slip, trip and/or fall. With respect to claims, these activities are subject to the Provincial Maintenance Standards (historically referred to as Minimum Maintenance Standards or MMS) under the *Municipal Act 2001*, the *Occupiers Liability Act* and the *Limitations Act*.

Municipal Act: Under the *Municipal Act 2001*, a municipality that has jurisdiction over a highway or bridge is required to keep it in a state of repair that is reasonable in the circumstances to prevent accidents. If a municipality fails to do so, it is subject to the *Negligence Act* - and could be liable to pay damages sustained because of its failure. If a municipality could not reasonably have been expected to have known about the road's state of repair, took reasonable steps to prevent the default from arising or it complied with the Provincial Maintenance Standards, then there is no negligence on behalf of the County.

In stating this, municipalities continue to face greater risk exposure due to Joint and Several Liability; which is a provision of the *Negligence Act* and commonly known as the 1% Rule. Under Joint and Several Liability, a municipality is only required to be found 1% liable for the cause of loss which contributed to a claimant's injuries, in order to be held jointly and severally liable - potentially having to

pay 100% of the amount awarded, despite contributory negligence by other parties. In other words, current legislation directs that a person injured by two or more negligent parties may collect full damages from any one of the negligent parties even if that party was only 1% responsible for a claim. As municipalities are seen as having “deep pockets” or unlimited financial resources, municipalities are frequently named in litigation claims. For years, municipalities have been requesting that the Ministry of the Attorney General amend this legislation, with the Association of Municipalities of Ontario (AMO) advocating on behalf of Ontario municipalities. More information can be found in Report LSS-01-2022 Joint and Several Liability of which the link to this report is provided below.

Occupiers Liability: Under the *Occupiers Liability Act*, an occupier (i.e., the County, Community Group, a renter) has a duty of care to make sure people are safe while on the premises including while participating in the activities allowed to be carried out on the premises. The *Occupiers Liability Act* has various defined duty of care standards based upon the premise such as public buildings, sidewalks, trails, parks, etc. The mere presence of a hazard does not inevitably lead to the conclusion that the occupier has breached this duty – the standard of care is one of reasonableness.

Limitations Act: Under the *Limitations Act, 2002*, a claimant has two years to bring forth a claim against another party from the day the discovery of the claim – meaning when the claimant knew or ought to have known that something caused the claimant’s loss or injury. There are exceptions to this rule including that if the injured person is a minor (under 18 years of age) or if the claimant is physically or mentally unable to commence proceedings with the two-year period.

Notice to the County

If an individual feels that Haldimand County has breached its duty under any of these Acts, legislation or regulations, they may opt to submit a claim directly to the County, issue a claim through a Small Claims Court application or through a Statement of Claim (SOC) issued through the Ontario Superior Court. The process selected is typically based upon the level of fiscal compensation being sought or as a result of discussion with a lawyer.

Regardless of the type of claim, as per the *Municipal Act, 2001*, an injured party must provide written notice of the incident and injury including the time, date and location of the event to the municipality within ten (10) days after the occurrence including for a MVA, slip, trip or fall. The purpose of the ten (10) day notice is to allow the municipality to investigate the place and circumstances of the incident and be able to build a defence in the case of litigation; and this also preserves the claimants right to file a SOC in the future. The exception to the ten-day notice requirement is if there is a reasonable excuse - such as a severe injury at which time a judge may allow the exception as long as the municipality is not prejudiced in its defence. Meaning, that the delay in providing notice to the municipality, did not harm its ability to develop a defence (i.e., take scene photos, obtain witnesses or documentation, etc.). Unfortunately, to the County’s detriment, the judiciary often demonstrates leniency to allow SOC’s to proceed even if Plaintiffs did not provide the ten-day notice.

Notice of Intent

The County also receives Notice of Intent letters which outlines that a claimant may file a lawsuit if demands are not met. In most cases, the County is already aware of the incident due to the ten-day written notice requirement; and investigation of the incident has already commenced. Each Notice of Intent is reviewed and evaluated based upon the merit of the claim and in discussion with the County’s insurer as applicable.

Litigation Process

The litigation process in Ontario has multiple steps, can be a lengthy process and is most often, is costly. The below provides a high level overview of the process with Legal and Support Staff providing facilitation, coordination or support for each of the activities outlined below.

The Pleadings Phase: A SOC is served to the Defendant(s) and defines the scope of issues, outlines the Plaintiff's case and identifies the remedy / damages that the Plaintiff is seeking. Within 20 days of receiving the Statement of Claim, the Defendant must serve a Statement of Defense, which sets out the Defendant's version of events and outlines the case for the defense.

There are times when the County will respond with a Counterclaim, meaning that the County will make a new claim of their own against the Plaintiff. The advantage of a Counterclaim is that if the judiciary deems that the Counterclaim has merit, the damages owed the Plaintiff can be reduced.

