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**DATE**: May 13, 1999

**HOUSE OF REPRESENTATIVES**
**COMMITTEE ON**
**JUDICIARY**
**ANALYSIS**

**BILL #**: HB 775 (Conference Report)

**RELATING TO**: Civil Actions (Litigation Reform)

**SPONSOR(S)**: Committee on Judiciary and Representative Byrd

**COMPANION BILL(S)**: SB 236(s), SB 374(s), SB 376(s), and SB 378(s)

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE**:
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I. SUMMARY:

This analysis is a substantial revision to reflect the Conference Committee Report filed April 29, 1999, and adopted and passed by both House and Senate on April 30, 1999. For provisions of previous versions of the bill, please see previous versions of this analysis.

HB 775 adopts comprehensive modifications to Florida's civil justice system. The bill is the culmination of over two years of debate, hearings and review of the litigation system. It incorporates several provisions passed by the Legislature but vetoed by the Governor in 1998, as well as some revisions of 1998 proposals and new provisions.

Some major provisions of HB 775:

- Increases juror participation in civil trials;
- Provides for alternative dispute resolution and expedited trial procedures;
- Authorizes new sanctions to deter frivolous claims, frivolous defenses, and unreasonable delays;
- Creates a 12-year statute of repose for most products liability actions and provides longer periods for certain products with longer useful lives;
- Creates a "government rules" defense giving some defendants a rebuttable presumption that a product is not defective when it complies with government rules and statutes concerning safety guidelines for the protection of the public;
- Limits the liability of convenience business owners for third party criminal acts, where the business complies with statutory security requirements;
- Revises and clarifies the duties property owners owe to certain types of trespassers;
- Modifies the burden of proof, revises conditions affecting recovery, and reconfigures caps related to punitive damages;
- Restricts repetitive punitive damage claims under certain circumstances;
- Abolishes joint and several liability for non-economic damages in all cases;
- Establishes new limitations and maximum liability amounts, which increase with a defendant's share of fault, on joint and several liability for economic damages; and
- Limits the vicarious liability of certain motor vehicle owners or rental companies for damages due to the operation of the vehicle by short term lessees or other permissive operators.

The overall fiscal impact of this bill is uncertain. It may spur economic development, but it could slightly increase reliance on some government services.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

**Alternative Dispute Resolution and Expedited Court Proceedings**

Chapter 44, F.S., provides that courts may refer all or any part of a filed civil action to mediation. Mediation is a process in which a neutral third party facilitates the resolution of a dispute between two or more parties. The mediator does not render a decision. Instead, the decision-making authority rests with the parties. Mediation is always non-binding. The law also provides that upon motion or request of a party, a court shall not refer certain domestic relations cases for mediation.

Chapter 44, F.S., also provides for arbitration. Arbitration is a process in which a neutral third party (or panel of arbiters) considers the facts and arguments presented by the parties. The arbitrator renders a decision that may be binding or non-binding. Courts may refer any civil action filed in circuit or county court to non-binding arbitration. The arbitration decision is presented to the parties in writing. This decision becomes final if a request for a trial de novo is not filed within the time provided by the rules promulgated by the Florida Supreme Court. The party who files for a trial de novo may be liable for legal fees and court costs of the other party if the judgment at trial is no more favorable to that party than the prior arbitration decision. Two or more parties may elect to submit their controversy to voluntary binding arbitration either under Chapter 44, F.S., or through private contract.

Generally, rules adopted by the Florida Supreme Court govern procedure in all Florida courts. Article V, Section 2(a), Fla. Const. Rule 2.085, Florida Rules of Judicial Administration, governs general timelines for conducting trial and appellate court proceedings. The rule provides that civil jury trials should be conducted within 18 months after filing, and civil non-jury trials should be conducted within 12 months after filing. Civil cases not completed within these time periods are reported on a quarterly basis to the Chief Justice of the Florida Supreme Court. There is no rule requiring speedy trials in civil matters comparable to the criminal speedy trial rule, Rule 3.191, Florida Rules of Criminal Procedure.

**Attorney's Fees**

Under most circumstances, each party to a civil action pays its own attorney's fees. The private contract between attorney and client governs such fees subject to the Rules of Professional Conduct (Rules Regulating the Florida Bar, Ch. 4). Contingency fees are allowed in Florida in certain fields of the law. Certain requirements must be met for a contingency fee to be permitted. The Florida Supreme Court limits contingency fees depending upon the stage in the proceedings at which a matter concludes. Numerous statutes and some court rules provide, in certain circumstances, for an award of attorney fees to a prevailing party. Statutes, rules, and case law govern the amount of the fee awarded in such cases.

**Economic and Non-Economic Damages**

Compensatory damages reimburse the actual losses sustained by a plaintiff. They restore the injured party to the position it occupied prior to the defendant's misconduct. Compensatory damages can be subdivided into economic and non-economic damages. Economic damages include lost wages, medical costs, and property destruction. Non-economic damages encompass pain and suffering, mental anguish, inconvenience, physical impairment, disfigurement, loss of capacity for enjoyment of life, and other non-pecuniary losses. Awards of compensatory damages are subject to court review. Section 768.74, F.S., which governs negligence actions, provides criteria for a court to apply in deciding whether to add to an insufficient jury award or reduce an excessive award.

In the Tort Reform Act of 1986, the Legislature imposed a $450,000 limitation or "cap" on damages for non-economic losses. In Smith v. Dept. of Ins., 507 So.2d 1080 (Fla. 1987), the Florida Supreme Court held that the cap violated Section 21, Article I of the Florida Constitution, which provides a right of access to the courts to seek redress of injuries. Thus claims for compensatory damages are constitutionally protected under the present Florida Constitution.

**Comparative Fault and Joint & Several Liability**

In 1986, the Florida Legislature codified the doctrine of comparative fault, first adopted by the Florida Supreme Court in 1973 in Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). This doctrine replaced the doctrine of contributory negligence. Under contributory negligence, any fault on the part of plaintiff barred recovery. The Court found this to be an unjust and harsh rule which "either placed the burden of a loss for which two were responsible upon only one party or relegated to Lady Luck the determination of the damages for which each of two negligent parties will be liable". Id at 437.

Under comparative fault, each party is responsible in proportion to its own fault. The Court reasoned comparative fault was a "more equitable system" of loss distribution. Id at 437.

The reach of the doctrine of comparative fault has been explored in Standard Havers Products, Inc. v. Benitez, 548 So.2d 1192 (Fla. 1994), in which the Supreme Court held that product misuse did not operate to bar a product liability claim, but misuse went to the issue of comparative fault. Product misuse, the Court determined, reduces the plaintiff's recovery in proportion to the plaintiff's own fault. The Court has also found that evidence of failure to wear a seat belt may be considered by a jury when assessing the plaintiff's damages under comparative fault principles. Insurance Co. of North America v. Pasakanvia 451 So.2d 447 (Fla. 1984). See also Ridley v. Safety Kleen Corp. 693 So.2d 934 (Fla. 1996).

The concept of comparative fault becomes more complex when applied to joint tortfeasors under the doctrine of joint and several liability. Joint and several liability makes each defendant a guarantor of the obligation of all defendants who are found liable for a particular harm. Section 768.81, F.S., provides for concurrent application of comparative fault and joint and several liability. Under the present statute, the court enters a judgment in negligence cases based upon each party's percentage of fault. The doctrine of joint and several liability applies to economic damages if a party's percentage of fault equals or exceeds that of the claimant. The statute precludes joint and several liability for non-economic damages (i.e. pain and suffering, etc.) with one exception: joint and several liability applies to all damages in cases where the total amount of damages (economic and non-economic) is $25,000 or less.

In a significant decision construing the interrelationship between the doctrines of joint and several liability and comparative fault, the Florida Supreme Court ruled in Fabre v. Marin, 623 So.2d 1182 (Fla.1993), that a defendant could apportion fault to non-party wrongdoers. Specifically, the court held that fault must be apportioned among all responsible entities whether or not they were joined as defendants in the lawsuit. In Nash v. Wells Fargo Guard Services, Inc., 678 So.2d 1262 (Fla.1996), the Court clarified that, in order for a non-party to be included on a jury verdict form, the defendant must plead the non-party's negligence as an affirmative defense and identify the non-party. In addition, the defendant bears the burden of presenting evidence that the non-party's negligence contributed to the claimant's injuries.

