

# **Joint and Several Liability in the *Negligence Act*: A Legislative History**

**ROMA Conference**

Ministry of the Attorney General, Policy Division

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# Overview

- Joint and Several Liability (“JSL”) is established in the *Negligence Act*. If a court finds that two or more people caused an injury through negligence, the victim (plaintiff) can bring a civil lawsuit to recover the full amount of damages from any one of those people. The person sued can then recover a share of that amount from other potential defendants.
- If one of the defendants is insolvent or underinsured, the shortfall must be paid by the other negligent defendants.
- The public policy underlying the rule recognizes that, as between an injured victim and the wrongdoers, the victim should not be the one to suffer if a wrongdoer is unable to pay its proportionate share.
- JSL has been a feature of Ontario law since the very first *Negligence Act* in 1930.

# Negligence Law in Ontario before 1930

## Distinction between joint liability and several liability at common law

- This distinction had both practical and legal consequences (1988 OLRC Report on Contributory Negligence, [p. 11](#)):

	<b>Joint</b> (plaintiff's loss due to one act by multiple persons)	<b>Several</b> (plaintiff's loss due to multiple acts by multiple persons)
<b>Judgment bar rule</b> (practical)	Judgment against a defendant barred actions against others	Judgment against a defendant did not bar actions against others
<b>Joinder rule</b> (practical)	All defendants could be sued in a single action	Each defendant had to be sued separately
<b>Release bar rule</b> (legal)	Release of a defendant from liability released the others as well	Release of a defendant from liability did not affect others
<b>Single judgment rule</b> (legal)	Only one judgment could be given against all defendants. One defendant could be liable for all damages.	Separate judgments were given against each defendant. Defendants could only be liable for damages for their portion of fault.

# Negligence Law in Ontario before 1930

## Limited right of recovery at common law

The common law also created economic consequences for parties.

- **Plaintiffs – contributory negligence:** common-law rule barred plaintiffs' recovery where they were found to be partially at fault.
  - The Canadian bar and judiciary in the early 20th century had increasingly critiqued this rule as being unfair to plaintiffs.
    - The suggested solution was to apportion damages among parties based on their degree of fault. This approach had been used with some success in admiralty law statutes and in Quebec law. ([MacDonald, The Canadian Bar Review \(1935\)](#))
- **Defendants** – whether jointly or severally liable, a defendant who paid for the loss had no automatic right to recover from other defendants.

# Negligence Law in Ontario before 1930

## Early legislative reform

- **1913 – abolition of joinder rule and single judgment rule:** *Rules of Practice and Procedure* (now the *Rules of Civil Procedure*) amended to permit joinder of joint and several defendants in the same action, and to permit varying judgments against multiple defendants based on their degree of fault.
  - The purpose of this amendment was “procedural convenience” (1988 OLRC Report, [p. 17](#))
- **1924 – plaintiffs’ right of recovery expanded:** [Contributory Negligence Act](#) enacted – abolished common-law rule barring plaintiffs from recovering where they were contributorily negligent. Similar Acts were enacted across Canada.
- **1930:** *Contributory Negligence Act* replaced by *Negligence Act*.

# JSL in the *Negligence Act*: 1930 vs. 2023

## **Extent of liability, – remedy over (1930)**

3. In any action founded upon the fault or negligence of two or more persons the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found liable they shall be jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

## **Extent of liability, remedy over (2023)**

1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

# The *Negligence Act*, 1930: S.O. 1930, c. 27

What does it mean to be “jointly and severally liable”?

- Distinction between “joint and several” liability and “*in solidum*” liability (1997 Saskatchewan Law Reform Commission Report on Contributory Negligence, [p. 4](#))
  - **“Joint and several” = procedural**: refers to the practical effects of permitting joint tortfeasors and several tortfeasors to be sued in the same action. This was the procedural change enacted in 1913.
  - **“*In solidum*” = substantive**: refers to the principle that where there are multiple tortfeasors, each tortfeasor is liable for the victim’s entire loss. Both joint tortfeasors and several tortfeasors can be liable *in solidum* – whether the harms done were joint or several, they all led to one loss to the plaintiff.
- Over time, these two concepts have collectively come to be called “joint and several liability”.

