Wisconsin’s Modified, Modified Comparative Negligence Law

John J. Kircher
Marquette University Law School, john.kircher@marquette.edu

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Wisconsin has a long and storied history of comparative negligence law. It dates back to 1931 when the statute creating the rule was first enacted. Prior to 1995, only one substantive change was made in the statute. In 1971 the words “greater than” were substituted for “as great as” so that, in its totality, section 895.045 of the Wisconsin Statutes provided:

“Contributory negligence shall not bar recovery in an action by any person or the person’s legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.”

1995 marks the second major substantive change in Wisconsin’s comparative negligence statute. Through section 1 of 1995 Wisconsin Act 17, the Wisconsin Legislature added language to the statute which makes it relatively clear that the drafters set out to accomplish two things: 1) to codify a previous court interpretation of the rule; and 2) to partially eliminate the doctrine of joint and several liability. This article examines those two provisions; attempts to discern legislative int-
How Wisconsin courts will interpret recent, dramatic changes in comparative negligence law will depend upon how the courts interpret the legislative product. Here's one person's educated guess on what that interpretation might entail.

tent; and briefly explores possible repercussions of those changes.

At the outset note should be taken of basic rules of statutory construction followed by Wisconsin courts. Construction of a statute is a question of law, with no deference being given to lower court interpretations. The purpose of statutory construction is to give effect to legislative intent. When determining legislative intent, the court first examines the language of the statute itself and will resort to extrinsic aids only if the language is ambiguous.

Reiter codification

The first substantive change to section 895.045 of the Wisconsin Statutes, effected by section 1 of 1995 Wisconsin Act 17, appears to be an attempt to codify a principle enunciated by the Wisconsin Supreme Court in *Reiter v. Dyken*. The importance of *Reiter* is put in better context by understanding that it followed the court's decision in *May v. Skelley Oil Co.* In *May* the court intimated that it was poised, given the appropriate case, to change its construction of the comparative negligence statute so that, to determine liability, the plaintiff's negligence would be measured against the combined negligence of all defendants. Many thought that *Reiter* would be that appropriate case. However, in *Reiter* the court restated the principle that, to determine liability, a plaintiff's causal negligence is to be examined separately in relation to the causal negligence of each defendant.
The 1995 Act adds a new sentence to the statute, providing that the plaintiff’s negligence “shall be measured separately against the negligence of each person found to be causally negligent.” In light of the 1995 amendment, it should be understood that Reiter was not concerned with how negligence is “measured.” The “measuring” or comparison of the parties’ negligence is carried out by the trier of fact— in most cases a lay jury. The jury is instructed, for example:

“You will determine how much and to what extent each party is to blame for the injuries to the plaintiff and whether the conduct of one made a larger, equal or smaller contribution than the other. You will fix the percentage attributable to each party in proportion to the fault that he contributed to cause the plaintiff’s injuries.”

Prior to its most recent amendment, section 895.045 expressed the principle that a plaintiff would be barred from recovery only if her negligence was found to be greater than that of the person against whom recovery is sought. Reiter, and presumably the amending language, is concerned with what a court does with the percentages after they are “measured” by the trier of fact. In determining liability under section 895.045, the plaintiff’s negligence will be considered separately against that of each individual defendant, and not against the defendants’ aggregate negligence. This determines the responsibility of each defendant to the plaintiff. Thus, a plaintiff found to be 40 percent causally negligent could not recover from any of three defendants each found to be 20 percent at fault, even though their combined negligence totals 60 percent. That, Reiter decided, had been and would continue to be the proper interpretation. That is presumably what the 1995 amendment means when it requires that the plaintiff’s negligence “shall be measured separately against the negligence of each person found to be causally negligent.”

There is another possible legislative intent, albeit hard to believe and possibly inconsistent with the additional amending language discussed in the next section of this article. The language could be interpreted to mean that, in multiple defendant cases, there will be separate divisions of 100 percent between the plaintiff and each defendant. At best, that interpretation is strained and a court must avoid a statutory interpretation that produces an absurd or unreasonable result.

The amendment’s use of the word “measured” could create a problem. The sentence could be interpreted to be nothing more than a codification of other Wisconsin Supreme Court interpretations of the comparative negligence statute. Under that precedent, triers of fact are to assign separate percentages of negligence to each person found to be causally negligent.