The holding of Fabre has not been extended to apportion fault between negligent and intentional tortfeasors. In Merrill Crossing Associates v. McDonald, 705 So.2d 560 (Fla. 1997), the Supreme Court held that s. 768.81(4)(b), F.S., which requires judgment against each party in negligence cases be based on comparative fault rather than joint and several liability, would not reduce the liability of negligent tortfeasors when the intentional criminal conduct of another tortfeasor was a foreseeable result of their negligence. The s. 768.81, F.S., is restricted to negligence actions and expressly excludes all actions where the claim is based on an intentional tort.

**Compliance with Government Rules and Statutory Standards in Products Liability Actions**

A plaintiff may bring a products liability action on any of three theories: negligence; breach of warranty; or strict liability. The general standard of care which applies to negligence actions is reasonable care under the circumstances. For actions based upon breach of warranty, a manufacturer's duties depend in part upon the performance expressly warranted. Under some circumstances, however, the manufacturer's duties may also be defined by implied warranties of merchantability or of fitness for a particular purpose. Strict product liability in tort requires that when the product left the seller's control, it was in a "defective condition unreasonably dangerous to the user or consumer," that it reached the plaintiff without any substantial change in its condition, and that the defect resulted in damages to the plaintiff.

Violation of statutes or rules designed to prevent the type of harm caused to the plaintiff can be construed as "negligence per se." DeJesus v. Seaboard Coast Line R.R. Co., 281 So.2d 198 (Fla. 1973). In other words, where the standard of care is defined by a statute, failure to adhere to the standards encompassed by the statute constitutes negligence as a matter of law. It should be noted, though, that if the violation of the rule or statute was not the proximate or contributing cause of the plaintiff's injury, then proof of the violation of the statute becomes irrelevant. See Periera v. Florida Power & Light Co., 680 So.2d 617 (Fla. 4th DCA 1996). The Restatement (Second) of Torts provides:

> s. 286. WHEN STANDARD OF CONDUCT DEFINED BY LEGISLATION OR REGULATION WILL BE ADOPTED.--The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose if found to be exclusively or in part
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> (a) to protect a class of person which includes the one whose interest is invaded, and
> (b) to protect the particular interest which is invaded, and
> (c) to protect that interest against the kind of harm which has resulted, and
> (d) to protect that interest against the particular hazard from which the harm results.

Government rules and statutes generally set minimum safety guidelines for the protection of the public. Florida's standard jury instructions require an instruction to the jury that non-compliance with such standards constitute negligence or a defect. There is no converse jury instruction, however, as the manufacturer or seller is not insulated from liability if the product conforms to the applicable government rules and regulations. Even where the product meets applicable regulations, courts must still resolve questions related to whether the cost savings and utility of the product outweigh the risk inherent in its design or, whether the product meets the reasonable expectations of consumers. Courts have allowed juries to consider evidence of compliance with government rules and statute, customary practices, industry standards, and advances when assessing the scientific liability of a manufacturer or seller. Moreover, it is the risk reasonably to be perceived by the introduction and sale of a product which creates the manufacturer's obligation to produce a reasonably safe product. In a product liability case, therefore, a manufacturer's compliance with government rules and standards is rarely determinative. Instead, the trier of fact weighs the utility of the product, the risk reasonably perceived by introduction of the product, and the reasonable expectation of the product by the public.

In many situations, no regulatory guidelines apply, or those that do apply are not specifically tailored to prevent the type of harm sustained by the plaintiff.

**Punitive Damages**

The courts will sustain an award of punitive damages only if the acts complained of were committed with malice, moral turpitude, wantonness, willfulness, outrageous aggravation, or reckless indifference to the rights of others. Intentional misconduct is not necessarily required. However, the misconduct:

> [M]ust be of a gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to the consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them. Ten Associates v. Brunson, 492 So.2d 1149, 1150 (Fla. 3d DCA 1986)(citations omitted).

A claim for punitive damages is barred unless the evidence proffered by the claimant provides a reasonable basis for recovery of punitive damages. s. 768.72, F.S. Until a 1995 Florida Supreme Court ruling, Globe Newspaper Co. v. King, 658 So.2d 518 (Fla. 1995), the District Courts of Appeal held conflicting positions on the issue of whether an appellate court could review a trial judge's finding that a plaintiff had met the evidentiary standard for punitive damages contained in s. 768.72, F.S. In Globe, the Florida Supreme Court held that common law certiorari is not available to review the sufficiency of the evidence before a judgment is rendered because the harm to the defendant is not irreparable. The court determined, however, that certiorari is available to resolve whether the trial court complied with procedural aspects of the statute.

Section 768.73, F.S., limits the amount of punitive damages that can be awarded in a civil action based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty. In these causes of action, punitive damages may not exceed three times the amount of compensatory damages awarded unless the claimant demonstrates by clear and convincing evidence that the award is not excessive in light of the facts developed at trial. Currently, Florida law does

not limit the amount of punitive damages that can be awarded in a civil action for intentional torts such as defamation or assault.

Under current Florida law, a claimant is entitled to receive the full amount of a punitive damage award. Formerly, s. 768.73, F.S., required the division of punitive damage awards between the claimant and the state. If the claim was a result of personal injury or wrongful death, the state's share of any punitive damages was payable to the Public Medical Assistance Trust Fund. For punitive damages awards based on any other types of claims, the state's share of the award was payable to the General Revenue Fund. On July 1, 1995, the provision which required a split of punitive damage awards was repealed pursuant to Chapter 92-85, s. 3, Laws of Florida.

The Florida Supreme Court, in Gordon v. State, 608 So.2d 800 (Fla.1992), upheld the constitutionality of dividing the punitive damage award between the state and the claimant. The Florida Supreme Court determined:

> Unlike the right to compensatory damages, the allowance of punitive damages is based entirely upon considerations of public policy. Accordingly, it is clear that the very existence of an inchoate claim for punitive damages is subject to the plenary authority of the ultimate policy-maker under our system, the legislature. In the exercise of that discretion, it may place conditions upon such a recovery or even abolish it altogether....The right to have punitive damages assessed is not property; and it is the general rule that, until a judgment is rendered, there is no vested right in a claim for punitive damages. It cannot, then, be said that the denial of punitive damages has unconstitutionally impaired any property rights of the appellant....The statute under attack here bears a rational relationship to legitimate legislative objectives: to allot to the public weal a portion of damages designed to deter future harm to the public and to discourage punitive damage claims by making them less remunerative to the claimant and the claimant's attorney.

Id. at 801-802 (citations omitted).[1]

Several factors affect whether punitive damages are actually awarded at trial. First, many cases settle before trial. Settlement agreements rarely provide for or apportion punitive damages. Second, counsel may withdraw a client's plea for punitive damages just before the jury begins its deliberations. This situation would permit the trier of fact to consider the conduct giving rise to punitive damages, but it would result in the removal of punitive damages from the verdict form. Third, a case may settle in the appellate stage, after the jury has rendered an award of punitive damages. Again, such settlement agreements generally do not address punitive damages awards.

Recent litigation on asbestos liability and other "mass torts" has raised the issue of whether a defendant can be subject to repetitive punitive damages awards in different trials stemming from the same conduct. In W. R. Grace & Co. v. Waters, 638 So.2d 502 (Fla. 1994), the Florida Supreme Court held that a defendant could be subject to multiple punitive damages awards for the same conduct. The defendants in W. R. Grace argued that, in the context of the asbestos litigation which had been brought against them, the public policy behind punitive damages had already been served. Punitive damages awards had previously been entered against them in other jurisdictions for the same conduct. The Florida Supreme Court relied on the unanimous position of other Florida state appellate courts and federal courts that had considered the issue and held that previous punitive damages awards did not insulate a defendant from future punitive damages awards. However, the court agreed with the defendants that evidence of other punitive damages awards could prejudice a jury's deliberations concerning liability. Therefore, the court held that upon motion of a defendant, the determination of whether punitive damages should be awarded could be separated from the rest of the trial.

