



Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #390

Contributory Negligence (General Provisions)

[LFB 2009-11 Budget Summary: Page 304, #1]

CURRENT LAW

Contributory negligence does not bar recovery in actions to recover damages for negligence resulting in death or in injury to person or property, if that negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed are diminished in proportion to the amount of negligence attributed to the person recovering. The negligence of the plaintiff is measured separately against the negligence of each person found to be causally negligent. The liability of each person found to be causally negligent whose percentage of causal negligence is less than 51% is limited to the percentage of the total causal negligence attributed to that person. A person found to be causally negligent whose percentage of causal negligence is 51% or more is jointly and severally liable for allowed damages. However, if two or more parties are found to have acted in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action.

GOVERNOR

Modify current contributory negligence provisions to provide that contributory negligence does not bar recovery in actions to recover damages for negligence resulting in death or in injury to person or property, if that negligence was not greater than the combined negligence of all of the persons against whom recover is sought, but any damages allowed will be diminished in proportion to the amount of negligence attributed to the person recovering. Any person found to be causally negligent whose percentage of causal negligence is equal to or greater than the negligence of the person recovering will be jointly and severally liable for the damages allowed. Further, provide that, in civil actions involving contributory negligence, the court must explain to the jury the effect on awards and liabilities of the percentage of negligence found by the jury to be attributable to each party.

DISCUSSION POINTS

1. Contributory-negligence doctrine, according to Black's Law Dictionary, 7th Edition, is a tort law construct which "completely bars a plaintiff's recovery if the damage suffered is partly the plaintiff's own fault. Most states have abolished this doctrine and have adopted instead a comparative-negligence scheme."

2. According to the same source, comparative-negligence doctrine is a legal "principle that reduces a plaintiff's recovery proportionally to the plaintiff's degree of fault in causing the damage, rather than barring recovery completely. Most states have statutorily adopted the comparative-negligence doctrine."

3. In Wisconsin, prior to 1971, an individual could recover damages if their negligence was not "as great as" the negligence of a person against whom recovery was sought. Damages were reduced in proportion to the amount of negligence attributable to the person recovering. Under this standard, if each party was equally negligent, no recovery was possible. Chapter 46, Laws of 1971, modified this provision to specify that recovery could be sought if negligence was not "greater than" the negligence of the person against whom recovery was sought. Thus, in a situation of equal negligence, one party could recover damages from the other, but reduced by the amount of their own negligence.

4. Under 1995 Act 17, the general standard created in Chapter 46, Laws of 1971, allowing recovery if negligence was not "greater than" the negligence of the person against whom recovery was sought was maintained, but it was specified that the "negligence of the plaintiff shall be measured separately against the negligence of each person found to be causally negligent." This modification codified case law related to the subject. Further, Act 17 specified that the "liability of each person found to be causally negligent whose percentage of causal negligence is less than 51% is limited to the percentage of the total causal negligence attributed to that person. A person found to be causally negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for the damages allowed."

Black's defines "joint and several liability" as: "Liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have the right of contribution and indemnity from nonpaying parties." Under joint and several liability, one defendant may be responsible for paying recovery costs for a group of liable defendants.

Act 17, further specified, that if two or more parties acted "in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action" despite the 51% or more specification for the application of joint and several liability.

5. The bill would modify current statutory provisions related to contributory negligence as follows:

a. Specify that an individual could recover damages if their negligence was not greater than the "combined" negligence of "all" of the persons against whom recovery is sought. Remove

the 1995 Act 17 provision specifying the measurement of negligence of the plaintiff.

b. Remove the 1995 Act 17 provisions specifying the liability of persons whose causal negligence is less than and greater than 51%. Instead, the bill would specify that any person found to be casually negligent whose percentage of causal negligence is equal to or greater than the negligence of the person recovering is jointly and severally liable for the damages allowed.

c. Require courts, in civil actions involving contributory negligence, to explain to the jury the effects on awards and liabilities of the percentage of negligence found by the jury to be attributable to each party.

d. Remove the 1995 Act 17 provision that if two or more parties acted in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action.

e. The modifications to contributory negligence would first apply to actions commenced on the effective date of the bill.

6. The attachment to the paper identifies various scenarios under current law and under the bill based on a plaintiff's percentage of negligence, and on the number of defendants. The current law scenarios would not apply in instances of a common scheme or plan between defendants, in which case defendants are jointly and severally liable. It should be noted that under both current law and the modifications provided under the bill, a plaintiff could not recover more than the amount of total damages, less their proportionate amount of negligence.

7. The administration indicates that the provisions are intended to assist plaintiffs in tort injuries who are currently unable to recover damages because of one or more defendants' inability to pay awards. Under current law, depending on a plaintiff's percent of negligence and the number of defendants, no award may be possible in certain circumstances. The bill, however, pools defendants when measuring percent negligence instead of measuring each defendant's negligence against the plaintiff's. Further, because of the application of joint and several liability under the bill, plaintiffs would be afforded additional avenues for recovery. In any circumstance in which any defendant's negligence exceeded the plaintiff's, the plaintiff could recover the entire amount of the award from any such party.

8. With regard to contributory negligence, and joint and several liability, there are two alternatives the Committee may wish to consider: (a) modifying the Governor's recommendations, in order to return to pre-1995 Act 17 law; or (b) adopting the Governor's provisions, but maintaining the current 51% of causal negligence threshold for the application of joint and several liability.