# The *Negligence Act, 1930*: [S.O. 1930, c. 27](#)

## Purpose of section 3 (joint and several liability provision)

- “The intention of [the provision] was merely to declare that the liability of concurrent tortfeasors is *in solidum*” (1988 OLRC Report, [p. 19](#))
  - The reference to “joint and several liability” in the Act is to substantive *in solidum* liability, not to the procedural joinder of joint and several defendants: it establishes each defendant’s liability for the plaintiff’s full loss.
- Contributory negligence legislation at the time was limited in its ability to compensate plaintiffs who were partially at fault:
  - Courts construed legislation like the 1924 Act to only apply to concurrent, not successive acts. This meant some severally liable plaintiffs remained unable to recover compensation. ([MacDonald \(1935\)](#))
  - “The primary purpose of the legislation was to allow to courts to take into account a plaintiff's own contribution to his or her injury [...] A rule permitting the defendants to make claims for contribution from one another was perhaps an obvious extension of the principle of contribution.” (1997 SLRC Report, [p.5](#))



# The *Negligence Act, 1930*: [S.O. 1930, c. 27](#)

## Purpose of section 3 (joint and several liability provision)

- The provision thus seeks to provide for apportionment of fault and contribution among tortfeasors while preserving plaintiffs' compensation in cases of contributory negligence.
  - **Benefit to plaintiffs:** ensures their full compensation, even where liability is several and damages are apportioned among multiple parties (1988 OLRC Report, [p. 19](#))
  - **Benefit to defendants:** “[remedies] the injustice” of tortfeasors being unable to recover from other defendants, and for potentially inconsistent legal results where they seek to do so ([Robinette \(1933\)](#))

# The *Negligence Act, 1930*

## Early judicial interpretation of section 3

Courts acknowledged the provision's objectives of ensuring plaintiffs' compensation and defendants' recovery rights:

- *Topping v. Oshawa Street Railway Co.*, [\[1931\] O.J. No. 33 \(ON CA\)](#): after finding a co-defendant partially liable for a streetcar accident, the court applied s.3 to find him partially liable to contribute to the main defendant.
  - Describes the Act as a “revolutionary and eminently reasonable statute” which “removed one more anomaly of our law” by allowing joint tortfeasors to recover from other tortfeasors regardless of any contractual promises between the plaintiff and the other tortfeasors.
- *Peccin v. Lonagan and T. & N. O. Railway Commission*, [\[1934\] O.R. 701 \(ON CA\)](#): the court gave a judgment for the full sum of damages against a partially liable defendant. It observed that s.3 “does not disentitle a plaintiff to judgment for the full amount of his damages against each defendant found liable for negligence”.

# The *Negligence Act*, 1930

## Early judicial interpretation of section 3 (con't)

- *Lecomte v. Bell Telephone Co.*, [\[1931\] O.J. No. 27 \(ON CA\)](#): The plaintiff's estate sued the defendant company for allegedly causing his death. The defendant sought an order to have the City of Ottawa added as a co-defendant.
  - The Court of Appeal called the Act “revolutionary (and, in my opinion, very valuable)”. The Court went on to uphold an order under s.6 (now s.5), which allows third parties to be added as defendants.
- *Carter et al. v. Wilson*, [\[1937\] O.R. 499 \(ON CA\)](#): “The intention of [the Act] was, I think, to remedy the evil that was felt to exist at common law. Contributory negligence constituted a complete defence no matter how minor it might be. The amendment to the law contemplates the ascertainment of the respective degrees of negligence and the apportionment of the aggregate loss between the parties in proportion to the degree of negligence found.”

# JSL Developments Since 1930

## JSL in the *Negligence Act*

[1931](#): opening words of s.3 (“In any action founded upon fault or negligence...”) changed to “Where damages have been caused or contributed to by the fault or neglect...”

- Had the practical effect of expanding defendants’ right to contribution from other liable defendants, even if the plaintiff had not made a claim against them – *Lang v. Hooey*, [\[1932\] O.R. 363 \(ON CA\)](#)

[1935](#): two legislative exceptions to the JSL rule added to the Act (subsections (2) and (3)) – parties could not recover from:

- **Owners or drivers of non-commercial vehicles:** where the victim was a passenger in a vehicle “not in the business of carrying passengers for compensation”, unless the owner or driver was grossly negligent.
- **Married spouses:** where a victim’s spouse was partially at fault for the loss/damage.

These exceptions were intended to address increased claims volume resulting from the Act (in particular, a growing number of collusion cases).