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[1] While the statute directed the splitting of punitive damage awards was in force, 179 cases involved an award of punitive damages. Punitive damages awarded totaled nearly $130 million, of which about $58.7 million was collectible by the state. Collections were made in 70 of the 179 cases in the total amount of about $8.8 million. A 1995 *per curiam* Florida Supreme Court opinion held that s. 768.83, F.S., did not govern punitive damages awarded in private arbitration, even if the award is enforced in state courts. Mile v. Prudential-Bache Securities, Inc., 656 So.2d 470 (1995) (certified question from the Eleventh Circuit Court of Appeals).

**Statutes of Limitation and Statutes of Repose**

Statutes of limitation extinguish, after a period of time, the right to sue on a cause of action. Statutes of repose limit potential liability by limiting the time during which a cause of action may be claimed. Generally, statutes if limitation are of a shorter duration than statutes of repose. Statutes of limitation involve less finality and are procedural in nature. They restrict only the remedy available to a particular plaintiff and do not operate as a limitation upon the underlying substantive right of action. Courts view statutes of limitation as affirmative defenses that the opponent of a claim must assert and prove in order to receive the protection offered under the statute. If the opponent of a claim fails to plead that the statute of limitations has expired, the defense is waived, and the claim may proceed through the courts. Statutes of limitation are predicated on public policy designed to encourage plaintiffs to assert their cause of action with reasonable diligence while witnesses are available and while memories of events are fresh. Statutes of limitation also shield defendants against the need to defend stale claims. Statutes of limitation usually run from the time at which a cause of action accrues. Currently, s. 95.11, F.S., provides a four-year statute of limitation for product liability actions.

Statutes of repose are generally longer and involve a greater degree of finality than statutes of limitation. Courts construe a cause of action rescinded by a statute of repose as if the right to sue never existed in the first place. Statutes of repose permanently lay a cause of action to rest and deprive the court of the power to hear the plaintiff's claim. Such statutes rest upon public purposes which override the claimant's need for relief from long past conduct. Words of finality, such as "in no event shall an action be commenced more than 12 years after the incident out of which the cause of action accrued," indicate that the Legislature intended to create a statute of repose. The Florida Supreme Court upheld as constitutional a 12 year products liability statute of repose in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985)(statute repealed in 1986). In upholding the statute of repose in Pullum, the Court stated that

> The Legislature, in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers and [] that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product."

476 So.2d at 659.

Currently, in Florida, no statute of repose restricts suits for injuries caused by defective products. This means that plaintiffs can bring an action for products liability 25 or even 50 years after the product was manufactured or sold. However, Florida law provides for a 12 year statute of repose for fraud and a 15 year statute of repose for improvements to real property.

**Vicarious Liability**

Vicarious liability is a long-standing, common law doctrine imposing indirect legal responsibility on non-tortfeasors. The nature of the relationship, whether it be employer-employee, principal-agent, or motor vehicle owner-operator, makes one party liable for the negligent acts of the other. The doctrine reflects a policy decision that a business should bear the cost of risks associated with its business activities.

Employers can be held vicariously liable for the torts of employees who are acting within the scope of employment. Principals, by contrast, generally cannot be held vicariously liable for the acts of independent contractors. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995); Williams v. Fort Pierce Tribune and Claims Center, 667 So.2d 174 (Fla. 1995); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956). Several exceptions allow the imposition of vicarious liability against principals under limited circumstances. See e.g., Midyette v. Madison, 559 So.2d 1129 (Fla. 1990)(holding that the property owner could be held vicariously liable for the negligence of an independent contractor who had engaged in inherently dangerous activities); Insinga v. Bell, 543 So.2d 209 (Fla. 1989)(holding that the corporate negligence doctrine imposed a duty on hospitals to choose and retain competent medical practitioners, irrespective of the status of such practitioners as independent contractors). The courts will independently assess the relationship between the entities to determine whether the relationship is one of principal/ independent contractor or employer/ employee. St. Johns & H.R. Co. v. Shalley, 33 Fla. 397 (Fla. 1894); Mumby v. Bowden, 25 Fla. 454 (Fla. 1889). If the supervising entity exerts considerable day-to-day control over the details of the work performed by the subordinate entity, courts will deem the relationship to be that of employer/ employee, even if the parties themselves categorize their relationship as one of principal/ independent contractor. Carroll v. Kencher, Inc., 491 So.2d 1311 (Fla. 4th DCA 1986).

Employers may be held vicariously liable for the tortious conduct of employees which occurs within the scope and course of employment. Rabideau v. State, 409 So.2d 1045 (Fla. 1982); Stinson v. Prevatt, 84 Fla. 416 (Fla. 1922). The main complexity which arises in this area of law is delineating the scope of employment. In Foremost Dairies of the South v. Godwin, 26 So.2d 773 (Fla. 1946), rehearing denied (Sept. 14, 1946), the Florida Supreme Court held that an employer was not liable for damages sustained in a collision involving an automobile owned by an employee. The collision took place while the employee was driving to work. The court noted that employer contributions for maintenance of the automobile did not place any ownership interest in the employer, so as to make the employer liable under the dangerous instrumentalities doctrine.

In Schropp v. Crown Eurocars, Inc., 654 So.2d 1158 (Fla. 1995), the Florida Supreme Court held that a corporation may be held liable for punitive damages based upon the conduct of a managing agent, or may be found vicariously liable for punitive damages for wanton and willful conduct by an employee, if the plaintiff establishes some negligence by the corporation. In assigning responsibility for punitive damages, principals are often relieved of liability because their agents' intentional torts fall outside the scope of employment. Florida, however, holds employers liable for punitive damages if the employee's conduct warrants punitive damages and a managing officer, director or primary owner commits some negligent act or omission contributing to the injury. Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981). In Mercury Motors, the Florida Supreme Court determined that a corporate employer could not be held vicariously liable for punitive damages for the willful and wanton misconduct of its employee, where the plaintiff failed to allege any fault on the part of the corporate employer.

**Premises Liability**

Premises liability involves the liability of property holders to persons who enter upon property with or without the property holder's permission. Premises liability constitutes a significant portion of tort cases heard in Florida courts and throughout the nation. The United States Department of Justice estimated in 1992 that premises liability claims accounted for 16.6 percent of all civil jury trials that take place in state courts.

Premises liability can be divided into two general categories. First, premises liability refers to actions arising from injuries caused by a pre-existing condition on the property. When persons who go upon the property are injured by such pre-existing conditions, the property owner's duty is defined by the status of the injured party. Second, premises liability involves harms, inflicted upon visitors to the property, by the intentional criminal acts of third parties. Under these circumstances, the liability of the property owner turns upon the foreseeability of the incident, the obligation of the property owner to maintain a reasonably safe premises, and whether adequate security measures were provided.

Duty to Protect Against Third Person Criminal Acts

When examining premises liability stemming from third party intentional acts, the court has employed a sliding scale format. The greater the foreseeability of a criminal attack, the higher the duty of the property holder to provide security. This legal framework has left some property holders with no clear indication of what they must do to avoid liability.

Florida courts have discussed the element of foreseeability in several recent decisions. Because crime is present to some degree throughout the state, the recent trend has been to find that criminal attacks are foreseeable under most circumstances. To support such a determination, courts have allowed the finder of fact to consider the occurrence of other criminal incidents that took place on the property or within the community. An examination of the cases in which this consideration has been permitted reveals no established pattern in the types of incidents that might support a finding of foreseeability. It is not clear what degree of factual similarity is required between other criminal activity and the incident giving rise to the action for damages. For example, would a single drug arrest in the neighborhood be sufficient to make a stabbing foreseeable? What if the drug arrest took place six months earlier? Would foreseeability be established if the drug arrest occurred more than five blocks away from the property where the stabbing occurred?