In returning to the pre-1995 Act 17 law, the 51% of causal negligence threshold for the application of joint and several liability under current law would be removed. Further, the AB 75 provision measuring the combined negligence of all parties to that of the plaintiff would be removed from the bill. Under this alternative, as long as a defendant's contribution to negligence equaled or exceeded that of a plaintiff, recovery could be made from each defendant, and joint and several liability provisions could apply. However, a plaintiff's contribution of negligence would be individually compared to each defendant, rather than all defendants combined. As a result, a

plaintiff could recover from any defendant whose contribution to negligence was equal to or greater than the plaintiff's, but not (as allowed under AB 75) from a defendant with a lower contribution level. Under this alternative, provisions which codified case law related to separate measurement of negligence and the application of joint and several liability would be maintained. [Alternative 2]

Another alternative would be to adopt the Governor's recommendation to allow for the combination of negligence, but maintain the 51% causal negligence threshold for the application of joint and several liability. As a result, a plaintiff could recover from any party if the combined negligence of the defendants exceeded that of the plaintiff, but joint and several liability would not be applicable unless a defendant's contributory negligence was 51% or more. [Alternative 3]

9. As indicated above, the bill would require that, in civil actions involving contributory negligence, the court must explain to the jury the effect on awards and liabilities of the percentage of negligence found by the jury to be attributable to each party. According to the Director of State Courts Office (DSCO), "it appears it will apply in only a small percentage of cases, those civil cases that involve contributory negligence and that are tried to a jury. The 2008 court statistics show there were 396 civil cases disposed of by a jury trial. Not all cases will involve issues requiring the application of this proposal. In the cases in which it would apply, the judge may be required to give a lengthier charge to the jury because it would include the explanation. The proposal will not require additional court proceedings."

10. The DSCO indicates that the Legislative Committee of the Judicial Conference does not favor the AB 75 proposal related to jury instructions "not based on workload but rather based on two main concerns: (1) the proposal puts the judge in a position where he or she may unduly influence the jury in its decision; and (2) there may be cases where not everyone would agree on exactly what the effect of the jury's verdict might be. If there is disagreement about the judge's explanation, it is possible this might add an appealable issue and thus lead to more appeals."

11. Based on the Judicial Conference's concerns, the Committee may wish to remove the jury explanation provision from AB 75. [Alternative 4] On the other hand, proponents of the jury instruction provision argue that the explanation to the jury will help inform the jury of "what the legal consequences of their factual findings are."

12. Since 1995 Act 17, no bill has been introduced to modify contributory negligence to assist plaintiffs to recover increased amounts. Therefore, the need for such a modification at this time may be questioned. If the Committee wishes, the provision could be removed from the bill. [Alternative 5]

ALTERNATIVES

1. Approved the Governor's recommendation to modify current contributory negligence provisions to: (a) provide that contributory negligence does not bar recovery in actions to recover damages for negligence resulting in death or in injury to person or property, if that negligence was not greater than the combined negligence of all of the persons against whom recover is sought, but any damages allowed will be diminished in proportion to the amount of negligence

attributed to the person recovering; (b) specify that any person found to be causally negligent whose percentage of cause negligence is equal to or greater than the negligence of the person recovering will be jointly and severally liable for the damages allowed; and (c) provide that, in civil actions involving contributory negligence, the court must explain to the jury the effect on awards and liabilities of the percentage of negligence found by the jury to be attributable to each party.

2. Modify the Governor's recommendation to remove the combined negligence provisions of Assembly Bill 75. [This alternative would return the contributory negligence statutes to law that existed prior to 1995 Act 17.]

3. Modify the Governor's recommendation to maintain the current law 51% causal negligence threshold for the application of joint and several liability. Further, delete the AB 75 provision stating that "Any person found to be causally negligent whose percentage of causal negligence is equal to or greater than the negligence of the person recovering" is jointly and severally liable.

4. Delete the provision specifying that in civil actions involving contributory negligence, the court must explain to the jury the effect on awards and liabilities of the percentage of negligence found by the jury to be attributable to each party.

5. Delete the provision.

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Attachment

ATTACHMENT

Contributory Negligence Recovery Allowed Current Law and Under Assembly Bill 75

	<u>Plaintiff</u>	<u>Defendants*</u>			<u>Total Maximum Possible Recovery from All Defendants</u>
Scenario #1					
Percent negligent	49%				
How much can plaintiff collect?					
Current law maximum recovery		51%			51%
AB 75 provision maximum recovery		51%			51%
Scenario #2					
Percent negligent	49%	28%	23%		
How much can plaintiff collect?					
Current law maximum recovery **		0%	0%	0%	
AB 75 provision maximum recovery		28%	23%	51%	
Scenario #3					
Percent negligent	30%	32%	23%	15%	
How much can plaintiff collect?					
Current law maximum recovery **		32%	0%	0%	32%
AB 75 provision maximum recovery without joint and several liability		32%	23%	15%	70%
Maximum recovery under joint and several liability					
Current Law		N.A.	N.A.	N.A.	N.A.
AB 75 provisions		70%	N.A.	N.A.	70%
Scenario #4					
Percent negligent	10%	58%	23%	9%	
How much can plaintiff collect?					
Current law maximum recovery without joint and several liability**		58%	23%	0%	90%
AB 75 provision maximum recovery without joint and several liability		58%	23%	9%	90%
Maximum recovery under joint and several liability					
Current Law		90%	N.A.	N.A.	90%
AB 75 provisions		90%	90%	N.A.	90%

N.A. Not applicable.

*Under current law and AB 75, a plaintiff may not recover from one or all defendants more than the amount of total damages, less their proportionate amount of negligence. Further, defendant's may subsequently seek recovery of damages paid from co-defendants.

**If a concerted action is found, defendants are jointly and severally liable.