# JSL Developments Since 1930

## JSL in the *Negligence Act* (con't)

**1977**: the 1935 exceptions were repealed consequent to a related amendment in the *Highway Traffic Act*.

- In support of this amendment, the government stated that the “gross negligence” standard was unfair to passengers and a source of confusion in the courts.
- The text of the JSL provision has remained the same since 1977.

**2002**: most recent amendment to *Negligence Act* – repeal of section 8 (one-year limitation period for bringing contribution and indemnity claims against an additional defendant) following enactment of the *Limitations Act, 2002*, which created a basic two-year limitation period.

- A defendant now has two years to bring a claim for contribution and indemnity from the date they are served with the original claim (*Limitations Act, 2002*, [s.18](#); MAG [consultation report](#)).

# JSL Developments Since 1930

## The *Limitations Act, 2002* and Government Liability

- The standard limitation period was a policy choice to create greater certainty in adjudicative processes and to moderate record-keeping and insurance costs.
- It was a systemic reform which affected a wide range of public statutes and actors, including both municipalities and the Crown.

Claim Type	Provincial or Municipal?	Previous LP	New LP
General negligence	Both	6 years	<a href="#">2 years</a>
Occupiers' liability	Both	6 years	
Contribution & indemnity for negligence	Both	1 year	
Public utilities	Municipal	6 months (1 year if continuing damages)	
<i>Public Authorities Protection Act</i> actions	Provincial	6 months	
Road maintenance & repair	Both	3 months	

# JSL in Historical Context

1850

- *Municipal Act*: municipal liability for road repair introduced

1894

- *Municipal Act*: gross negligence standard for snow and ice on sidewalks introduced

1913

- JSL civil rules enacted (common-law joinder and single judgment rules abolished)

1914

- Introduction of workers' compensation

1924

- *Contributory Negligence Act* enacted

# JSL in Historical Context

1930

- ***Negligence Act*** enacted
- Introduction of legislative requirements for (voluntary) auto insurance coverage

1932

- Additional statutory requirements for (voluntary) auto insurance policies

1935

- *Negligence Act*: spouse and non-commercial vehicle JSL exceptions enacted

1947

- Creation of the Motor Vehicle Accident Claims Fund

1969

- Introduction of OHIP

1977

- *Negligence Act*: current JSL provision enacted



# JSL in Historical Context

1978

- [Andrews](#) Supreme Court case: established a \$100,000 common-law cap on pain & suffering damages (about \$425,000 today)

[1979](#)

- Introduction of mandatory auto insurance

1990

- Introduction of no-fault auto insurance

[1996](#)

- *Municipal Act*: “reasonable” repair standard and statutory defences introduced

[2001](#)

- *Municipal Act, 2001* enacted: s.44 notice period standardized to 10 days

2002

- *Negligence Act*: most recent amendment (s.8 limitation period repealed)
- *Municipal Act*: Minimum Maintenance Standards enacted

# Municipal Risk, Insurance and Pooling

January 23, 2023

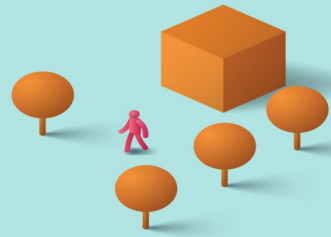


# Shannon Devane Program Manager – Municipal Risk Management





# What is insurance



**Insurance is a contract, represented by a policy, in which an individual or entity receives financial protection or reimbursement against losses from an insurance company. The company pools clients' risks to make payments more affordable for the insured.**

**The losses of the few are covered by the many.**

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# What is the Noise?



- **Joint and Several Liability**
- **Global, National and Local Occurrences – Large Municipal Losses (road accidents, building code claims), Wildfires in the West, Miami Condo collapse, Hurricanes**
- **Insurance Procurement Process**
- **Soft insurance market vs. hard insurance market**
- **Insurers and brokers entering and leaving the market**
- **Rising premiums**
- **Increasing deductibles**
- **Coverage Restrictions**
- **How do we finance risk? Pooling discussions under way**

# Risk Management Committee



## Established in 2021

- Comprised of municipal risk managers across the Province
  - Focus on education and risk management best practices
  - Topics include data management, total cost of risk, strategic risk financing, self insured retentions, alternate risk financing like insurance pools and more

[www.las.on.ca/learning/publications](http://www.las.on.ca/learning/publications)

## Municipal Risk

WINTER 2022

**LAS** | LAMCO Business Services

### How do municipalities manage risk?

Municipalities provide a wide variety of services that people depend on every day. They also manage large capital assets. These services, facilities and infrastructure all come with risk. Insurance is essential for protecting the financial interests of municipalities and no one can really afford to go without it.

