



# WISCONSIN CIVIL JUSTICE COUNCIL, INC.

*Promoting Fairness and Equity in Wisconsin's Civil Justice System*

## FACT SHEET

### Contributory Negligence Budget (AB 75) Provisions

The civil justice system in Wisconsin and this country is intended to provide fairness and equity in determining if and how someone was injured; to apportion fault between or among parties; and to set the level of damages as a result of the injury.

Fairness means our current system does not create a second victim by forcing a party minimally at fault to be responsible for all damages because the person most at fault has insufficient resources. Nor do our current laws allow suit against a person or business less at fault than the plaintiff. Finally, the idea that the jury be advised how its allocations of fault affect damage awards is inconsistent with any sense of fair play for businesses caught in the cross hairs of the plaintiffs' bar.

Yet, buried in Governor Doyle's proposed budget, AB 75, are provisions that do just that.

**These Changes have no Place in the Budget.** In 1995 civil liability laws in Wisconsin were reformed to match liability more closely to fault and fairness. We moved from a "one percent-pay all" system to one requiring at least 51 percent fault before being liable for 100% of the damages.

Notably, the 1995 legislation (SB 11/Act 17) had public hearings and the full deliberation of elected officials. These reforms passed by wide margins with bipartisan support (24-8 in the Senate and 69-27 in the Assembly). The Doyle budget proposal would abolish Wisconsin's bipartisan reforms and implement a system even more radical than existed prior to 1995.

**Sweeping Changes in the Budget.** Buried deep in the Budget are fundamental changes to our civil justice system relating to contributory negligence. These changes and how they compare to existing law and our laws before the 1995 reforms include:

1. Anyone with equal or greater fault than the plaintiff can be held 100% responsible ("jointly and severally liable"), even if only 1% at fault. (AB 75, page 1605)

*Existing law requires a person to be at least 51% at fault before he or she can be held responsible for 100% of damages.*

2. A person or business that is less at fault than the plaintiff can be sued so long as the "combined" fault of all persons sued is greater than the plaintiff. (AB 75, page 1605)

*Existing law requires the plaintiff to be less at fault than each defendant he or she is suing.*

*Pre- 1995 law also required the plaintiff to be less at fault than those being sued.*

3. The court must inform the jury how the jury's findings on fault affect responsibility for damages; that is, to allow the jury to adjust fault determinations to maximize awards. (AB 75, page 1588)

*Existing law limits a jury's duty to fact finding, consistent with over a hundred-year rule of jurisprudence; juries determine relative degrees of fault, judges will apply the law and assess liability for damages.*

*The jury has never, including prior to 1995, been instructed on how to modify findings of fault to maximize the plaintiffs' lawyer lottery.*

**How these Changes Work.** In essence, these changes allow plaintiff lawyers to cast a wide net to ensnare more litigation targets, including businesses in all sectors of Wisconsin's economy, as well as individuals, charities or anyone financially responsible enough to have savings, equity in homes or business buildings, insurance or otherwise have financial assets to make them "deep pocket" targets.

Suing Those with Minor Fault for 100% of Damages. The law was changed in 1995 because it is unfair to require someone with little fault to pay for all of the damages. The budget changes relating to joint and several liability allow someone as little as 1% at fault to pay 100% of the damages.

These changes allow the plaintiffs' bar to target anyone that may have a nexus to the event causing injury. For example, a bus company can be sued by a passenger of an automobile when the driver runs a stop sign and hits a bus legally in the intersection. With the driver most at fault, but with no meaningful assets, the innocent passenger merely has to show the bus company was 1% at fault.

This is not a hypothetical. Before the 1995 changes, millions were paid by a bus company to avoid the legal extortion. Under the budget provision, expect more settlements at the courthouse steps to avoid being found 1% at fault, but 100% liable for substantial damages.

Suing those Less at Fault. Requiring someone to pay damages to another who is more at fault is equally perverse; and, contrary to plaintiffs' lawyers' assertions, was never allowed under the law prior to the 1995 changes. We always compared a defendant's fault individually to the plaintiff.

For example, under this change, two defendants 25% at fault each, could be sued and made to pay a plaintiff 50% at fault. While joint and several liability would not apply in this instance, each defendant would have to pay the plaintiff 25% of his or her damages, even though the plaintiff was twice as much at fault as either defendant.

Probably the most significant danger this provision poses to businesses is how it allows for a wide net to be cast when suing businesses. So long as the plaintiff is arguably 50% or less at fault, companies can be sued if their fault is negligible, even if substantially less than the plaintiff's. It is another version of the joint and several extortion game: Sue 'em first, discuss settlement later.

"Instructing" the Jury on how the Game can be Rigged. The budget provision requires the jury be told how their fault allocations affect awards and as such is inconsistent with any sense of fairness. Again, this gaming of the system was never allowed under the law prior to or after the 1995 changes.

Take, for example, the provision allowing recovery for lesser at fault businesses. The court must instruct the jury that for the plaintiff to recover, the defendants' total fault must be equal to or greater than the plaintiff's. Assume a sympathetic, but mostly at fault plaintiff, and several "deep pocket" businesses or individuals, all or some of which are less at fault than the plaintiff; the jury can simply do the math to make the defendants' collective fault add up to equal or more than the plaintiff's to assure recovery from all defendants.

Under the joint and several liability provision, the jury is conveniently - and with intended prejudice - informed that if they find any of the deep pocket businesses with the same or greater fault than the plaintiff, the plaintiff receives full compensation.

**The Impacts of Greatly Expanding Businesses' Legal Liabilities.** Wisconsin is at a competitive disadvantage when litigation risks are uncertain or costs to protect against such risks become disproportionately high compared to other states. The provisions in the budget drastically change Wisconsin's litigation landscape, tilting the scales of justice away from fairness and toward more litigation, higher awards and to a less competitive Wisconsin. At a minimum, they should be removed from the budget and allowed to be debated as separate legislation, with public hearings and the full deliberation of elected officials.