

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 355 Dangerous Instrumentality Doctrine

**SPONSOR(S):** Insurance & Banking Subcommittee; Civil Justice Subcommittee; Leek and others

**TIED BILLS:** IDEN./SIM. **BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	10 Y, 5 N, As CS	Jones	Poche
2) Insurance & Banking Subcommittee	11 Y, 2 N, As CS	Lloyd	Luczynski
3) Judiciary Committee			

### SUMMARY ANALYSIS

Under the dangerous instrumentality doctrine, a person is financially liable when:

- The person owns an item deemed to be a dangerous instrumentality;
- The person entrusts, leases, or loans the item to a third party; and
- The third party negligently injures another person.

In Florida, a court determines which instrumentalities are dangerous. The doctrine originally applied to fire, water, and poisons, but over time, courts included automobiles, trucks, buses, tow-motors, golf carts, and other motorized vehicles. Recently, the Florida Supreme Court expanded the list to include a multi-terrain loader (a compact, mobile, multifunction piece of equipment run by an onboard operator that is common to construction sites) and held the lessor of the loader liable for damages caused by the lessee.

The bill addresses the expansion of the dangerous instrumentality doctrine in two ways. First, it revises the factors that the court must consider when determining whether an instrumentality is dangerous, rather than ordinary, by replacing case law with statutory law and, second, it provides that a piece of "special mobile equipment" is not a dangerous instrumentality and the lessor is immune from liability under the doctrine, if certain conditions are met.

The bill has no impact on state or local government revenues or expenditures. The bill has positive and negative impacts on the private sector.

The bill has an effective date of July 1, 2019.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background

##### Common Law

The court-created dangerous instrumentality doctrine holds an owner strictly liable for injuries caused by another person's negligent use of the owner's property. Specifically, when the owner entrusts a dangerous instrumentality to another person, the owner is responsible for damages caused by the other person. Whether the owner was negligent or at fault is irrelevant. The rationale for holding an innocent person responsible for such damages is that the owner of an instrumentality capable of causing death or destruction should be liable for damages caused by anyone operating it with the owner's consent.<sup>1</sup>

The dangerous instrumentality doctrine originated in English common law and was adopted by the Florida Supreme Court (Court) in 1920 in *Southern Cotton Oil Company v. Anderson*, 86 So. 629 (1920).<sup>2</sup> The Court acknowledged the doctrine was originally limited to fire, water, and poisons, but had expanded over time:

It is true that, in the early development of this very salutary doctrine, the dangerous agencies consisted largely of fire, flood, water, and poisons. In *Dixon v. Bell* . . . Lord Ellenborough extended the doctrine to include loaded firearms. With the discovery of high explosives, they were put in the same class. As conditions changed it was extended to include other objects that common knowledge and common experience proved to be as potent sources of danger as those embraced in the earlier classifications. The underlying principle was not changed, but other agencies were included in the classification. Among them are locomotives, push cars, street cars, etc., and it is now well settled that these come within the class of dangerous agencies, and the liability of the master is determined by the rule applicable to them. The reasons for putting these agencies in the class of dangerous instrumentalities apply with equal, if not greater, force to automobiles.<sup>3</sup>

In *Kraemer v. General Motors Acceptance Corporation*, 572 So. 2d 1363 (Fla. 1990), a man leased a car from a lessor. The man loaned his car to a friend, and the friend caused an accident, killing another person. The victim's estate sued the lessor of the car directly. The Court held that the lessor was liable for the death of the victim under the dangerous instrumentality doctrine, even though the lessor did not cause the accident. The Court acknowledged that the dangerous instrumentality doctrine was "unique to Florida" but justified the doctrine as necessary "to provide greater financial responsibility to pay for the carnage on our roads."<sup>4</sup>

The Second District Court of Appeal has acknowledged that the dangerous instrumentality doctrine creates "real and perceived inequities" and "has drawn its fair share of criticism."<sup>5</sup> Once a court decides that an item is a dangerous instrumentality, an owner of such instrumentality is liable for damages the instrumentality causes, even if the owner was not in control of the instrumentality at the time.

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<sup>1</sup> *Roman v. Bogle*, 113 So. 3d 1011, 1016 (Fla. 5th DCA 2013).

<sup>2</sup> *Id.* at 1014.

<sup>3</sup> *Southern Cotton Oil Company v. Anderson*, 86 So. 629, 631 (1920).

<sup>4</sup> *Kraemer v. General Motors Acceptance Corp.*, 572 So. 2d 1363, 1365 (Fla. 1990).

<sup>5</sup> *Fischer v. Alessandrini*, 907 So. 2d 569, 570 (Fla. 2d DCA 2005).

Whether an item is a dangerous instrumentality is a pure question of law depending on several factors (none of which alone are dispositive of the question), including:

- Whether the instrumentality is a motor vehicle.<sup>6</sup>
- Whether the instrumentality is frequently operated near the public; but not necessarily on public property at the time of an accident.
- The instrumentality's peculiar dangers relative to other objects that courts have found to be dangerous instrumentalities.
- The extent to which the Legislature has regulated the instrumentality.<sup>7</sup>

If the court decides an item is a dangerous instrumentality, the owner is liable regardless of the facts of the particular case. This is known as strict liability. Over time, Florida courts have expanded the applicability of the doctrine to include automobiles,<sup>8</sup> trucks, buses,<sup>9</sup> tow-motors,<sup>10</sup> golf carts, and other motorized vehicles.<sup>11</sup>

### Negligent Entrustment

Negligent entrustment is a separate doctrine that holds a defendant liable for negligently entrusting an object to a person who is not capable of wielding the object, such as a child or an incompetent person. The main difference between the dangerous instrumentality doctrine and negligent entrustment is that:

- Under the dangerous instrumentality doctrine, a plaintiff can hold a non-negligent defendant liable simply for being the owner or lessor of an object; and
- Under negligent entrustment, a plaintiff must show the defendant was actively negligent in entrusting the object to another.