As risks and costs rise, we need new approaches to manage risk and its related costs.

### What is insurance?

Insurance protects a person or organization from financial losses. Insurance companies issue policies, which reimburse their clients from losses. Insurance companies can do this because they spread the risk across many clients, making the cost of insurance more affordable for the insured. In other words, the losses of the few are covered by the many.

The cost of insurance includes the premium, which reflects the cost of purchasing the coverage. It also includes deductibles, which reflect the share of the loss that the insured must cover if there is a claim.

Insurance companies play an important role in financial markets. Not only do they invest the substantial premiums they collect, but their role also helps ensure financial stability for institutions, organizations and households.

### Who are the different players?

There are different kinds of people and organizations involved in providing insurance:



#### Insurer/Underwriters

Insurers or insurance companies are the organizations that agree to take on financial risk for a fee, also known as an insurance premium. These fees are set by an insurer's underwriters, who evaluate and analyze the potential risk.



#### Brokers

Brokers are independent businesses that provide expert insurance advice. They are paid to find the best policies and price for their clients. They do not work for insurance companies or set premiums. However, they can have exclusive agreements with insurance companies. In Ontario, AON, Marsh, BFL and EQUA are all brokers serving the municipal community.



#### Managing General Agent

An MGA is a specialized kind of broker that has been given authority by an insurance company to bind coverage, set premiums and provide other management functions. Frank Cowan Company was an MGA. The business is now a subsidiary of Intact Insurance (Intact Public Entities) and is still an MGA.

This is the first in a series of quarterly publications on the world of municipal liability and risk. The goal is to provide good information on a complex subject, so that the sector can improve risk management. This edition provides a general overview of municipal insurance and risk management concepts. Some topics, like pools, self-insurance and data analysis, will be detailed further in future editions. [Contact us](#) if there are topics you want to learn more about in future publications.

# Technical Working Group



## Established 2022

- Comprised of a separate set of municipal risk managers
  - Questionnaires created, distributed and analyzed regarding municipal risk and insurance
  - Cyber coverage identified as a key area which required immediate attention
  - Feasibility study underway





# Digital Incident Response Team



## Cyber incident response identified as an immediate issue

- RFP issued in June and currently in evaluation
  - Intention is to create a program accessible to municipalities who are unable to secure cyber insurance or need additional support
  - Includes an opportunity to review IT policies and procedures for participating municipalities





# AMO and ClearRisk



ClearRisk is an accessible, agile, cloud-based solution that automates risk and claims data processing. It is built for municipalities with a roadmap that is 100% designed around municipal environments, processes, and workflow.

AMO completed an RFP to find a solution that would assist municipalities collect data such as:

- Claim Data - 10 years of losses from dollar 1
- Insurance Data - History of coverages and their limits, sub limits and deductibles
- Insurable Asset Data - Property, Equipment and Automobile listings

This data at an aggregate level will also assist AMO LAS in advocating for and supporting municipal risk management initiatives.



# Risk Financing Considerations

- What is the primary goal of looking at an alternative risk financing structure?
  - Alternate risk financing methods are not always 'cheaper'
- Procurement by law – what are your restrictions?
  - Consider removing all risk financing related purchases from the procurement by law
- Current budget for your total cost of risk (deductibles, premiums, uninsured losses) vs. future budget considerations for increased costs - consider long term solutions

# Managing Risk in a Complex World: Municipalities, Insurance and Liability

January 2023





**A partnership of local public entities** (e.g. cities, counties, towns, schools, special districts) covering and sharing in the cost of their risks.

A key method to **support essential local services**.