The intent to codify Reiter would have been more clear if the Legislature had chosen language providing, for example, that “in determining liability to the plaintiff, the negligence percentages of the persons against whom recovery is sought shall not be combined.” Nevertheless, the new language added by the Legislature should foreclose further action by the supreme court on the Reiter issue because there is no other reasonable interpretation of that language.

Some might question why, in light of Reiter, any new language was necessary. The Legislature may have read the Reiter decision to mean that the court simply was unwilling to adopt a rule combining the negligence of defendants to determine liability to the plaintiff, and not to mean that the court thought it lacked the power to do so. There would be good reason for such a view of the case. The Reiter majority stated:

"Thus the question presented is not whether the court has the power to extend the defense of contributory negligence beyond the limitation placed upon it by the legislature, but whether it may limit the application of that doctrine further than the legislature has required.

"We believe it can.”

Joint and several liability
More interesting than the Reiter issue is the concluding language of section 1 of the Act, which adds two additional sentences to the statute:

"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.”

This new language is concerned with joint and several liability, leaving intact a basic principle of the unamended Wisconsin comparative negligence rule—a plaintiff whose negligence is “greater than” that of an individual defendant will not be able to recover damages from that defendant. For example, let us assume a situation in which a plaintiff’s total damages are found to be $100,000, and in which percentages of causal negligence are determined to be as follows:

<table>
<thead>
<tr>
<th>P</th>
<th>D1</th>
<th>D2</th>
<th>D3</th>
</tr>
</thead>
<tbody>
<tr>
<td>30</td>
<td>30</td>
<td>30</td>
<td>10</td>
</tr>
</tbody>
</table>

No legislative intent should be inferred that would allow the plaintiff to recover from anyone other than D1 and D2. The unamended portion of the statute still provides that if the plaintiff’s negligence is “greater than” the negligence of a defendant, the plaintiff will be barred from recovery against that person. Thus no recovery from D3 should be possible. As to the plaintiff’s recovery from D1 and D2, the total damages of $100,000 first would be reduced by 30 percent to the sum of $70,000 because of the plaintiff’s fault. The unamended language of what is now section 895.045(1) calls for that reduction by continuing to provide that “any damages allowed shall be diminished in the proportion to the amount of negligence attributed to the person recovering.”

After the reduction reflecting the plaintiff’s portion of causal fault, the amendment would appear to require that 3/6 or 1/2 of the $70,000 would be recoverable from D1 and a like amount from D2. The Legislature appears to want each of the two defendants in this situation to be severally liable to the plaintiff for $35,000, and nothing more. Under the “old” rule each of the two defendants would be jointly and severally liable to the plaintiff for $70,000. Now, with several liability under the new rule, the insolvency of a liable defendant would result in an incomplete recovery for the plaintiff.

The only other plausible interpretations of the “limited to the percentage of the total causal negligence attributed to that person” language would be that D1 and D2 each would be liable to the plaintiff for either 30 percent of the total damages (that is, 30% X $100,000 = $30,000) or 30 percent of the total damages after the reduction in proportion to the plaintiff’s fault (30% X $70,000 = $21,000). However, either interpretation would mean a second reduction of the plaintiff’s damages, although the unamended language refers to only one
form of reduction. Again, a court must avoid a statutory interpretation that produces an absurd or unreasonable result.\(^\text{18}\)

Consider if the plaintiff’s total damages in the previous example remained the same and the percentages of causal negligence were changed to the following:

<table>
<thead>
<tr>
<th></th>
<th>P</th>
<th>D1</th>
<th>D2</th>
<th>D3</th>
</tr>
</thead>
<tbody>
<tr>
<td>10</td>
<td>20</td>
<td>60</td>
<td>10</td>
<td></td>
</tr>
</tbody>
</table>

In this example, the amendment would significantly change a portion of Wisconsin comparative negligence law. Again, however, the change would affect only rules of joint and several liability. Each of the three defendants no longer would be jointly and severally liable to the plaintiff for total damages, reduced by the plaintiff’s 10 percent (that is, $90,000). As with the previous illustration D1 and D3 would be severally liable only for their shares of the recoverable damages (2/9 or $20,000 and 1/9 or $10,000, respectively). However, with respect to D2, who has “51% or more” of the causal negligence, the amendment would appear to make her jointly and severally liable with the others for all of the plaintiff’s recoverable damages. Thus, the plaintiff could recover the entire $90,000 from D2.

