The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 744
INTRODUCER:	Senator Richter and others
SUBJECT:	Negligence/Products Liability Action
DATE:	March 3, 2010 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Treadwell	Maclure	JU	**Pre-meeting**
2.			CM	
3.			SPSC	
4.				
5.				
6.				

I. Summary:

The bill changes the apportionment of damages in products liability cases in which a plaintiff alleges an additional or enhanced injury (e.g., crashworthiness cases). More specifically, the fact finder in these cases must consider the fault of all individuals and entities who contributed to the accident when apportioning fault among the parties and nonparties included on the verdict form.

The bill reorganizes the comparative fault statute by moving the definition of "negligence action" to the definitions subsection in the current comparative fault statute and also includes a definition of "products liability action."

This bill substantially amends section 768.81, Florida Statutes.

II. Present Situation:

Crashworthiness Doctrine

Prior to 1968, courts in the United States did not allow those injured in automobile accidents to hold automobile manufacturers liable for injuries sustained where the negligence of the driver or a third party caused the accident, including scenarios in which an automobile defect contributed to the injuries sustained. However, this practice changed with the Eighth Circuit's decision in *Larsen v. General Motors Corp*.[1] In *Larsen*, the plaintiff was injured after a head-on collision that caused the steering mechanism to strike the plaintiff in the head. The federal court held that, because automobile accidents involving collisions are often inevitable and foreseeable,

[1] *Larsen v. General Motors Corp*., 391 F.2d 495 (8th Cir. 1968).

manufacturers have a duty to exercise reasonable care in designing vehicles for the safety of users.[2]

Most state courts adopted the *Larsen* rationale in some form, which led to the inception of "crashworthiness" or "second collision" cases. In crashworthiness cases, if a defective product causes enhanced injuries during an automobile accident, the product manufacturer may be liable for the enhanced portion of those injuries.[3] For example, if an airbag fails to deploy during an initial collision and the driver subsequently collides with the windshield, the manufacturer may be liable for damages attributable to the second collision caused by the defective airbag.[4]

When faced with the practical application of the crashworthiness doctrine, many jurisdictions continue to grapple with whether a defendant automobile manufacturer may introduce evidence of, or assert as a defense, the comparative fault or contributory negligence of the driver or a third party in causing the initial collision.[5] Some state courts have concluded that "introduction of principles of negligence into what would otherwise be a straightforward product liability case is not allowed."[6] Conversely, a majority of courts have allowed defendants to introduce evidence of the driver's or third party's negligence in causing the initial collision.[7]

Majority View

A majority of states have adopted the view that a manufacturer's fault in causing additional or enhanced injuries may be reduced by the fault of a plaintiff or third party who caused or contributed to the primary collision.[8] For example, in a Delaware crashworthiness case, the plaintiff's automobile was struck by another vehicle when the plaintiff allegedly failed to stop at a stop sign.[9] As a result, the automobile's airbag deployed, crushing the plaintiff's fingers. The defendant automobile manufacturer argued that the plaintiff's recovery should be reduced by his comparative fault in failing to stop at the stop sign and causing the initial collision. The court concluded that the cause of the initial collision is a proximate cause of the subsequent collision and the resulting enhanced injuries to the plaintiff's fingers. The court further opined that:

> [i]t is obvious that the negligence of a plaintiff who causes the initial collision is one of the proximate causes of all of the injuries he sustained, whether limited to those the original collision would have produced or including those enhanced by a defective product in the second collision.[10]

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[2] *Id*. at 502.
[3] Ellen M. Bublick, *The Tort-Proof Plaintiff: The Drunk in the Automobile, Crashworthiness Claims, and the Restatement (Third) of Torts*, 74 BROOK L. REV. 707, 707 (Spring 2009).
[4] *Id.*
[5] Mary E. Murphy, Annotation, *Comparative Negligence of Driver as Defense to Enhanced Injury, Crashworthiness, or Second Collision Claim,* 69 A.L.R. 5TH 625, 625 (1999).
[6] *Id.*
[7] *Id.*
[8] Edward M. Ricci et al., *The Minority Gets It Right: The Florida Supreme Court Reinvigorates the Crashworthiness Doctrine in D'Amario v. Ford*, 78 FLA. B.J. 14, 14 (June 2004). Some of the states recognizing the majority view include: Alaska, Arkansas, California, Colorado, Delaware, Louisiana, Indiana, North Carolina, North Dakota, Oregon, Tennessee, Washington, Wyoming, and Iowa.
[9] *Meekins v. Ford Motor Co.*, 699 A.2d 339 (Del. Super. Ct. 1997).
[10] *Id.* at 346.