Numerous cases have discussed the element of foreseeability in connection with premises liability for criminal attacks by third persons. In Hardy v. Pier 99 Motor Inn, 664 So.2d 1095 (Fla. 1st DCA 1995), the First District Court of Appeal held that the trial court erred by granting summary judgment to a hotel in a case involving a criminal attack and stabbing in the hotel parking lot. According to the court, although there had not been any prior violent assaults on the premises, other incidents of criminal activity on or near the premises created a material issue of fact involving the foreseeability of the attack. The dissent cautioned, "In truth, a decision such as today's imposes absolute liability upon [the hotel]. . . . The courts have lowered the bar to such an extent in this type of case that a commercial premises owner . . . is a virtual insurer of the safety of its business invitees." Id. at 1099 (Kahn, J., dissenting).

Similarly, the Fourth District Court of Appeal, in Larochelle v. Water & Way Ltd., 589 So.2d 976 (Fla. 4th DCA 1991), held that a landlord could be held liable for a sexual battery committed against a tenant, because the landlord was on notice of danger to tenants by virtue of other crimes committed within a four to twelve block radius and as a result of unsavory conduct that occurred in another apartment unit. See also Holiday Inns, Inc. v. Shelburne, 576 So.2d 322 (Fla. 4th DCA 1991); Odice v. Pearson, 549 So.2d 705 (Fla. 4th DCA 1989); Paterson v. Deeb, 472 So.2d 1210 (Fla. 1st DCA 1985). In some older decisions Florida courts did not find foreseeability. See Hall v. Billy Jack's, Inc., 458 So.2d 760 (Fla. 1984); Reichenbach v. Days Inn of America, Inc., 401 So.2d 1366 (Fla. 5th DCA 1981). In other cases, Florida courts have discussed the adequacy of various security arrangements. See Orlando Executive Park, Inc. v. P.D.R., 402 So.2d 442 (Fla. 5th DCA 1981). These cases, taken as a whole, provide little guidance concerning what types of security measures would be sufficient to avoid liability.

In U.S. Security Services Corp. v. Ramada Inn, Inc., 665 So.2d 268 (Fla. 3d DCA 1995), the Third District Court of Appeal held that, in a case involving a criminal attack against an invitee of a hotel, the hotel had a non-delegable duty to provide a reasonably safe premises and, therefore, the hotel was vicariously liable for any negligence of the firm it had hired to provide security services. The Fifth District Court of Appeal, in National Property Investors, II, Ltd. v. Attardo, 639 So.2d 691 (Fla. 5th DCA 1994), held that the trial court properly dismissed third-party action against a convenience store, where an abductor followed the victim from the parking lot of the convenience store to an apartment complex where the assault took place. The court noted, "Apparently the security at [the convenience store] . . . was sufficient to protect its patron so long as she remained there. No court has yet extended the liability of landholders beyond this point." Id. at 692. But, in Gutierrez v. Dade County School Bd., 604 So.2d 852 (Fla. 3d DCA 1992), the Third District Court of Appeal held that a student, who was shot and injured by an assailant while exiting a school parking lot, was entitled to maintain a cause of action against the school board even though the incident took place off school property. The court noted that the duty to maintain reasonably safe premises extends to approaches and entrances to the property.

Duty to Warn/Maintain/Inspect

A property holder's duty to a person who is present on the premises is guided by the status of the person. Did the person come onto the property at the invitation of the property owner or was the person a trespasser? Was the injured party a child who was lured onto the property by what the law has defined as an attractive nuisance? Several types of entrants include:

- "Public Invitees" are owed the highest degree of care from property owners. Public invitees are persons who enter property that is held open to the public by design or through the conduct of the property holder. Formerly, the "economic benefit test" was used to determine whether an entrant was a public invitee. This standard no longer applies. Persons may be classified as invitees even if they do not bestow any sort of economic benefit upon the property holder. Examples of public invitees include store customers, delivery persons, employees, amusement park guests, restaurant and bar patrons, business visitors, museum visitors, and persons passing through airports and train stations. The property holder owes three duties to public invitees: (1) the duty to keep property in reasonably safe condition, (2) the duty to warn of concealed dangers which are known or should be known to the property holder, and which the invitee cannot discover through the exercise of due care, and (3) the duty to refrain from wanton negligence or willful misconduct. The duty to keep property in reasonably safe condition may require periodic inspections of the property as well as the duty to provide security to prevent intentional torts by third parties.

- "Licensees by Invitation" are persons who enter upon property, for their own pleasure or convenience, at the express or reasonably implied invitation of the property occupier. This category was created by the Florida Supreme Court in Wood v. Camp, 284 So.2d 691 (Fla. 1973), and is unique to Florida. It requires some sort of personal relationship aspect and generally applies to party guests and social visitors. The duties owed by a property holder to licensees by invitation are identical to those owed to public invitees.

- "Emergency Entrants," are police or firefighters who enter property during the discharge of duties for which they were summoned to the property. These entrants come under what is commonly known as "the firefighter's rule.". The property holder owes such persons: (1) the duty to refrain from wanton negligence or willful misconduct; and (2) the duty to warn of dangerous conditions, known to the property holder, when the danger is not open to ordinary observation.

- "Uninvited Licensees" are persons who choose to go upon property for their own convenience. Their presence is neither sought nor prohibited, but is merely tolerated by the property holder. Included within this category might be sales persons or persons soliciting contributions for various causes. The duties owed by property holder to uninvited licensees are the same as those owed to emergency entrants: (1) the duty to refrain from wanton negligence or willful misconduct, and (2) the duty to warn of dangerous conditions, known to the property holder, when the danger is not open to ordinary observation.

- "Discovered Trespassers" are persons who enter property without permission or privilege under circumstances where the property holder has actual or constructive notice of the presence of the intruder. Constructive notice may be established where the property holder is aware of a worn path through the woods, tire marks showing the intermittent passage of vehicles, the remains of campfires, the presence of litter, or other evidence of repeated intrusions. The property holder owes discovered trespassers two duties: (1) the duty to refrain from wanton negligence or willful misconduct, and (2) the duty to warn of dangerous conditions, known to the property holder, when the danger is not open to ordinary observation. This arrangement places a slightly greater burden on the property holder than the requirements established in most other states. Most jurisdictions only require notification of *artificial* dangerous conditions, which are hidden to others, but which are known to the property holder.

- "Undiscovered Trespassers", are persons who enter property without permission or privilege and without the knowledge of the property holder. The only duty owed to undiscovered trespassers is to refrain from inflicting wanton or willful injury.

- The attractive nuisance doctrine applies to "Child Trespassers" (no fixed age limit) who are lured onto the property by the structure or condition that injures them and, who, because of their youth, are unable to appreciate the risks involved. In past decisions, the courts have applied the attractive nuisance doctrine to children who trespass upon property to swim in a pool, pond, or open pit; play upon a construction site or excavation; climb upon dirt piles, mineral heaps, debris, or trees; or use playground or sporting equipment. Under the attractive nuisance doctrine, the property holder has a duty to protect from known dangerous conditions, where the property holder knows or should know that children frequent the area, and where the expense of eliminating the danger is slight compared with the magnitude of the risk.

B. EFFECT OF PROPOSED CHANGES:

HB 775 makes wide-ranging and substantial modifications to procedural and substantive components of the civil justice system in Florida. These charges are detailed in the section-by-section analysis below. Through its principal provisions, the bill:

- Provides for an expanded role for juries during civil trials, including the ability to pose questions and take notes.

- Requires court-ordered mediation for all civil cases, when requested by one party, with limited exceptions;

- Expands the availability of sanctions for and clarifies the standard for legal arguments which are frivolous or that unreasonably delay litigation;

- Authorizes alternative trial resolution or expedited trials in certain cases;

- Establishes a 12-year statute of repose in most product liability cases, with longer periods for certain products having longer useful lives;
- Limits the vicarious liability of certain motor vehicle owners and rental companies for damages caused by the operation of the vehicle by a person other than the owner, provided there is no negligence or intentional misconduct on the owner's or the rental company's part, with raised limits in cases of uninsured or underinsured operators;
- Provides a narrow premises liability limitation for convenience businesses complying with statutory security requirements;
- Provides immunity from liability for property owner negligence in actions for injury to a trespasser on real property or injury to a person who is committing or attempting to commit a crime;
- Creates a rebuttable presumption that a product is not defective or unreasonably dangerous if the product complies with relevant, applicable state or federal government standards or requirements;
- Requires "clear and convincing evidence" to prove liability for punitive damages (although the "greater weight of the evidence" burden applies to the determination of the amount of damages), imposes caps on punitive damages in many cases, and brings certain arbitration proceedings under the statutory limitations upon punitive damages;
- Eliminates the application of joint and several liability to non-economic damages (currently available where damages are less than $25,000), and to economic damages where a defendant is less than 10% at fault. It provides limits, increasing with fault, on joint and several liability for economic damages when a party's fault exceeds the claimant's fault;
- Imposes conditions for recovery of expert witness fees as a taxable cost; and
- Provides a limitation on vicarious liability for parties to joint employment arrangements.