# Covered Public Resources

## Public Parks and Athletic Facilities



## Local Festivals and Events



## Local Government Employees and Buildings



## Local Streets, Sidewalks and Sewers



## Local Elected Officials



## Firefighters, EMTs, Fire Trucks and Stations



## Teachers and Schools



## Employee Relations



## Employee Health Care



## Public Safety Officers and Operations



## Maintenance of Public Spaces



## ...and even pools



- ✓ **Commitment to local public entities, only** — specialized coverages and risk management programs
- ✓ **Public sector mindset** — stewardship of public dollars, transparency, good governance
- ✓ **Not for profit mission** — priority is about meeting member needs, not shareholder returns
- ✓ **Long-term perspective** — stable coverages and sustainable economic value to meet public sector budget realities





1

**Protect the people, operations and assets of local public entities**

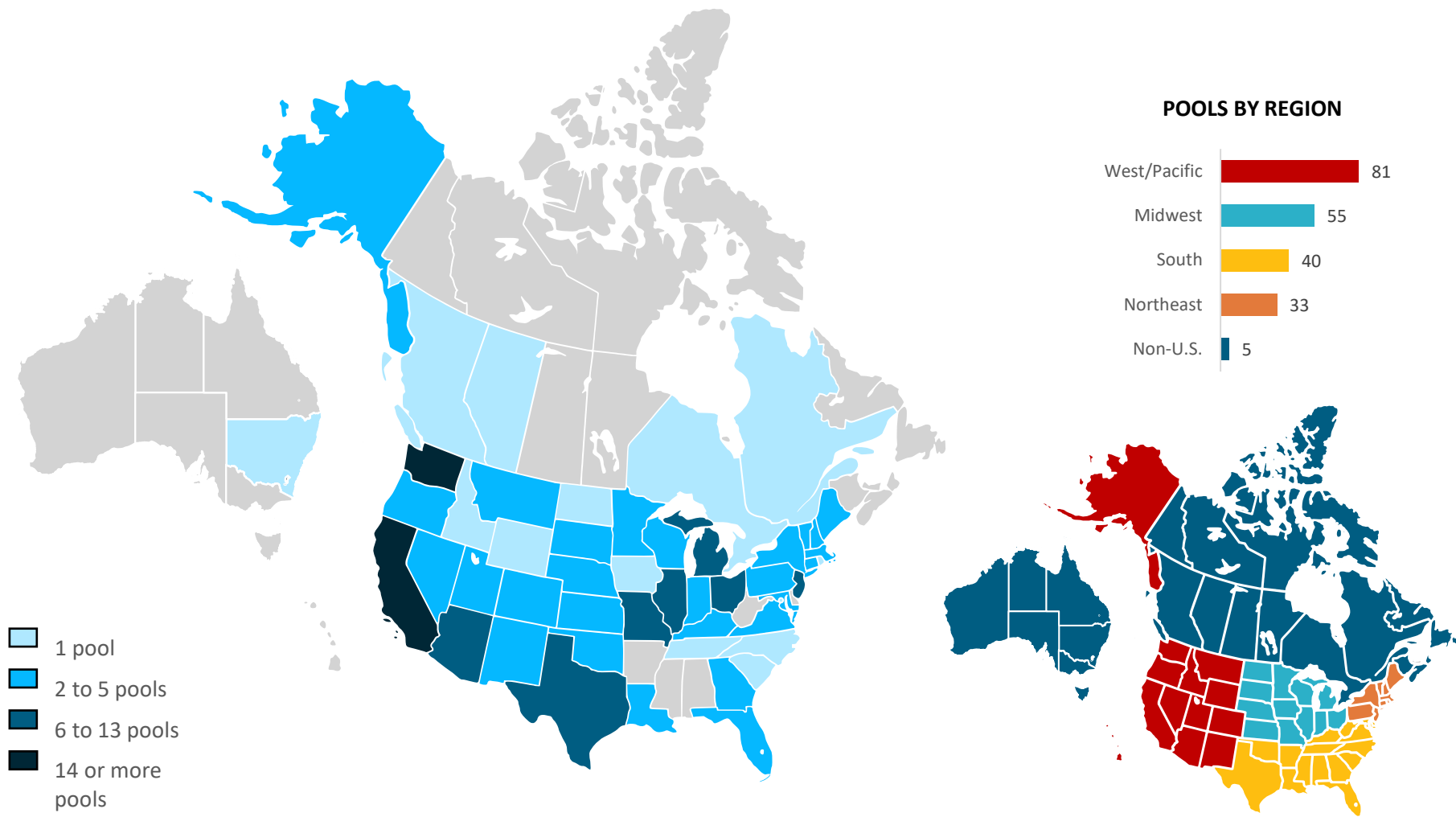