Some courts following the majority position have reasoned that, in crashworthiness cases, the person causing the initial collision may be liable for the subsequent negligence of the automobile manufacturer because any enhanced injuries resulting from the second collision are foreseeable consequences of the first collision.[11] For example, in an Alaska crashworthiness case, the court allowed the automobile manufacturer to assert that its liability for a defective seatbelt system should be reduced because the initial head-on collision was caused by a third party. The court sided with the manufacturer, citing that "[a]n original tortfeasor is considered a proximate cause, as a matter of law, of injuries caused by subsequent negligen[ce]" of the manufacturer of the defective product.[12]

Other courts holding the majority view have also stated that "general fairness and public policy considerations require that the fault of the original tortfeasor be considered in apportioning liability for enhanced injuries."[13] Courts have also recognized that the application of comparative fault in crashworthiness cases enhances the public's interest in deterring drivers from driving negligently.[14]

Minority View

A minority of courts have adopted the theory that, because an automobile manufacturer is solely responsible for any product defects, the manufacturer is also solely liable for the enhanced injuries caused by those defects. The minority position results from "a stricter construction of the crashworthiness doctrine that treats each collision as a separate event with independent legal causes and injuries."[15] Further reasoning behind the minority view is that a manufacturer maintains a duty to anticipate foreseeable negligence of users of the automobile, as well as the negligence of third parties.[16]

One federal court applied the minority view in a crashworthiness case and determined that:

> Because a collision is presumed, and enhanced injury is foreseeable as a result of the design defect, the triggering factor of the accident is simply irrelevant. . . . Further, the alleged negligence causing the collision is legally remote from, and thus not the legal cause of, the enhanced injury caused by a defective part that was supposed to be designed to protect in case of a collision.[17]

A federal district court in Ohio excluded evidence of a driver's intoxication at the time of the accident in a products liability action against the automobile manufacturer.[18] In addition to ruling that the probative value of the evidence of intoxication was outweighed by the danger that the

[11] Ricci, *supra* note 8, at 18.
[12] *General Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1217-18 (Alaska 1998).
[13] Ricci, *supra* note 8, at 18 (citing W*hitehead v. Toyota Motor Corp.*, 897 S.W.2d 684, 695 (Tenn. 1995)).
[14] *Moore v. Chrysler Corp.*, 596 So. 2d 225, 238 (La. Ct. App. 1992).
[15] Ricci, *supra* note 8, at 18.
[16] Victor E. Schwartz, *Fairly Allocating Fault Between a Plaintiff Whose Wrongful Conduct Caused a Car Accident and a Automobile Manufacturer Whose Product Allegedly "Enhanced" the Plaintiff's Injuries*, 10 (2010) (on file with the Senate Committee on Judiciary).
[17] *Jimenez v. Chrysler Corp.*, 74 F. Supp. 2d 548, 566 (D.S.C. 1999), *reversed in part and vacated*, 269 F.3d 439 (4th Cir. 2001).
[18] *Mercurio v. Nissan Motor Corp.*, 81 F. Supp. 2d 859 (N.D. Ohio 2000).

jury could misuse the information, the court reasoned that it was foreseeable that front-end collisions occur and that an automobile manufacturer is under an obligation under Ohio law to use reasonable care in designing vehicles that do not expose a user to unreasonable risks.[19]

The rationale underlying the minority view may also flow from a public policy belief that permitting manufacturers to avoid or reduce their liability through application of comparative fault will reduce the manufacturer's incentive to design a safe automobile for consumer use.[20] One court opined that "'[a] major policy behind holding manufacturers strictly liable for failing to produce crashworthy vehicles is to encourage them to do all they reasonably can do to design a vehicle which will protect a driver in an accident.'"[21]

Restatement (Third) of Torts

The Florida Supreme Court adopted strict liability in the defective products context, which follows the Restatement (Second) of Torts on Products Liability.[22] However, the Restatement (Second) did not articulate the burden of proof in enhanced injury cases. In the Restatement (Third) of Torts, the American Law Institute attempted to establish a uniform burden of proof in these types of cases.[23] The Restatement (Third) provides:

> When a product is defective at the time of commercial sale or other distribution and the defect is a substantial factor in increasing the plaintiff's harm beyond that which would have resulted from other causes, the product seller is subject to liability for the increased harm.[24]

Under the Restatement (Third), a plaintiff must prove that the defect in the automobile was a "substantial factor" for the "increased harm." In the event the increased harm could not be separated from other causes contributing to the accident, such as an intoxicated driver, the automobile manufacturer would be liable for all damages flowing from both the defect and other causes.[25] The Restatement (Third) appears to support the majority position by suggesting the application of comparative fault in crashworthiness or other enhanced-injury cases. With regard to apportionment, the Restatement (Third) provides that:

> [a] plaintiff's recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and the plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care.[26]

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[19] *Id.* at 861.
[20] Ricci, *supra* note 8, at 18-20.
[21] *Id.* (quoting *Andrews v. Harley Davidson, Inc.*, 769 P.2d 1092, 1095 (Nev. 1990)).
[22] Larry M. Roth, *The Burden of Proof Conundrum in Motor Vehicle Crashworthiness Cases*, 80 FLA. B.J. 10, 14 (Feb. 2006).
[23] *Id.*
[24] RESTATEMENT (THIRD) OF TORTS: Prod. Liab. s. 16 (1998).
[25] Roth, *supra* note 22, at 14; *see also* RESTATEMENT (THIRD) OF TORTS: Prod. Liab. s. 16, cmt. a (1998).
[26] RESTATEMENT (THIRD) OF TORTS: Prod. Liab. s. 17 (1998).

Therefore, a plaintiff's or third party's misuse of the product, alteration of the product, or modification of the product is relevant to the determination of the issues of defect, causation, and comparative responsibility.[27]

Comparative Fault in Florida

The Florida Supreme Court, in 1973, retreated from the application of contributory negligence and adopted pure comparative negligence.[28] The court reasoned that:

> . . . the most equitable result that can ever be reached by a court is the equation of liability with fault. Comparative negligence does this more completely than contributory negligence, and we would be shirking our duty if we did not adopt the better doctrine.[29]

The doctrine of comparative negligence is now codified in Florida law. The law provides that "any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery."[30] Current law explicitly states that the comparative fault principles apply in products liability actions.[31]

Following the culmination of additional reforms to the application of joint and several liability, in 2006, the Legislature generally repealed the application of joint and several liability for negligence actions.[32] It amended s. 768.81, F.S., to provide, subject to limited exceptions, for apportionment of damages in negligence cases according to each party's percentage of fault, rather than under joint and several liability.[33]

Crashworthiness in Florida

Prior to 2001, Florida courts generally applied comparative fault principles in crashworthiness cases where the injury was caused by the initial collision or an enhanced injury caused by a subsequent collision.[34] For example, in *Kidron, Inc. v. Carmona*, a mother and child brought a wrongful death action for the death of the father in a collision with a truck that had stalled, as well as an action against the manufacturer of the truck alleging strict liability for the manufacturer's design of the rear under-ride guard.[35] The court held that "principles of comparative negligence should be applied in the same manner in a strict liability suit, regardless of whether the injury at issue has resulted from the primary or secondary collision."[36] The court further recognized that:

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[27] *Id.* at cmt. c.
[28] *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).
[29] *Id*. at 438.
[30] Section 768.81(2), F.S.
[31] Section 768.81(4)(a), F.S.
[32] Chapter 2006-6, s. 1, Laws of Fla.
[33] Section 768.81(3), F.S.
[34] Schwartz, *supra* note 16, at 6.
[35] *Kidron, Inc. v. Carmona*, 665 So. 2d 289 (Fla. 3d DCA 1995).
[36] *Id.* at 292.

> . . . fairness and good reason require that the fault of the defendant and of the plaintiff should be compared with each other with respect to all damages and injuries for which the conduct of each party is a cause in fact and a proximate cause.[37]

As a result, the court concluded that the decedent's negligence in failing to avoid the collision should be considered along with the manufacturer's liability in the design of the truck, as well as any other entity or person who contributed to the accident regardless of whether that entity was joined as a party.[38]

In 2001, the Florida Supreme Court retreated from the application of comparative fault and the holding in *Kidron, Inc.*, and adopted the minority view in crashworthiness cases. The seminal decision in *D'Amario v. Ford Motor Company* precludes fact finders from apportioning fault to a party contributing to the cause of the initial collision when considering liability for enhanced injuries resulting from a second collision.[39] In *D'Amario*, the court reviewed consolidated crashworthiness cases. The following is a brief synopsis of the facts and final disposition in both cases under review in *D'Amario*:

- ***D'Amario***–In the first case, Clifford Harris, a minor, was injured when the automobile in which he was riding as a passenger collided with a tree and burst into flames. The driver of the car was allegedly intoxicated and traveling at a high rate of speed at the time of the collision. Harris was severely burned, losing three limbs. Harris's mother sued Ford alleging that a defective relay switch caused his injuries. After a ruling allowing Ford to submit evidence of the driver's intoxication and high rate of speed as a cause of the initial collision to the jury, the parties stipulated to these facts. The jury returned a verdict in favor of Ford.[40]

- ***Nash***–In the second case, Maria Nash was driving her two children to church when an approaching car crossed the center line and struck her vehicle. Nash's head collided with the metal post separating her windshield from the driver's door, and she died as a result of these injuries. The driver of the car that collided with Nash was intoxicated at the time of the accident. Nash's estate filed a strict liability suit against General Motors alleging that the vehicle's seatbelt failed. The trial court allowed General Motors to introduce the fact that the driver of the second vehicle was intoxicated because the jury "had a right to know all the facts." The jury ultimately found no liability on the part of General Motors.[41]

In its examination of liability and admissibility of evidence in these cases, the Florida Supreme Court concluded that "the principles of comparative fault involving the causes of the first collision do not generally apply in crashworthiness cases."[42] In reaching its conclusion, the court compared crashworthiness cases to medical malpractice actions in which the cause of an initial

[37] *Id.*
[38] *Id.* at 293.
[39] *D'Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001).
[40] *Ford Motor Co. v. D'Amario*, 732 So. 2d 1143 (Fla. 2d DCA 1999).
[41] *Nash v. General Motors Corp.*, 734 So. 2d 437 (Fla. 3d DCA 1999).
[42] *D'Amario*, 806 So. 2d at 441.

injury that may require medical treatment is not ordinarily considered as a legal cause of enhanced injuries resulting from subsequent negligent treatment.[43] The court further noted that:

> . . . unlike automobile accidents involving damages solely arising from the collision itself, a defendant's liability in a crashworthiness case is predicated upon the existence of a distinct and second injury caused by a defective product, and assumes the plaintiff to be in the condition to which he is rendered after the first accident. No claim is asserted, however, to hold the defendant liable for that condition. Thus, crashworthiness cases involve separate and distinct injuries– those caused by the initial collision, and those subsequently caused by a second collision arising from the defective product.[44]

The court held that the focus in crashworthiness cases is the enhanced injury; therefore, consideration of the conduct that allegedly caused the enhanced and secondary injuries is pivotal, not the conduct that gave rise to the initial accident.[45] As a result, the court concluded that admission of evidence related to the intoxication of the non-party drivers, which caused the initial collisions, unduly confused the jury and shifted the focus away from determining causation of the enhanced injuries.[46]

The *D'Amario* Debate

Opponents of the rule enunciated in *D'Amario* argue that Florida should align with the majority view.[47] These advocates assert that the fault of the person who caused the initial accident should be compared with any fault of an automobile manufacturer in the design of the automobile because the defect would not have manifested itself but for the negligence of the person causing the initial injury. They further assert that the *D'Amario* decision fails to account for the comparative fault of irresponsible drivers and neglects to consider that automobile accidents typically occur so quickly that two distinct instances of harm are almost impossible to dissect. These advocates urge legislators to adopt legislation that ensures that the jury has the opportunity to consider all of the facts pertinent to the cause of the accident, including both the initial and subsequent collisions.

Proponents of the *D'Amario* decision argue that the ruling promotes fairness and objectivity in jury deliberations in product liability cases.[48] They further assert that the current rule recognizes the clear distinction between fault for causing an accident and a manufacturer's liability for a defective product that may cause enhanced injuries separate and distinct from the initial collision. These advocates assert that a retreat from the *D'Amario* decision would allow

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[43] *Id.* at 435. In addition, the court recognized that in medical malpractice actions, an initial tortfeasor who causes an injury is not to be considered a joint tortfeasor. *Id.*
[44] *Id.* at 436-47.
[45] *Id.* at 437.
[46] The court also ruled that driving while intoxicated does not fall within the "intentional tort" exception to the comparative fault statute. *See* s. 768.81(4)(b), F.S.
[47] Florida Justice Reform Institute, *White Paper: Florida's Crashworthiness Doctrine: Allowing Negligent Drivers to Escape Liability* (2010) (on file with the Senate Committee on Judiciary).
[48] Florida Justice Ass'n, *White Paper: Products Liability – Crashworthiness Doctrine* (Dec. 9, 2009) (on file with the Senate Committee on Judiciary).

introduction of evidence that could only serve to confuse the jury and preclude it from evaluation of an entire set of circumstances surrounding an automobile accident.