Productions and Examinations for Discovery Phase: Through the Affidavit of Documents process, each party must disclose all relevant documents to the other. Subsequently, an Examinations for Discovery occurs which is an out-of-court interview under oath or affirmation that provides for each party to examine the opposing party on relevant issues.

Pre-Trial Phase: If the matter is not resolved after the Examinations for Discovery, a pre-trial hearing is held which provides a forum for settlement or mediation and encourages the parties to narrow the issues for trial.

Trial Phase: Often parties will decide to settle the matter before it goes to trial because the legal fees involved can be quite high. However, if the parties are unable to reach a settlement, then the matter can proceed with a trial for presentation of the evidence. At the end of a trial, a judge will make a decision that is binding on all parties. If a party is not satisfied with the judge's decision, an appeal may be started. When matters involve a municipality, there is no jury, only a judge that presides.

Confidential addendum (Memorandum LSS-M02-2023) is included in the March 21, 2023, Closed Session Council in Committee agenda, which outlines the specific details of the claims currently in litigation.

Frivolous/Groundless SOC

From time to time, the County is named as a Defendant or Co-Defendant in a SOC because of Joint and Several Liability – for example: where the loss did not occur on County premises or a County owned roadway. Although, not Haldimand's jurisdiction, the County is still legally required to enter a Notice of Intent to Defend within 20 days of receipt of the SOC. If a Notice of Intent to Defend is not issued and served, the SOC states and of which the court relies on: "If you fail to defend this proceeding, judgement may be given against you in your absence and without further notice to you."

Each SOC that names the County as a Defendant has a cost – including those that are deemed as frivolous or groundless. To ensure that costs can remain as minimal as possible, the County as well as the insurers have defense strategies available including:

- Waiver of Defense – The County's legal counsel as assigned by the insurer will request a Waiver of Defense to state that the location of the incident is not in Haldimand's jurisdiction, although it remains up to Plaintiff counsel to grant the waiver. Plaintiff's counsel may grant a waiver if there is more than one named Defendant in the SOC. The granting of a waiver does not remove the County from the SOC – it only means that the Plaintiff's counsel will try to resolve the matter with the other named Defendant(s) while Haldimand's counsel and staff monitor the proceeding but is not actively involved. If the matter resolves, then Haldimand County will be released from the matter without incurring a substantial amount of money. If Plaintiff's counsel does not resolve the matter with a Co-defendant, then Haldimand County must enter a Statement of Defense and proceed with the litigation process.
- Motion for Summary Judgement – this is a procedural tool available in certain cases to obtain judgement without the need for a formal trial. A summary judgement enables early disposal of the matter and bring the proceedings to an end, saving time and costs for all involved. Such a

motion is usually brought after Examinations for Discovery to enable the court to determine if the Plaintiff has no real prospect of succeeding on the claim.

ANALYSIS:

At the end of 2022, there were 22 insurance claims in various stages of litigation representing a claimed loss value in excess of \$114.9 million; with six of the claims fully resolved at a County cost of \$340,570. The claimed loss value represents a worse case scenario and typically, this exposure is not fully realized for the majority of claims.

When a claim is received, staff assign a loss exposure value which includes the claim value and estimated court and legal costs. These values are identified in Table 1 below in the “Known/Potential Exposure on Open Claims” column.

Also identified in Table 1 the County currently has open claims from as far back as 2015 to 2022.

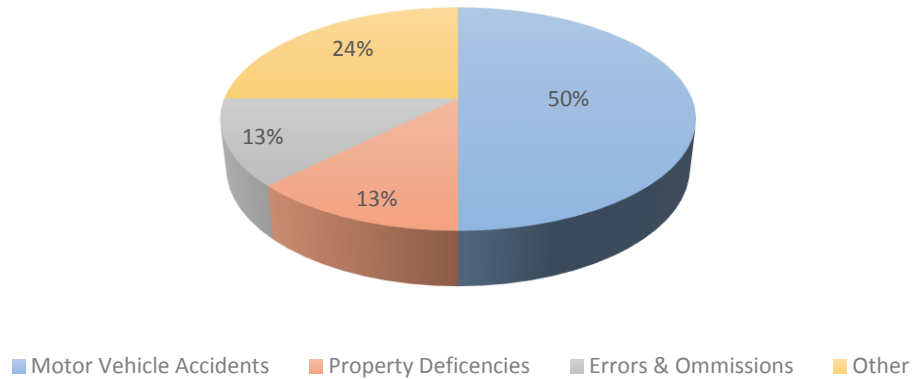
Table 1

Policy Year	Claims in Litigation by Date of Loss #	Claims Remaining Open at 12/31/22 #	Known Potential Exposure on Open Claims
2015	9	1	\$2,000,000
2016	7	0	\$0
2017	0	0	\$0
2018	3	2	\$8,000,000
2019	6	4	\$28,600,000
2020	7	6	\$73,750,000
2021	3	3	\$2,575,000
2022	1	0	\$0
Total	36	16	\$114,925,000

Table 1 does not include insurance claims that are administered internally through the Self Insurance Reserve program, unless an internal defense was provided for in Small Claims Court. Internally administered claims are not submitted to the external insurer as the dollar value of the loss did not exceed the deductible or did not meet the dollar threshold criteria of a reportable claim to the external insurer (i.e., personal injury).

