

MEMORANDUM

TO: Bill Smith, President, Wisconsin Civil Justice Council

CC: Robert Fassbender

FROM: Noreen Parrett

DATE: 6/3/09

IN RE: Joint and Several Proposed "Compromise"

You asked my opinion of the impact of the proposed "compromise" on the changes to Wis. Stat. § 895.045 (joint and several) in the Governor's budget bill (AB 75). I understand that the only language we have so far to describe that compromise is the Motion 700 language. That language is not very clear in its intent but I will describe below what the language appears to be suggesting. The original language in AB 75 amending Wis. Stat. § 895.045 has the following two effects:

1. On the threshold issue of whether a plaintiff can recover at all, it permits a plaintiff to compare his/her percentage of negligence against the combined negligence of all of the other persons (including natural persons and business and governmental entities) involved in the incident. This change is a very substantial change from current law. Under current law, the comparison is individual which is fair and logical; a person more at fault than another should not be able to sue and collect damages. Under the Governor's proposal, a person who is 50% at fault can sue five other persons who are 10% at fault each – an outcome that is neither logical nor fair from the standpoint of holding one responsible for one's actions. While in the short run it may seem like a good idea to some, in the long run it is going to cause havoc in Wisconsin's court system and increase the cost of Wisconsin's tort system because it will increase litigation. Ultimately, it will cause angst among Wisconsin residents who find that, although less at fault than a plaintiff, they can still be held liable for the plaintiff's damages. This provision is a first for Wisconsin and may even put Wisconsin in the inglorious position nationwide of excluding all semblance of fairness from its tort system.
2. The second effect of the original AB 75 language is that it permits a plaintiff to hold a defendant jointly and severally liable if the defendant's percentage of negligence is equal to or greater than the plaintiff's. This proposal brings joint and several back to the era of

deep pocket liability, i.e., if you are 1% at fault, you may be held liable for 100% of the liability. The unfairness is multiplied, though when you look at the total effect of the two effects.

Add the above two provisions to the provision, also in the Governor's budget bill, that permits jury instructions that tell the jury, before deciding the facts of the case, what impact the facts will have on a jury award and Wisconsin has just become a litigation heaven – a “go to” place for every lawyer who has any argument whatsoever for a Wisconsin venue. I might also point out that the above proposal, as well as the “compromise,” do not move Wisconsin back to pre-1995 – they are much less fair than even the pre-1995 joint and several provision.

Unfortunately, the “compromise” suggested as described in Motion 700 does not make the joint and several provisions more logical or fair. Although we don't have the exact statutory language for the suggested compromise yet, it appears from the description in Motion 700 that:

1. On the threshold issue of comparison of liability, it does not appear that anything really changes in the “compromise,” except that the categories of comparison are broadened and enumerated – i.e., the plaintiff's negligence is compared against a combination of:
 - Any party against whom recovery is sought. Presumably this means the liability of the person the plaintiff chooses to sue;
 - Third-party defendants who are liable in tort to the plaintiff. Presumably this means anyone else who may have some portion of the liability, whether the plaintiff chooses to sue or not; and
 - Any person with whom the plaintiff has settled. Presumably this gives the plaintiff the option of settling with a low-asset defendant (or his/her insurer) but still combine the percentage of negligence of the settling defendant for the threshold determination of whether the plaintiff can sue anyone else.

A plaintiff who is 50% contributorily negligent still can recover when everyone else involved in the incident is less negligent than the plaintiff. The additional enumerated categories make the provision more onerous – it is still neither logical nor fair.

2. On joint and several liability, the threshold suggested as a compromise is 20%. That is, any defendant who is found to be at least 20% negligent can be held liable to pay 100% of the plaintiff's damages (minus the plaintiff's percentage of contributory negligence, of course). So, for example, not only can a defendant who is less negligent than a plaintiff (remember, the threshold comparison is based on combined negligence) be held liable for his/her own percentage of negligence, that same person can be held jointly liable if he/she is found to be at least 20% at fault. So, for example, under the proposal, if a plaintiff is 50% at fault and two defendants are each 20% and 30% at fault, the 20% at fault defendant can be held responsible for 50% (jointly with the 30% negligent person) of the plaintiff's damages even though that defendant is 30% less at fault than the plaintiff! That certainly won't strike the person who is 20% at fault as a fair tort system. In fact, it likely won't strike anyone as a fair tort system.

In addition, the Motion 700 language includes the following sentence: “Except for persons who have settled with the plaintiff, there is no comparison of negligence with any person who is not a party to the action to recover damages.” While it is not entirely clear, presumably this sentence refers to the joint and several calculation, not the threshold comparison calculation, because the threshold comparison has already been established in the preceding language. Its purpose appears to be to establish who can be held jointly liable for all of the plaintiff’s damage. The comparison here is limited to:

- The party from whom recovery is sought; and
- Any party with whom the plaintiff has settled.

It does not include third-party defendants who are liable in tort to the plaintiff. Does this language permit the plaintiff to, in effect, rig the lawsuit so that a defendant who otherwise would not reach the 20% joint liability threshold ends up being held jointly liable anyway? For example, you have two defendants, one who is 96% negligent and one who is 1% negligent, and a plaintiff who is 3% negligent. Under the above combination of negligence rule for determining the threshold question of whether the plaintiff can recover, you combine the 96% negligent person and the 1% negligent person to reach 97%. Under that rule, the plaintiff, who is only 3% at fault, can recover from either or both of the persons who are 96% and 1% negligent. Let’s say the 96% negligent person is judgment-proof so the plaintiff does not either settle with or seek to recover from that defendant. Is the joint and several apportionment then between the 1% defendant and the 3% plaintiff, leaving the 1% defendant vis-à-vis the 3% plaintiff with 25%, over the joint liability threshold of 20%. If this is what the language means, the 1% defendant would be left to pay all of the plaintiff’s damages except the portion attributed to the plaintiff’s 3% of contributory negligence. I think you could get to that answer based on the Motion 700 language, whether or not that is what is intended. If that is what is intended, though, then the result is certainly that the 20% threshold offered is no “compromise.” And the result, because of the combined liability on the threshold question, is much less fair than even the pre-1995 joint and several statute.

As stated above, we do not have the exact statutory language yet. It is possible that the language will clarify some of the uncertainties in the motion. Based on the motion, though, it is very easy to reach the above conclusions. And, as I stated, if the above interpretation is what is actually intended, then “compromise” is truly not the label to be applied.

Furthermore, since this change would be enacted after enactment of ch.102, I am not certain of its effect on Wisconsin’s worker’s compensation law. As you know, the legislature is presumed to know and understand all laws outstanding at the time they enact a new law. Yet because of the substantial change in policy and the language proposed to be used in Motion 700, it is unclear how an employer’s liability in a worker’s compensation accident might be factored in, and whether the effect will be different for self-insured employers than for insured employers.

Please call if you have any questions on the above.