III. Effect of Proposed Changes:

The bill changes the apportionment of damages in products liability cases in which a plaintiff alleges an additional or enhanced injury (e.g., crashworthiness cases). More specifically, the fact finder in these cases must consider the fault of all entities who contributed to the accident when apportioning fault among the parties and nonparties included on the verdict form.

In effect, the bill requires the trier of fact in a products liability case alleging an enhanced injury, such as a crashworthiness case, to consider the facts related to the cause of the initial collision, as well as the subsequent collision. As a result, the negligent actions of the plaintiff or a third party in causing or contributing to the accident must be considered, regardless of whether their actions relate to the primary or secondary collision. Thereafter, the fact finder must apportion fault to all negligent parties or nonparties appearing on the verdict form if the evidence supports the party's or nonparty's negligence.

The bill requires allocation of fault to all "entities." This term typically references business associations such as corporations, limited liability companies, and partnerships. If it is the intent of the Legislature to allocate fault to individuals and entities, it may consider using the term "persons" because it is broadly defined to capture both individuals and various business associations.[49]

The bill also references allocation of fault to entities who contributed to the "accident" that is the subject of the action. Because the term "accident" typically refers to automobile accidents, it is unclear if this provision is referencing solely crashworthiness cases or products liability cases with enhanced injuries generally. If the Legislature wishes to make clear that comparative fault should be applied in all products liability cases alleging enhanced injuries, it may wish to substitute another term for the term "accident."

The bill reorganizes the comparative fault statute by moving the definition of "negligence action" to the definitions subsection in the current comparative law statute. The bill also defines a "products liability action" as a civil action based upon a theory of strict liability, negligence, breach of warranty, nuisance, or similar theories for damages caused by the manufacture, construction, design, formulation, installation, preparation, or assembly of a product. This definition specifies that the term includes those claims in which the alleged injuries were greater than the injury would have been, but for the defective product. The definition of "products liability action" also provides that the substance of the claim, not the conclusory terms used by a party, determines whether an action satisfies the definition.

The bill also removes references to chs. 517, 542, and 895, F.S., in the subsection of the comparative fault statute which specifies that the law does not apply to causes of action brought under certain chapters.[50]

[49] *See* s. 1.01(3), F.S.

[50] Section 768.81(4)(b), F.S., provides that the comparative fault statute "does not apply . . . to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by chapter 403, chapter 498, chapter

The bill will take effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

An individual suffering enhanced injuries attributed to the use of a defective product may recover less damages, in some instances, if the individual's own negligence contributed to the injury. A third party whose negligence contributed to the injuries suffered by a plaintiff in a crashworthiness case, regardless of whether the negligence contributed to the primary or secondary collision, may be liable for damages. In some instances, manufacturers of defective products may experience a decrease in liability for enhanced injuries when the trier of fact can apportion fault to the plaintiff or a third party as a result of the plaintiff's or third party's negligence related to the initial or subsequent collision.

C. Government Sector Impact:

The Office of the State Courts Administrator (OSCA) reports that the fiscal impact to the judiciary cannot be determined at this time due to the unavailability of necessary data to evaluate the increase in judicial workload resulting from the requirement that the jury or the judge must consider the fault of all those contributing to injuries in products liability cases where enhanced injuries are alleged.[51]

The OSCA further reports that the judiciary may experience an increase in workload related to revising the Standard Jury Instructions in civil cases to reflect the changes in

517, chapter 542, or chapter 895." Chapters 517 (securities transactions), 542 (combinations in restraint of trade), and 895 (racketeering) do not contain specific references to the application of joint and several liability.

[51] Office of the State Courts Administrator, *Judicial Impact Statement: HB 433* (Jan. 1, 2010) (on file with the Senate Committee on Judiciary).

apportionment of fault as written in the bill. However, OSCA reports that the fiscal impact of this workload issue is not likely to be substantial.[52]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[52] *Id.*