C. APPLICATION OF PRINCIPLES:

1. <u>Less Government:</u>

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

The bill reduces the authority of courts to award punitive damages and to adjudicate some personal injury disputes.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

The bill creates new responsibilities for the judicial system relating to mediation, greater jury involvement and alternative trial procedures.

(3) any entitlement to a government service or benefit?

The right to bring some claims to court may be reduced.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

Costs of certain alternative dispute proceedings will be borne by the parties, saving judicial resources.

(2) what is the cost of such responsibility at the new level/agency?

Indeterminate, but such proceedings will not be mandatory and should be chosen where other legal and delay costs will be avoided.

(3) how is the new agency accountable to the people governed?

The alternate dispute methods will be subject to oversight by the judiciary.

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

The bill may increase or shift the costs of some alternative court proceedings through the mandatory mediation and expert witness cost regulations in the bill.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

The bill expands the sanctions for frivolous claims, frivolous defenses and tactics which aim to delay litigation. The bill reduces the ability of some trespassers to bring actions for personal injuries. The bill exempts intoxicated tortfeasors from limitations on punitive damages. The bill eliminates limitations on punitive damages where the tortfeasor acts intentionally. The bill reduces the number of cases where punitive damages might be awarded to plaintiffs. The bill denies recovery to plaintiffs whose intoxication was primarily responsible for their injuries.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

A party requesting mandatory mediation may be required to pay the cost of the mediation process. Parties seeking voluntary trial resolution must compensate the trial resolution judge. Convenience business owners would bear the costs of security measures taken to secure the presumption of non-liability for crimes of third parties.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/ associations to conduct their own affairs?

The bill reduces the damages for which some property owners may be liable for negligent or faultless conduct. The bill eliminates punitive damages for corporations and other legal entities where the managers, officers, directors or the owners acted with culpability below that of gross negligence. The bill gives parties statutory alternatives to most civil trials.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

The bill does not purport to provide services to families or children.

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

The bill may increase the obligations of families to care for dependent tort victims by reducing recoveries available through the civil justice system. This may be offset by a greater availability and affordability of liability insurance for a variety of activities, which would provide greater recovery in some cases.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

The bill does not create or change a program providing services to families or children.

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

This bill substantially amends the following sections of the Florida Statutes: 44.102, 44.104, 47.025, 57.071, 57.105, 90.407, 95.031, 324.021, 400.023, 400.429, 400.629, 768.075, 768.095, 768.72, 768.73, 768.77, 768.78, and 768.81. The bill also creates the following sections: 40.50, 768.0705, 768.096, 768.098, 768.1256, 768.1257, 768.36, 768.725, 768.735, 768.736, and 768.737. The bill also repeals the following subsections: 768.77(2) and 768.81(5).

E. SECTION-BY-SECTION ANALYSIS:

A section-by-section summary description follows:

**Section 1** creates s. 40.50, F.S., to provide new rights for and responsibilities of jurors in civil cases. The section requires courts to provide detailed preliminary instructions to jurors, permit jurors to take notes in trials likely to exceed 5 days, and allow jurors to submit written questions to witnesses (subject to review and approval by the court). This section also permits the court to give final instructions to the jury before closing arguments to enable the jurors to apply the law to the facts in appropriate cases.

**Section 2** amends s. 44.102(2), F.S., relating to court-ordered mediation, to mandate that all civil actions for monetary damages be referred to mediation, upon request of a party, unless such actions fall within certain exceptions. The exceptions are actions between landlord and tenant not involving personal injury claims, actions for debt collection, actions for medical malpractice, actions governed by the Florida Small Claims Rules, actions the court determines should be referred to non-binding arbitration, those actions for which the parties have agreed to binding arbitration, actions conducted by expedited trial, and actions resolved by voluntary trial resolution. In all cases for which mediation is not mandatory under the proposed changes, the court would retain the current statutory discretion to refer those cases to mediation under s. 44.102, F.S.

**Section 3** amends s. 44.104, F.S., to allow parties to a civil action in which no constitutional issues are raised to agree to a voluntary trial resolution. The parties must select and compensate the trial resolution judge. The trial resolution judge must be a member in good standing of The Florida Bar for the preceding 5 years (the same qualifications Florida places on a circuit court or county court judge).

Currently, s. 44.104, F.S., allows voluntary binding arbitration with three arbitrators. The new alternative would follow the same process in many respects. The decision by a trial resolution judge, however, would be subject to slightly less review by the circuit court, presumably due to the higher legal qualifications of the trial resolution judge. Decisions in either case can be filed as judgments of the circuit court.

This provision gives the trial resolution judge authority to administer oaths and conduct the proceedings in accordance with the Florida Rules of Civil Procedure, and to issue enforceable subpoenas. A party may enforce a judgment obtained in a voluntary trial resolution by filing a petition

for enforcement in circuit court. A party may appeal to the appropriate appellate court but review of factual findings is not allowed. The "harmless error doctrine" applies in all such appeals. The bill does not specify what the standard of review will be. However, no further review will be allowed of a judgment unless a constitutional issue is raised. (The presence of competent substantial evidence to support the findings is a standard of review for most appellate cases.)

Voluntary trial resolution would not be available in actions involving child custody, visitation, or child support or in any dispute involving the rights of a party not participating in a voluntary trial resolution.

**Section 4** amends s. 57.105, F.S., relating to the award of attorney's fees in frivolous (or unfounded) lawsuits. This section revises the standard for an award of attorney's fees which currently requires a showing of the complete absence of a justiciable issue of law or fact. The new standard for an award of attorney's fees, upon the court's initiative or motion of a party, will be whether the losing party or the losing party's attorney knew or should have known that the claim or defense at the time it was initially presented or at any time before trial, was not supported by material facts or by the application of then-existing law. This section retains the good faith exception (modified slightly to apply to the new standard) for the losing party's attorney if the attorney acted in good faith based on his or her client's representations as to material facts. In addition, sanctions for attorney's fees will not apply if the claim or defense is determined to have been made "as a good-faith argument for the extension, modification, or reversal of existing law or the establishment of new law, with a reasonable expectation of success." The language relating to the nature of the arguments is adapted from Rule 11, F.R.Civ.P.

This section also expands the court's authority to award damages as punishment for protracted litigation if the moving party proves by a preponderance of evidence that any actions were taken for the primary purpose of unreasonable delay. The new authority supplements existing powers and remedies.

**Section 5** amends s. 57.071, F.S., relating to taxable costs in civil proceedings, to condition the recovery of expert witness fees as taxable costs to a prevailing party. The party retaining the expert witness must furnish each opposing party a written report signed by the expert witness which summarizes the opinions expressed, the factual basis for the opinions, and the authorities relied upon for such opinions. The report must be filed at least 5 days prior to the deposition of the expert or 20 days prior to the close of discovery, whichever is sooner, or as otherwise determined by the court.

**Section 6** creates an optional expedited civil trial procedure. Upon joint motion of the parties with approval of the court, the court is authorized to conduct an expedited civil trial. In an expedited trial where two or more plaintiffs or defendants have a unity of interest such as a husband and wife, the parties shall be considered one party. Unless otherwise ordered by the court or agreed to by the parties, discovery must be completed within 60 days of the order granting the motion for expedited trial. The court must determine the number of depositions required. The trial, whether jury or non-jury, must be conducted within 30 days after discovery ends. Jury selection is limited to 1 hour. Case presentation by each party is limited to 3 hours each. The trial is limited to 1 day. Verified expert witness reports and excerpts from depositions, including video depositions, may be introduced in lieu of live testimony regardless of availability of the expert witness or deponent. The case must be tried within 30 days after the close of discovery, unless such schedule would pose an unreasonable burden on the court.

