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TO: ALL LEGISLATORS

FROM: Don Dyke, Chief of Legal Services and Ron Sklansky, Senior Staff Attorney; and Jere Bauer, Program Supervisor, Legislative Fiscal Bureau

RE: Comparative Negligence and Joint and Several Liability Provisions of 2009 Assembly Bill 75 (Biennial Budget Bill) and Assembly Substitute Amendment 1, to Assembly Bill 75

DATE: June 8, 2009

In response to numerous legislative inquiries, this memorandum briefly describes the provisions* contained in the Biennial Budget Bill, 2009 Assembly Bill 75, and Assembly Substitute Amendment 1 to the bill [**Attachment 1**], that revise the current statute which contains comparative negligence and joint and several liability rules that generally apply in negligence actions. In addition, the memorandum updates an attachment to Legislative Fiscal Bureau Issue Paper 390 which, under various scenarios, identifies comparative negligence recovery allowed under current law, Assembly Bill 75, and Assembly Substitute Amendment 1 to the bill.

COMPARATIVE NEGLIGENCE

Under the concept of comparative negligence, a plaintiff whose contributory negligence was a cause of the plaintiff's injury may nonetheless be able to recover, depending on the extent to which the plaintiff's contributory negligence compares to the negligence of one or more defendants. The concept of comparative negligence was developed to mitigate the effect of the common law doctrine of "contributory" negligence, which prohibited a plaintiff from recovering damages if his or her own negligence, no matter how slight, contributed in any way to the plaintiff's damages.

* See, generally, SECTION 3271 of Assembly Bill 75 and SECTION 3271 of Assembly Substitute Amendment 1. Note that Assembly Bill 75 contains an additional, related change: in a civil action involving contributory negligence, the court is required to 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. See SECTION 3223 of Assembly Bill 75. Under current case law, this information is not given to the jury. This provision is unchanged by Assembly Substitute Amendment 1 (see SECTION 3223).

Also, the provision on jury instructions and the provisions described in this memorandum first apply to actions commenced on the effective date of the proposal. See SECTION 9309 (2) of Assembly Bill 75. This provision is unchanged by Assembly Substitute Amendment 1 (see SECTION 9309 (2)).

Current Law

Section 895.045 (1), Stats., provides that a plaintiff's contributory negligence does not bar recovery if the plaintiff's negligence was not greater than the defendant's negligence; however, any damages allowed are diminished in proportion to the amount of the plaintiff's negligence.

Further, the plaintiff's negligence is to be measured separately against the negligence of each defendant found to be caused negligent. In other words, if there is more than one defendant, the plaintiff's negligence cannot be greater than a particular defendant's causal negligence in order for the plaintiff to be able to recover against that defendant.

Assembly Bill 75

Assembly Bill 75 retains the rule that a plaintiff is not barred from recovery if the plaintiff's contributory negligence was not greater than the negligence of the defendant when there is one defendant. Further, the bill retains the rule that any damages allowed a plaintiff who is not barred from recovery are diminished in proportion to the plaintiff's negligence. However, the bill provides that the plaintiff's negligence is measured against the "combined" negligence of all defendants, when there is more than one defendant, rather than measured separately against each defendant. Thus, under the bill, a plaintiff may recover against a defendant whose negligence is less than the plaintiff's, as long as the plaintiff's negligence is not greater than the combined negligence of all the defendants.

Assembly Substitute Amendment 1

The amendment retains the bill's provision that the plaintiff's negligence is measured against the "combined" negligence of all persons against whom recovery is sought, when there is more than one such person, rather than measured separately against each. Thus, as under the bill, a plaintiff may recover against a defendant whose negligence is less than the plaintiff's, as long as the plaintiff's negligence is not greater than the combined negligence of all the defendants.

However, the amendment also provides that, except for persons who have settled with the plaintiff, the negligence of any person who is not a party to the action is not to be compared with the negligence of the plaintiff. Thus, for example, the negligence of a party who is immune from liability will not be included in the calculation of causal negligence among the plaintiff and other defendants. This differs from current law, which generally compares the negligence of any person who contributed to plaintiff's injuries, whether or not a party to the action at the time the negligence comparison is made.

JOINT AND SEVERAL LIABILITY

The concept of joint and several liability applies when two or more defendants (joint tortfeasors) have contributed to the plaintiff's injuries. Generally speaking, the rule holds that if two or more defendants are liable (jointly) to a plaintiff, each liable defendant is also individually (severally) liable for the entire amount the plaintiff is entitled to recover (although the plaintiff is not entitled to double recovery). (Note too, that the defendants, under the theory of contribution, may ultimately pay only that proportion of the plaintiff's damages corresponding to their respective negligence, if each has sufficient assets to do so.)

Current Law

Section 895.045 (1), Stats., provides that the liability of each defendant whose causal negligence is less than 51% is limited to the percentage of the total causal negligence attributed to that defendant. In other words, a person whose causal negligence is less than 51% is only liable to the plaintiff for his or her proportionate share of plaintiff's damages, not individually liable for the entire amount plaintiff may recover. A defendant whose negligence is 51% or greater may be jointly and severally liable for plaintiff's recovery.

