

## Summary of Comparative Negligence – Joint Finance Committee Action

1. The jury instructions provision as set forth in Gov. Doyle’s budget (AB 75) was adopted. This requires the court to inform the jury how the “deep pocket” lottery works, which has heighten import to the trial lawyers in light of the more complicated rigging of the system adopted by Joint Finance.
2. The amendment expands the “combined fault” provision that under AB 75 included the pooling of fault of all “persons against whom recovery is sought.” Added to the aggregation scheme is “the negligence of third party defendants who are liable in tort to the plaintiff” and “the negligence of any person with whom the claimant has settled.”

Recall, existing law requires the plaintiff to be less at fault than *each* defendant he or she is suing. Under the amendment, you can now be sued when less at fault so long as the fault of all three enumerated sources equals or is greater than the plaintiff’s fault.

3. The amendment changes the joint and several trigger to 20 percent at fault. Under the Doyle budget, you could be responsible for 100 percent of the damages merely upon a finding your fault was “equal to or greater” than the fault of the plaintiff; that is, someone as little as one percent at fault could be liable for 100 percent of the damages. This changes an absurd policy to merely the worst legal standard in the 12-state Midwest Region. (See comparisons, below)

But the 20 percent threshold is an illusion and the one-percent rule still stands for many cases. That is because when calculating the 20 percent fault contribution, the amendment precludes consideration of “any person who is not a party to the action to recover damages.” Thus, if the plaintiff’s attorney wants to reach a deep pocket defendant with little fault, they just don’t file suit against those primarily responsible if they have little financial resources or legal limits on their liability.

For example, two deep pocket defendants with only five percent fault are sued. Not sued is the 90 percent, judgment-proof person. Since the 90 percent person is not a party, that contribution is not considered and the two five percent defendants are now 50 percent at fault for the purpose of joint and several liability. In the [City of Milwaukee case](#), the City was found one percent at fault when the police activated their lights and siren “causing” a felon to flee in a stolen vehicle and kill the plaintiff. If the 99 percent at fault but judgment proof felon is not brought into the suit, the City would be found jointly and severally liable under the amendment.

### How Wisconsin Compares to Other Midwest States

#### No Joint and Several Liability

(Pay percentage of fault)

Michigan

Indiana

Kansas

North Dakota

#### Limited Joint and Several Liability

(Requiring more than 50% fault)

Iowa

Minnesota

Ohio (only if intentional)

Missouri

Nebraska  
South Dakota

**Expanded Joint and Several Liability**  
(Pay 100% even if less than 50% at fault)  
Illinois – 25% Fault Threshold  
**Wisconsin – 20% Fault Threshold**

### **Contributory Negligence**

4. *Joint and Several Liability Threshold [LFB Paper #390].* Maintain a threshold for the application of joint and several liability, but reduce the threshold percentage from 51% of causal negligence to 20% causal negligence. Specify that the court compare the negligence of the plaintiff with the negligence of any party against whom recovery is sought, the negligence of third party defendants who are liable in tort to the plaintiff, and the negligence of any person with whom the claimant has settled. 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. Include the AB 75 provision related to jury instructions on the effect on awards and liabilities of the percentage of negligence found by the jury to be attributable to each party.

Under current law, 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. Assembly Bill 75 removes this provision.