**Section 7** amends s. 768.77, F.S., relating to itemized verdicts. The amendment removes the requirements that the trier of fact itemize and calculate on the verdict form economic damages before and after reduction to present value. It also removes the requirement that the trier of fact specify the period of time for which future damages are intended to provide compensation. The trier of fact is still required to itemize damages as to economic and non-economic losses, and to itemize punitive damages when awarded.

**Section 8** amends s. 768.78, F.S., relating to alternative methods of payment of damage awards, to conform the provisions of the alternative payment statute with the elimination of the itemization of future economic losses by the trier of fact as amended in s. 768.77, F.S. The term "trier of fact" is replaced with the term "the court" as the specific trier of fact to make the determination of whether an award includes future economic losses exceeding $250,000, for purposes of alternative methods of payment of damage awards. This modification allows the court to ensure that the allocation of future economic damages conforms with the evidence and the verdict.

**Section 9** creates s. 47.025, F.S., to prohibit clauses in contracts for improvements to real property which require legal action involving a resident contractor, subcontractor, sub-subcontractor, or materialman to be brought outside Florida. Such actions may be brought in the Florida county where the defendant resides, where the cause of action accrued, or where the property in litigation is located unless the parties stipulate otherwise.

**Section 10** requires the clerks of court, through the state uniform case reporting system, to report to the Office of State Courts Administrator, beginning in 2003, information from each settlement or jury verdict and final judgment in negligence cases, as the President of the Senate and Speaker of the House may require.

**Section 11** amends s. 95.031, F.S., to create a 12-year statute of repose for product liability actions, including actions for wrongful death or other claims for personal injury or property damages caused by a product. The new statute of repose generally bars any action based on products liability more than 12 years after the date of delivery of the completed product to the original purchaser or lessee, regardless of the date on which the facts giving rise to the cause of action were or should have been discovered. The repose will not apply where a claimant was exposed to or used the product within the applicable repose period, but where the injury caused by such exposure did not manifest itself until after the expiration of the period.

The bill provides expressly for a longer repose period for aircraft used in commercial or contract carrying of passengers or freight, vessels of more than 100 gross tons, railroad equipment used in commercial or contract carrying of passengers or freight, and improvements to real property. For those products, other than improvements to real property which are covered by a 15 year statute elsewhere, the bill provides a repose period of 20 years.

A product with an expressly represented or warranted useful life greater than the applicable repose period will not be barred until the end of that stated useful life. The section applies to any action commenced on or after the effective date of the act, regardless of when the cause of action accrued, subject to the savings period provided in Section 12, described below.

The 12-year period will be tolled during any period when the manufacturer is shown to have actual knowledge that the product at issue in the litigation was defective and intentionally concealed the defect. This section requires that a claim of concealment be based on substantial factual and legal support, and requires that the claim be plead with specificity. A party's attempt to maintain trade secrets does not constitute concealment for purposes of this section.

**Section 12** creates a savings period to allow products liability actions that would not have otherwise been barred, but for the new statute of repose. Such actions must be brought before July 1, 2003, or otherwise be subject to the new statute of repose.

**Section 13** amends s. 90.407, F.S., to provide that evidence of measures taken after an injury or harm caused by an event, which measures would have made the injury or harm less likely to occur is not admissible to prove negligence, the existence of a product defect, or culpable conduct. Such evidence may be offered for other purposes, such as proving ownership, control, or the feasibility of precautionary measures, if controverted, or impeachment.

**Section 14** creates s. 768.1257, F.S., providing for a "state-of-the-art" defense to products liability claims. This section requires the finder of fact in such cases to consider the state of the art in scientific and technical knowledge and other circumstances that existed at the time of manufacture, not at the time of loss or injury.

**Section 15** creates s. 768.1256, F.S., to provide for a "governmental rules defense" in product liability actions. This section provides a manufacturer or seller with a rebuttable presumption that a product is not defective or unreasonably dangerous and the manufacturer or seller is not liable under limited conditions. At the time the product was sold or delivered to the initial purchaser or user the aspect of the product that allegedly caused the harm must have been in compliance with applicable federal or state product design, construction, or safety standards. The standards must be relevant to the event causing the harm. The standards must be designed to prevent the type of harm that allegedly occurred. And compliance with the standards must be required to sell or distribute the product. Non-compliance with the applicable standards, or lack of agency approval, raises a statutory presumption that the product is defective or unreasonably dangerous. The term "product" is not defined and would likely include drugs or medical devices approved by the Federal Food and Drug Administration (FDA).

**Section 16** creates s. 768.096, F.S., to provide for a presumption against negligent hiring by an employer in cases where an employee intentionally causes the death of, injury to, or damage to a third party. Such employers are presumed not to have negligently hired the tortious employee if the employer conducts a background investigation of the employee prior to hiring that person and the background investigation does not reveal any information that would reasonably demonstrate the employee's unsuitability for the work to be performed or for employment in general. The section lists a number of optional components for the background check. These options include interviewing the job applicant, requesting a criminal background check from the Florida Department of Law Enforcement, checking the driving record of an employee expected to be driving on the job, checking references, and using comprehensive applications which inquire into relevant criminal history.

**Section 17** amends s. 768.095, F.S., to provide employer immunity from liability for disclosures made about current or former employees, unless a claimant proves by clear and convincing evidence that the employer disclosed information that it knew was false or that violated any civil right of the former or current employee.

**Section 18** creates s. 768.0705, F.S., imposes limits on premises liability for convenience businesses. The owner or operator of a convenience business gains a presumption against liability if the business implements security measures set out in ss. 812.173 and 812.174, F.S.

**Section 19** amends s. 768.075, F.S., to expand the immunity of property owners from liability to trespassers. This provision precludes *all* civil or criminal trespassers under the influence of drugs or alcohol from recovering damages. This section also lowers the blood-alcohol threshold from 0.10 percent or higher to 0.08 percent or higher. The immunity does not apply if the property owner engaged in gross negligence or intentional misconduct.

New subsection (2) bars any recovery by trespassers except as provided in subsection (3). New subsection (3) defines the terms "implied invitation," "discovered trespasser," and "undiscovered trespasser." This subsection also delineates the duties owed by property owners to different categories of trespassers. Under this subsection, a property owner is not liable to an undiscovered trespasser if the property owner refrains from intentional misconduct. The property owner has no duty to warn undiscovered trespassers of dangerous conditions. A property owner is not liable to a discovered trespasser if the property owner refrains from gross negligence or intentional misconduct and warns the discovered trespasser of dangerous conditions which were known to the property owner but were not readily observable by others.

This section expressly provides that it does not alter the common law doctrine of attractive nuisance.

Finally, this section provides that a property owner is not liable for civil damages for negligent conduct resulting in death, injury, or damage to a person who is injured while attempting to commit or who is committing a felony on the property.

**Section 20** creates s. 768.36, F.S., to prohibit recovery by a plaintiff in an civil action if the trier of fact determines that the plaintiff was under the influence of alcohol or any drug to the extent that the plaintiff's normal faculties were impaired or the plaintiff had a blood or breath alcohol level of .08 percent or higher and that the plaintiff was more than 50 percent at fault for his or her own harm as a result of the influence of the alcohol or drug.

**Section 21** creates s. 768.725, F.S., raising the burden of proof for punitive damages in civil actions to "clear and convincing evidence". The "greater weight of the evidence" burden of proof applies to the determination of the amount of punitive damages.