The chart below depicts open litigation claims by type for 2015 – 2022. Of the sixteen open claims that are currently in litigation, 50% arose from motor vehicle accidents that are alleged to have occurred due to deficiencies on the County’s roadways; 13% are attributed to allegations of deficiencies related to the County’s sidewalks or property; 13% are errors & omissions claims, and the remaining 24% are categorized as “Other-Miscellaneous” which are further explained in the confidential Memorandum LSS-M02-2023 attachment.

Open Litigation Claims by Type - 2015 - 2022



To date, the County has taken great strides to mitigate risk in the more claims-prone areas including the continued development of a Corporate Risk Management Strategy methods to evaluate the total cost of risk (loss prevention, claims management, coverage gaps), development of appropriate risk mitigation and risk transfer strategies, and staff education and training plans. The overall goal is to reduce the frequency and severity of claims and costs.

In addition, adequate investments in maintaining the County's infrastructure as identified through the Asset Management Plan, diligent winter control and roads maintenance operations (where the majority of claims arise), and excellent record keeping will assist in mitigating risk exposure.

Despite, the above-noted proactive activities, with a legal system predicated on Joint and Several Liability, municipalities seen as the “deep pockets”, and the overall level of general exposure across municipal functions, claims will always exist and the County will always be required to defend them.

FINANCIAL/LEGAL IMPLICATIONS:

The County's share of costs to resolve insurance claims do not always become due in the year a claim is filed, as litigation claims can take several years to resolve.

As of December 31, 2022, there are sixteen outstanding insurance claims in litigation being administered by the County's external insurers with the County incurring approximately \$504,853 in expenses. Based on deductibles in place as at the date of each alleged loss, the County's maximum potential exposure for these outstanding claims is set at approximately \$3,461,000. More information regarding the deductible values can be found in Report [LSS-22-2022 General Insurance Renewal \(Attachment 1\)](#). Any costs in excess of the County's deductible to settle a claim would be borne by the external insurer. This maximum exposure would be a worst-case scenario. Typically, it would be unusual for every claim to exceed the County's deductible, however, actual outcomes are determined based on the individual merits of each claim.

The County's insurance claims costs, whether administered internally or through the applicable deductible if administered by the external insurer, are funded by the Self Insurance Reserve. At the end of 2022, the SIR has a projected balance of approximately \$843,300. This balance includes an accrual for outstanding claims currently in litigation or under investigation totalling \$1,800,000.

As part of the annual operating budget preparation and the year-end financial analysis, staff re-evaluate the required contributions to the Insurance Reserve in light of current claims experience (both internal and external). Any adjustments to the self-insured contributions would be recommended to Council through the budget approval process and/or insurance policy renewal report. Each year, \$400,000 in

contributions are made to the Self Insurance Reserve, funded by the base levy. Historically, this has been seen as a sufficient reserve level with the understanding that, if necessary, the County could draw upon other reserve sources, in particular the contingency reserve, should exposure occur that is higher than the SIR balance, preventing a significant impact to the levy.

Although the County has a robust risk mitigation program and is referred to in the industry as a model client, premiums are continually increasing. Additionally, as new types of risk emerge and as we continue to see larger judgements for significant claims across the province, these factors will trigger consideration to increasing the contributions to the reserve. Additional information regarding the Self Insurance Reserve is included in the confidential memo.

STAKEHOLDER IMPACTS:

Insurance litigation impacts all departments within the County, whether it is the actual staff time investigating and preparing to defend against claims or in subsequent increases to the insurance premiums resulting from a poor loss experience or a hard insurance market. Risk management strategies, including loss exposure identification, loss prevention measures and risk transfer approaches are integral to the operations of all departments. The trend of a more litigious society drives the need for more diligent acknowledgement, documentation and enforcement of preventative measures by County staff. By taking a proactive approach to managing risks, the County's exposure to potentially costly insurance litigation and the related diversion of financial resources will be reduced.

REPORT IMPACTS:

Agreement: No

By-law: No

Budget Amendment: No

Policy: No

REFERENCES:

1. [LSS-20-2023 3rd Quarter Insurance Activity – 2022](#)
2. [LSS-22-2022 General Insurance Renewal \(Attachment 1\)](#)
3. [Report LSS-01-2022 Joint and Several Liability](#)

ATTACHMENTS:

None