Assembly Bill 75

Assembly Bill 75 eliminates the 51% or greater threshold for joint and several liability and provides, instead, that any person whose percentage of causal negligence is equal to or greater than the causal negligence of the plaintiff is jointly and severally liable for the damages allowed. Thus, under the revised rule, a defendant whose causal negligence is less than 51% may be liable for the entire amount of plaintiff's recovery as long as his or her causal negligence is at least equal to or greater than the plaintiff's contributory negligence.

Assembly Substitute Amendment 1

The amendment provides a 20% threshold for joint and several liability and eliminates the bill's provision that a defendant's negligence be at least equal to or greater than the plaintiff's contributory negligence for joint and several liability to apply. Thus, under the amendment, a defendant whose negligence is equal to or greater than 20% may be jointly and severally liable to the plaintiff, regardless of whether the plaintiff's negligence is greater than that defendant's (although the plaintiff's negligence may not be greater than the combined negligence of all person's whose negligence is compared to the plaintiffs). The liability of each person found to be causally negligent whose percentage of causal negligence is less than 20% is limited to the percentage of the total causal negligence attributed to that person.

UPDATED ATTACHMENT FROM LEGISLATIVE FISCAL BUREAU ISSUE PAPER 390

On May 19, 2009, Legislative Fiscal Bureau Issue Paper #390, related to the contributory negligence provisions in Assembly Bill 75, was released. The paper included an attachment which, under four different scenarios, identified comparative negligence recovery allowed under current law and the provisions of Assembly Bill 75. The table which follows updates the attachment to include the provisions of Assembly Substitute Amendment 1 to Assembly Bill 75 under the same scenarios.

**Comparative Negligence Recovery Allowed Under Current Law,
and Under Assembly Bill 75, and Assembly Substitute Amendment 1 to Assembly Bill 75**

	<u>Plaintiff</u>	<u>Defendants*</u>			<u>Total Maximum Possible Recovery from All Defendants</u>
Scenario #1					
Percent negligent	49%	51%			
How much can plaintiff collect?					
Current law maximum recovery		51%			51%
AB 75 maximum recovery		51%			51%
ASA 1 to AB 75 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 maximum recovery		28%	23%		51%
ASA 1 maximum recovery without joint and several liability		28%	23%		51%
Maximum recovery under joint and several liability					
Current law		N.A.	N.A.		N.A.
AB 75		N.A.	N.A.		N.A.
ASA 1 to AB 75		51%	51%		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%
ASA 1 to AB 75 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		70%	N.A.	N.A.	70%
ASA 1 to AB 75		70%	70%	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 maximum recovery without joint and several liability		58%	23%	9%	90%
ASA 1 to AB 75 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		90%	90%	N.A.	90%
ASA 1 to AB 75		90%	90%	N.A.	90%

N.A. Not applicable.

*Under current law, AB 75 and ASA 1 to AB 75, a plaintiff may not recover from one or all defendants more than the amount of total damages, less the plaintiff's proportionate amount of negligence. Further, a defendant may subsequently seek recovery of damages paid from co-defendants.

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

It should be noted that under Scenario #4 of the table, if liability were proportioned in a manner such that the defendant identified as 9% negligent was instead 10% negligent compared to a plaintiff at 10%, Assembly Bill 75 could have resulted in the application of joint and several liability. Under the modified scenario, and applying current law, a defendant at 10% could not be held jointly and severally liable because that defendant did not exceed the 51% threshold. Under Assembly Bill 75, however, the 10% defendant could be held jointly and severally liable since their determined contribution was equal to or greater than the plaintiff (both at 10%). By contrast, under Assembly Substitute Amendment 1, a defendant at 10% with a plaintiff at 10% would not be jointly and severally liable because that defendant's attributed contribution is less than the 20% threshold.

It should be further noted that the table does not account for persons who may be excluded from an action under Assembly Substitute Amendment 1. Exclusion of these persons would have the effect of allocating liability among fewer parties (including the plaintiff). Further, to the extent that a person is excluded from consideration of comparison, it is possible that the remaining parties would exceed the Assembly Substitute Amendment 1 threshold of 20% liability, and potentially be subject to joint and several liability.

If you have any questions or need additional information, please contact us directly at the Legislative Council staff offices or at the Legislative Fiscal Bureau.

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Attachment

ATTACHMENT 1

8 SECTION 3271. 895.045 (1) of the statutes is renumbered 895.045 and amended
9 to read:

10 **895.045 Contributory negligence.** Contributory negligence does not bar
11 recovery in an action by any person or the person's legal representative to recover
12 damages for negligence resulting in death or in injury to the person or property, if
13 that negligence was not greater than the combined negligence of all of the person
14 persons against whom recovery is sought who are liable in tort to the person
15 recovering and of any person with whom the person recovering has settled, but any
16 damages allowed shall be diminished in ~~the~~ proportion to the amount of negligence
17 attributed to the person recovering. ~~The negligence of the plaintiff shall be measured~~
18 ~~separately against the negligence of each person found to be causally negligent~~
19 Except for persons who have settled with the plaintiff, the trier of fact may not
20 compare the negligence of the person recovering with the negligence of any person
21 who is not a party to the action to recover damages. The liability of each person found
22 to be causally negligent whose percentage of causal negligence is less than ~~51%~~ 20
23 percent is limited to the percentage of the total causal negligence attributed to that
24 person. A person found to be causally negligent whose percentage of causal
1 negligence is ~~51%~~ 20 percent or more shall be jointly and severally liable for the
2 damages allowed.