**Section 22** amends s. 768.72, F.S., relating to claims for punitive damages. This section adds subsection (2) to raise the common law standard of culpability required to hold a defendant liable for punitive damages. A defendant may only be liable for punitive damages if the plaintiff proves by clear and convincing evidence that the defendant was personally guilty of intentional misconduct or gross negligence. The term "intentional misconduct" is defined as conduct the defendant knew was wrongful and had a high probability that it would result in injury or damage to the claimant but intentionally pursued it anyway. The term "gross negligence" is defined as conduct so reckless or wanting in care that it constitutes a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

Subsection (3) revises the common law threshold for holding an employer or other principal vicariously liable for punitive damages. This section specifies the criteria necessary to hold an employer, principal, corporation, or other legal entity liable for punitive damages based on the conduct of an employee or agent. The employee's conduct must rise to the level of gross negligence or intentional misconduct, and either: a) the employer, principal, corporation or other legal entity actively and knowingly participated in such conduct, b) the officers, directors, or managers knowingly condoned, ratified, or consented to such conduct; or c) the employer, principal, corporation, or other legal entity engaged in gross negligence contributing to the damages.

**Section 23** amends s. 768.73, F.S., to provide a cap on punitive damages of three times the amount of compensatory damages or $500,000, whichever is greater. This cap may be exceeded where the trier of fact finds that the defendant's wrongful conduct was motivated by a desire for unreasonable financial gain and that the defendant knew of the unreasonably dangerous nature of the conduct and the high likelihood of injury. In such cases, the cap on punitive damages is four times compensatory damages or $2,000,000, whichever is greater. There is no cap on punitive damages in cases where the defendant also had specific intent to harm the claimant and that the defendant's conduct actually harmed the claimant.

This section also restricts multiple awards of punitive damages. The same defendant in any civil action may avoid subsequent punitive damages if that defendant can establish that punitive damages have previously been awarded against the defendant in any state or federal court for harm from the same act or course of conduct for which claimant seeks damages.

However, subsequent punitive damages may be awarded if the court determines by clear and convincing evidence that the amount of prior awards was insufficient to punish the defendant's behavior. The wrongdoer's cessation of the wrongful conduct may be considered in making this determination. If a subsequent award is permitted, the finder of fact will determine the total punitive damages appropriate to punish the conduct. The court will then enter judgment for that amount LESS any prior awards paid.

The section also clarifies that any contingent attorney fees on punitive damages are to be calculated based upon the final judgment, not the total punitive damages determined to be appropriate.

**Section 24** creates s. 768.735, F.S., which exempts from the limitations on punitive damages actions based upon child abuse, abuse of the elderly, or abuse of the developmentally disabled or any action arising under Chapter 400, F.S. (nursing homes and related services). This section re-enacts, for purposes of the specified classes of cases, the current law governing punitive damages, which provides for punitive damages up to three times compensatory damages and allows punitive damages to exceed this amount if the claimant can prove by clear and convincing evidence that the award of punitive damages was not excessive in light of the facts and circumstances of the case.

**Section 25** creates s. 768.736, F.S. It prohibits ss. 768.725 and 768.73, F.S., from allowing the recovery of punitive damages by any defendant who, at the time of the act or omission was under the influence of any alcoholic beverage or drug to the extent that the defendant's normal faculties were impaired, or who had a blood or breath alcohol level of 0.08 percent or higher. This would mean that the increased burden of proof and limitation on punitive damages set forth in the previous section would not apply.

**Section 26** creates s. 768.737, F.S., which applies the punitive damages provisions of ss. 768.72, 768.725, and 768.73, F.S. to arbitrations. This section requires an arbitrator to issue a written opinion explaining the grounds for an award of punitive damages and demonstrating compliance with s. 768.72, F.S.

**Section 27** amends s. 768.81, F.S., relating to comparative fault and apportionment of damages. This section eliminates the doctrine of joint and several liability as to non-economic damages altogether. It also provides additional further limits the application of joint and several liability for economic damages as follows:

Consistent with present law, where the defendant has a lower percentage of fault than the plaintiff, such defendant is not subject to joint and several liability.

In cases where the plaintiff has some fault, a defendant found to be 10 percent or less at fault shall not be subject to joint and several liability. For a defendant found to be more than 10 percent but less than 25 percent at fault, joint and several liability is capped at $200,000. For a defendant found to be at least 25 percent but not more than 50 percent at fault, joint and several liability is capped at $500,000. For a defendant found to be more than 50 percent at fault, joint and several liability is capped at $1,000,000.

Where a plaintiff is found to be without fault, a defendant found to be less than 10 percent at fault shall not be subject to joint and several liability. For a defendant found to be at least 10 percent but less than 25 percent at fault, joint and several liability is capped at $500,000. For a defendant found to be at least 25 percent but not more than 50 percent at fault, joint and several liability is capped at $1,000,000. For a defendant found to be more than 50 percent at fault, joint and several liability is capped at $2,000,000.

This section also codifies Fabre and Nash, requiring a defendant who identifies a non-party to be at fault to affirmatively plead that defense, and absent a showing of good cause, identify that non-party. Additionally, in order to include the non-party on the verdict form, the defendant must prove the non-party's fault in causing the claimant's injuries by a preponderance of the evidence. This constitutes permanent legislative adoption of the relevant judicial interpretation in those cases.

**Section 28** amends s. 324.021, F.S., relating to the financial responsibility of an operator or owner of a motor vehicle. This section limits damages awardable under Florida's common law dangerous instrumentality doctrine, which currently allows a motor vehicle owner to be held liable for injuries caused by the negligence of anyone entrusted to use the motor vehicle. This section limits the vicarious liability of a motor vehicle owner or a rental company that rents or leases motor vehicles. Subsection (9)(b)2. provides that unless there is a showing of negligence or intentional misconduct on part of a motor vehicle owner or rental company that rents or leases motor vehicles for a period less than 1 year, the vicarious liability of the lessor to a third party for injury or damage to a third party due to the operation of the vehicle by an operator or lessee is limited to $100,000 per person and $300,000 per occurrence for bodily injury and $50,000 for property damage. If the lessee or operator of the motor vehicle is uninsured or has less than $500,000 combined property and bodily injury liability insurance, then the lessor is liable for an additional $500,000 in economic damages which shall be reduced by amounts actually recovered from the operator or insurance of the lessee or operator.

Subsection (9)(b)3. is added to apply the same vicarious liability limitations to owners (who are natural persons) who lend their motor vehicles to permissive users. Subsection (9)(c) is added to exclude owners of motor vehicles that are used for the owner's commercial activity, other than rental companies that rent or lease motor vehicles, from the limits on vicarious liability in subsections (9)(b)2. and (9)(b)3. The term "rental company" is defined to include an entity that is engaged in the business of renting or leasing motor vehicles to the general public and rents or leases a majority of

its vehicles to persons with no direct or indirect affiliation with the rental company, and a motor vehicle dealer that provides temporary replacement vehicles to its customers for up to 10 days.

Subsection (9)(c) also exempts commercial vehicles transporting hazardous materials unless a lessee agrees in writing to not use the vehicle for such purpose, or the lessee or other user operates the vehicle with minimum insurance of $5,000,000 combined property damage and personal injury coverage.

**Section 29** creates s. 768.098, F.S., a new limitation on liability for parties to joint employment arrangements. This section provides that a party to a joint employment arrangement shall not be liable for the tortious acts of shared employees of another party to the arrangement if that party did not authorize or direct the tortious action, did not have actual knowledge of the tortious action and fail to take appropriate action, and did not exercise control over the day-to-day job duties of the shared employee or of the job site from which the tortious acts arose or otherwise. The party seeking to avoid liability must also be absolved in the written contract forming the joint employment relationship of control over the day-to-day duties of the shared employee and actual control over that portion of the job site where the shared employee worked or from where the tortious acts arose. This section also requires joint employers to report complaints, allegations, or incidents of tortious conduct to the party seeking to avoid liability.

**Section 30** amends s. 400.023, F.S., to provide for mediation of a claim brought under the civil enforcement provisions of s. 400.023, F.S., which relates to nursing homes, and for the award of attorney's fees. Once the mediation process is concluded and the plaintiff prevails at trial by an amount greater than the defendant's last offer in mediation, the plaintiff shall be entitled to an award of attorney's fees.

**Section 31** amends s. 400.429, F.S., to provide a mediation/attorney's fees mechanism identical to that provided in Section 30 of the bill with respect to claims brought under s. 400.429, F.S., which relates to assisted living facilities.

**Section 32** amends s. 400.629, F.S., to provide a mediation/attorney's fees mechanism identical to that provided in Section 30 of the bill with respect to claims brought under s. 400.629, F.S., which relates to group home facilities.