2

**Allow important public service decisions to be made on factors other than cost**

3

**Do the right thing for local public entities and their taxpayers**

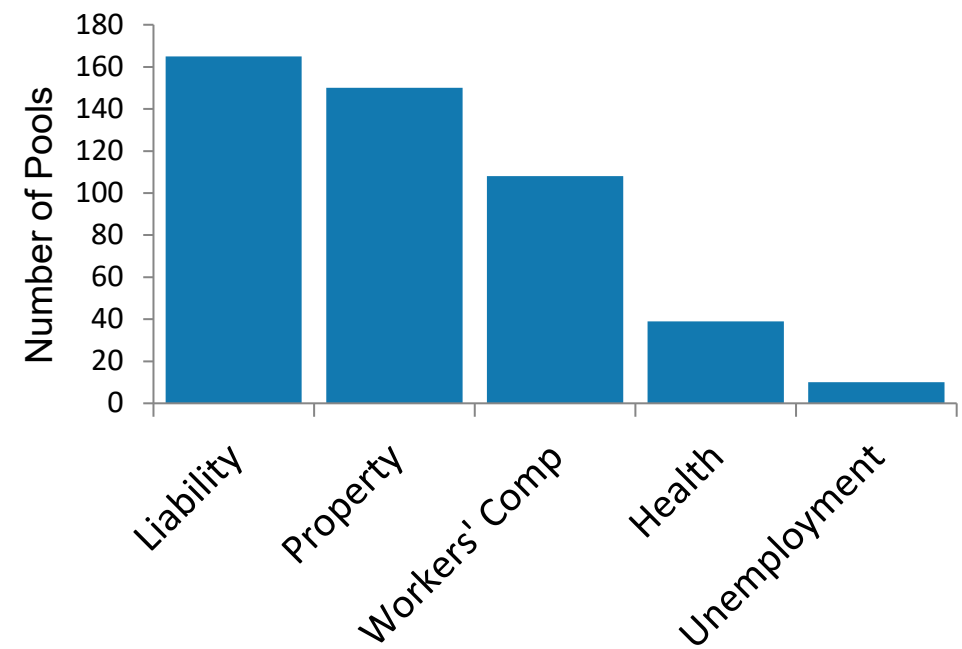




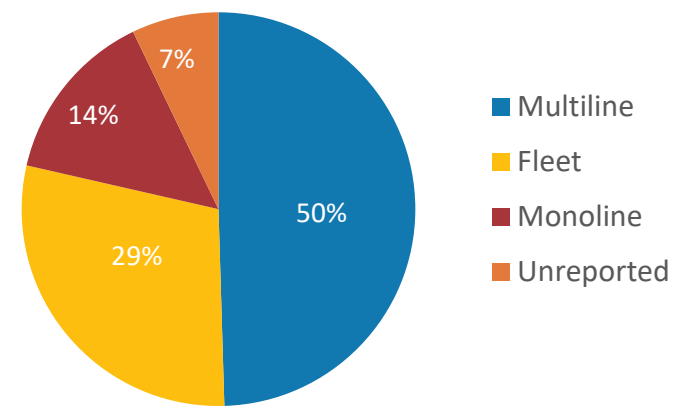
**Est. 75,000 public entities in the U.S. buy one or more coverages from a pool**



### Lines of Coverage Offered



### Structure of Coverage Offered



**TERRORISM**



**POLLUTION**



**CYBER**



**EMPLOYMENT**



**CRIME**



**AUTO**

- Social inflation
- Social justice concerns and changing norms
- Public perceptions about local government
- Cybersecurity
- Sexual abuse and molestation (SAM)
- Law enforcement and corrections

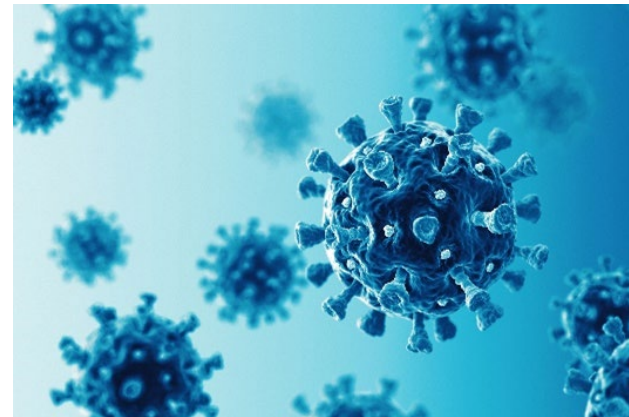


- “New normal” of natural disasters (number and cost)
- Increasing property values and damages
- Introduction of climate resiliency models and tools