No portion of the amending language speaks to the issue of the contribution rights of parties once the plaintiff has been made whole. It is generally accepted that for a right of contribution to exist, a party needs: 1) to share common liability with the plaintiff, with others, and 2) to have paid more than her fair share of the plaintiff’s damages.\(^\text{19}\) With the addition of the new language it would appear that, with one exception to be noted subsequently, only one who is “51% or more” causally negligent will be in a position to have paid more than her fair share of the recoverable damages. As noted in the last example above, only D2 could be forced to pay the plaintiff the total amount of the plaintiff’s recoverable damages. In fact, basic math poriends that in no case could there be more than one party who is “51% or more” causally negligent.\(^\text{20}\)

Thus, using the figures supplied above, if D2 paid the plaintiff all the recoverable damages of $90,000, D2 would have contribution rights against D1 and D3 for their fair shares of the $90,000 (2/9 or $20,000 and 1/9 or $10,000, respectively). Of course, the foregoing assumes that the Wisconsin Supreme Court will determine that with D1 and D3 being only severally liable and D2 being jointly and severally liable, the three share “common liability” to the plaintiff.

The subjects of comparative negligence and contribution in Wisconsin naturally lead to the topic of releases, particularly the famous Pierringer release.\(^\text{21}\) The value of the Pierringer release lies in the fact that a settling defendant can make her peace with the plaintiff without worry about a later contribution claim by a nonsettlor. The amendments should have little impact upon the use of these releases. Settlers will not be aware, until after the trial, of whether their liability to the plaintiff was only several or joint and several. Pretrial settlement could lead to a situation in which the settlor paid more than her fair share of a plaintiff’s recoverable damages, even though the settlor is subsequently found less than 51 percent causally negligent. Normal rules of contribution would apply to such a situation. However, the Legislature has imposed a rather short one-year statute of limitations applicable to pretrial settlement contribution claims.\(^\text{22}\)

Conclusion

The foregoing have merely been one person’s educated guesses as to how Wisconsin courts will interpret these dramatic changes in comparative negligence law. What is important is how Wisconsin courts will interpret the legislative product. No one can predict with certainty how Wisconsin courts will integrate these changes into the comparative negligence jurisprudence. One should remember the words of Justice Frankfurter that “[t]he intrinsic difficulties of language and the emergence, after enactment, of situations not anticipated by even the most gifted legislative imagination reveal the doubts and ambiguities in statutes that so often compel judicial construction.”\(^\text{23}\)

Endnotes

1931 Wis. Laws 242. Some would argue that it dates back to 1913 Wis. Laws 644, which created a form of comparative negligence for railroad employees in actions against their employers.\(^\text{24}\)


The change from “as great as” to “greater than” occurred due to 1971 Wis. Laws 47.

Reiter v. Dyken, 95 Wis. 2d 461, 290 N.W.2d 510 (1980).


State v. Pham, 137 Wis. 2d 31, 33-34, 403 N.W.2d 35, 36 (1987).

Id. at 34, 403 N.W.2d at 36.

Id.; In re D.X., 142 Wis. 2d 129, 134, 416 N.W.2d 292, 294 (1987).

Nonstatutory changes include changing the statute’s title from “Contribution Negligence” to “Comparative Negligence,” one spelling correction and three grammatical changes in the old statute.

95 Wis. 2d 461, 290 N.W.2d 510 (1980).

83 Wis. 2d 30, 264 N.W.2d 574 (1978).

1195 Wisconsin Act 17, § 1 (emphasis added). Section 895.045 of the Wisconsin Statutes now becomes section 895.045(1).

See, e.g., Wis. Civil 1585 (1981).

DeMars v. LaPour, 123 Wis. 2d 366, 370, 366 N.W.2d 891, 893 (1985).

Reiter, 95 Wis. 2d at 469-70, 290 N.W.2d at 515.

Id. at 472, 290 N.W.2d at 516.

1995 Wisconsin Act 17, § 1.

Bieliski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1963).

DeMars, 123 Wis. 2d 366, 370, 366 N.W.2d 891, 893 (1985).


Of course, numerous product sellers could be assigned the same percentage of negligence under Wisconsin’s version of Restatement (Second) of Torts § 402A (1965); see City of Franklin v. Badger Ford Truck Sales, 58 Wis. 2d 641, 207 N.W.2d 866 (1973). The same could be true in a situation involving concert of action or in a situation in which two or more parties are found to have a duty to protect which is joint, an opportunity to protect that was equal, and in which as a matter of law neither the obligation nor the breach of it was divisible. Reiter, 95 Wis. 2d at 467, 290 N.W.2d at 513.