**Section 33** requires the Office of Program Policy Analysis and Government Accountability (OPPAGA) to contract with a national independent actuarial firm to conduct an actuarial analysis of the expected reduction in liability judgments, settlements, and related costs resulting from tort reform. Such report must be completed and submitted to OPPAGA by March 1, 2007.

**Section 34** contains a statement of intent by the Legislature that the Florida Supreme Court promulgate rules of practice and procedure as it may deem necessary, consistent with the bill.

**Section 35** provides a severability clause.

**Section 36** provides that the act shall take effect October 1, 1999.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

The bill would reduce the case load of the courts by restricting certain actions. The bill would slightly decrease the liability of state agencies for trespassers or crime victims injured on public

property. It could slightly increase the cost of public health care in a few cases where compensation for injuries is reduced.

3. Long Run Effects Other Than Normal Growth:

Business decisions resulting from this legislation should enhance growth.

4. Total Revenues and Expenditures:

It is not possible to determine the net fiscal impact on the state, if any.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

The bill would slightly decrease the liability of local governments for respect to trespassers or crime victims injured on public property.

3. Long Run Effects Other Than Normal Growth:

See Recurring Effects.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

The bill shifts some costs of medical care from liability insurers, manufacturers and property owners to accident victims.

A reduction in the ability of plaintiffs to collect punitive damages could diminish the incentives for businesses to provide safe products and services.

2. Direct Private Sector Benefits:

The new punitive damages limits and the products liability statute of repose may reduce some disincentives to innovation which derive from unlimited exposure to litigation. Greater innovation in a competitive economy should enhance product safety and consumer satisfaction.

The bill may reduce the costs of liability insurance and self-insurance in the private economy. A reduction in civil litigation may attract more business investment in Florida. It could also enhance the success and growth of small business in Florida, the source of most new employment. In addition, business cost savings should enhance the affordability of goods and services for all Floridians.

Providing convenience businesses with incentive to enhanced security on commercial property could reduce crime. In addition, a reduction in the liability costs for owners of real property may result in greater private sector productivity.

3. Effects on Competition, Private Enterprise and Employment Markets:

Any reduction in the cost of doing business in Florida should make Florida businesses more competitive, more profitable and expand employment in the state.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill would not reduce the percentage of a state tax shared with counties or municipalities. Therefore, it would not contravene the requirements of Article VII, Section 18, of the state constitution.

V. COMMENTS:

**1. Legislative Intent**

In his explanation of the Conference Committee Report to the House in Session on April 30, 1999, Judiciary Chairman Johnnie B. Byrd stated the conclusion that the legislation was necessary to accomplish the following goals:

- enhance the predictability and uniformity of Florida's civil justice system;
- enhance substantial fairness by reducing payments by innocent parties;
- encourage amicable settlements through alternate dispute resolutions;
- help stimulate economic development and productivity;
- improve productivity of Floridians;
- enhance Florida's competitive posture;
- encourage innovation and new products;
- enhance Florida's ability to attract a better manufacturing base;
- discourage frivolous litigation;
- encourage personal responsibility by shifting emphasis from compensation based primarily upon loss toward responsibility based upon fault.

These listed conclusions arose out of a two year process of hearings and negotiation in both the House and Senate. The House Civil Justice & Claims Committee, then chaired by Representative Tom Warner, began hearings in September, 1997, to develop the House version of the 1998 legislation. Extensive testimony was received from academics, practitioners and policy advocates. The conclusions stated by Chairman Byrd in 1999 were informed by his membership on that Committee. Similar hearings were conducted by a select committee in the Senate in early 1998. The 1998 legislation, SB 874, which HB 775 generally tracks, was a result of these two independent processes. The chief differences between the 1998 and 1999 final bills are the details of the products liability, punitive damages and joint and several liability provisions. The policies pursued by each version are substantially the same.

**2. Separation of Powers**

The separations of powers doctrine forbids one branch of government from usurping the functions of another. Article II, Section 3, Fla. Const. While the Legislature has authority to create substantive law, the Florida Supreme Court has authority to promulgate court rules of practice and procedure. *See* Article V, Section 2(a), Fla. Const. The Legislature can repeal the court rules by a 2/3 vote. *See* Article V, Section 2(a), Fla. Const. It cannot, however, enact law that amends or supersedes existing court rules. *See* Market v. Johnston, 367 So.2d 1003 (Fla. 1978).

The question of whether a law is procedural or substantive has been decided by Florida courts on a case-by-case basis. Generally substantive laws create, define and regulate rights. Court rules of practice and procedure prescribe the method or process by which a party seeks to enforce or obtain redress. *See* Haven Federal Savings & Loan Assoc., 579 So.2d 730 (Fla. 1991).

The courts tend to find certain types of provisions unconstitutional such as those regarding timing and sequence of court procedures, creating expedited proceedings, issuing mandates to the courts to perform certain functions, and attempting to supersede or modify existing rules of court or intrude in areas of practice and procedure. HB 775 contains a number of provisions which could involve matters of judicial practice and procedure. If the court were to strike any of these provisions, it would not invalidate the bill as a whole.

However, over the years, the courts have shown some willingness to adopt a "procedural" statute as a court rule, particularly when the court finds the legislative intent or underlying legislative policy to be beneficial to the justice system. In this situation, the court will typically invalidate the procedural as constitutionally infirm and then adopt the substance of the invalid section as a court rule. TGI Friday's, Inc. V. Dvorak, 663 So.2d 606 (Fla. 1995); Timmons v. Combs, 608 So.2d 1 (Fla. 1992). Under Florida Rule of Judicial Administration 2.130(a), the courts can also adopt the substance of an invalid section as an emergency rule of procedure based on a recognition of the importance of providing a procedural vehicle or otherwise recognizing the usefulness of the policy sought to be asserted by the Legislature. *See* Fla.R.Civ.P. 1.222 (emergency rule adoption of statutory provisions governing Mobile Homeowners' Association).

Section 34 of the bill expresses the Legislature's deference to the Court on rulemaking matters. It states the intent that any provision found to be procedural should be interpreted as a request for a rule change.

**3. Access to the Courts**

Article I, Section 21 of the Florida Constitution states: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." As a general rule, statutes of limitation and statutes of repose do not infringe upon the right of access to the courts. See Carr v. Broward County, 541 So.2d 92 (Fla. 1989); Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985). In Damiano v. McDaniel, 689 So.2d 1059 (Fla. 1997), for example, the Florida Supreme Court found that the medical malpractice statute of repose did not violate the right of access to the courts, even though the plaintiff's injury did not manifest itself within the statutory four-year period following the incident which caused the injury. In addition, limitations on joint and several liability and certain other tort reforms have been upheld by the Florida Supreme Court in the face of access to courts challenges. See Smith v. Dept. of Ins., 507 So.2d 1080 (Fla. 1987)(limitation on joint and several liability does not violate access to courts right); Eller v. Shova, 630 So.2d 537 (Fla. 1993)(changing degree of negligence necessary to maintain tort action does not abolish right to redress for injury).

HB 775 does not abolish any cause of action, cap awards for compensatory damages or otherwise deny substantive rights constitutionally protected by the right to access courts. Rather, in its substantive revisions, the bill shifts responsibility from one actor to another in certain situations where the Legislature has determined responsibility is better assigned. For example, the products liability statute of repose shifts responsibility for old products from manufacturers to those who use and maintain old products. Similarly, the new limitations on joint and several liability and on automobile owner liability both reduce responsibility for damages arising from the fault of others while preserving full liability for compensatory damages caused by one's own fault.

## VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

This analysis has been substantially revised to reflect the "strike all" amendment adopted by the Conference Committee. The major changes in the Conference Committee report from the bill as passed by the House on third reading is the omission of amendments to the Offer of Judgment statute and compromises with the Senate on joint and several liability and punitive damages limitations. The Conference Committee also expanded the nursing home mediation proposal to include assisted living and group home facilities which are similarly covered by Chapter 400, F.S., civil enforcement provisions.

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

| Prepared by: | Staff Director: |
| --- | --- |
| Michael W. Carlson | Don Rubottom |