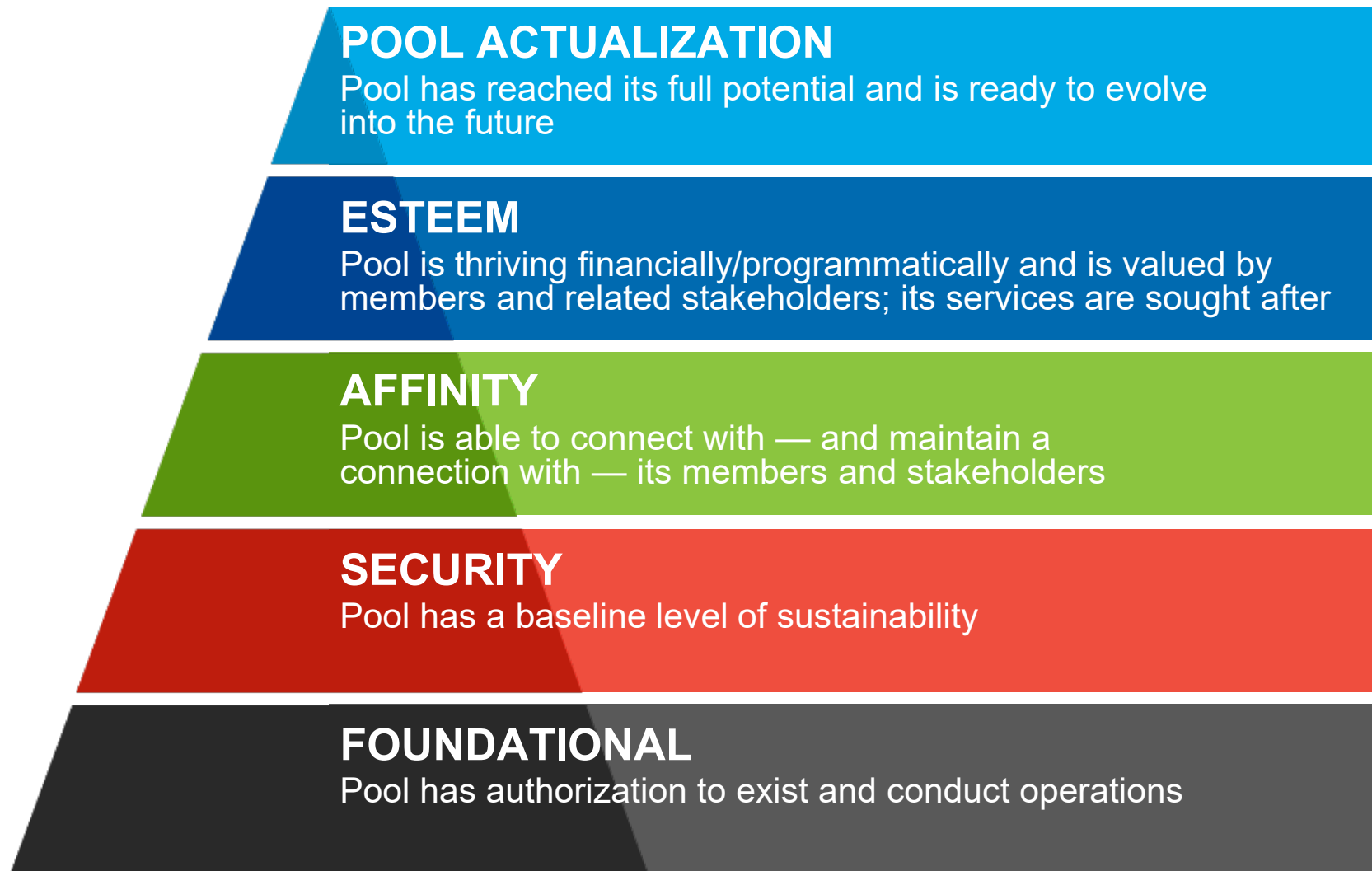
- Expanded presumptions
  - Covered employees
  - Named conditions
- Unknowns of PTSD and COVID-19





- COVID-19 claims
- Pharmacy utilization and expense
- Mental health needs
- Health equity







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