An example of a case of negligent entrustment is *Kitchen v. K-Mart Corporation*, 697 So. 2d 1200 (Fla. 1997), where an intoxicated man purchased a rifle from a K-Mart retailer. He then shot his girlfriend, rendering her a quadriplegic. The girlfriend sued K-Mart on the theory of negligent entrustment, arguing that K-Mart was negligent for selling a firearm to an intoxicated man. The Court held K-Mart could be liable for negligent entrustment, noting that "[t]he doctrine of negligent entrustment was actually established prior to the publication of the first Restatement of Torts, and is a recognized civil cause of action in nearly every state."<sup>12</sup>

### Limitations on the Dangerous Instrumentality Doctrine

The Florida Legislature has limited the dangerous instrumentality doctrine by:

- Declaring that a powered shopping cart used by a customer in a retail establishment is not a dangerous instrumentality.<sup>13</sup>
- In the case of a vessel, limiting the doctrine's application to the operator, and not the owner, unless the owner is present.<sup>14</sup>
- Limiting the liability of a lessor of a motor vehicle subject to registration for operation on public roads, depending on the lease's duration:
  - *Long-term lease.* The lessor is not liable for damages caused by a lessee, if:
    - The lease term is at least one year;

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<sup>6</sup> A motor vehicle is a "wheeled conveyance that does not run on rails and is self-propelled, especially one powered by an internal combustion engine, a battery or fuel-cell, or a combination of these." *Newton v. Caterpillar Financial Servs. Corp.*, 253 So. 3d 1054, 1056 (Fla. 2018) (quoting Black's Law Dictionary (10th ed. 2014)).

<sup>7</sup> *Newton*, 253 So. 3d at 1056.

<sup>8</sup> *S. Cotton Oil Co. v. Anderson*, 86 So. 629 (Fla. 1920).

<sup>9</sup> *Meister v. Fisher*, 462 So. 2d 1071, 1072 (Fla. 1984).

<sup>10</sup> *Eagle Stevedores, Inc. v. Thomas*, 145 So. 2d 551 (Fla. 3d DCA 1962) (where plaintiff was struck in a dock area by a "tow-motor," a small motor-operated vehicle, dangerous instrumentality doctrine applied).

<sup>11</sup> *Meister*, 462 So. 2d at 1072.

<sup>12</sup> *Kitchen v. K-Mart Corp.*, 697 So. 2d 1200, 1202 (Fla. 1997).

<sup>13</sup> S. 768.093, F.S.

<sup>14</sup> S. 327.32, F.S.

- The motor vehicle is not used for commercial activity, other than a motor vehicle rental company; and
- Insurance is carried on the vehicle:
  - Obtained from the lessor, for at least \$1 million for combined bodily injury and property damage liability; or
  - Obtained otherwise, for at least \$100,000 per person and \$300,000 per accident bodily injury liability and \$50,000 property damage liability, or at least \$500,000 combined bodily injury and property damage liability.<sup>15</sup>
- *Short-term lease.* For a lease shorter than one year, the lessor is liable for damages only up to \$100,000 per person and \$300,000 per incident for bodily injury and up to \$50,000 for property damage.
  - However, the lessor can be liable for up to an additional \$500,000 in economic damages, only, if the lessee or operator of the motor vehicle is:
    - Uninsured; or
    - Insured for less than \$500,000 combined bodily injury and property damage liability.

Florida courts recognize three exceptions to the doctrine, which shield an automobile owner from liability when:

- The owner entrusts his or her vehicle to a repair shop and then the mechanic causes injury.
- The automobile is stolen and the thief causes injury.
- The instrumentality is owned technically but not practically, such as when a person sells his car to another but has not technically signed over the title at the time the new owner causes an accident. This exception is applied narrowly and on a case-by-case basis.<sup>16</sup>

In 2005, Congress enacted the Graves Amendment to prohibit states from imposing vicarious liability on car rental companies.<sup>17</sup> Federal law supersedes Florida's dangerous instrumentality doctrine when a rental car company rents a car to a driver who negligently injures another person.<sup>18</sup>

### Recent Judicial Expansion of the Dangerous Instrumentality Doctrine

In spite of these efforts to limit the applicability of the dangerous instrumentality doctrine, the Court continues to broaden the applicability of the doctrine to include additional types of instrumentalities. In *Newton v. Caterpillar Financial Services Corporation*, 253 So. 3d 1054, 1056 (Fla. 2018), the Court expanded the applicability of the doctrine to include a multi-terrain loader,<sup>19</sup> holding the lessor liable for the lessee's negligent operation of the loader.

In *Newton*, a person was operating a loader, on lease from Caterpillar Financial Services Corporation, to clear debris from a private residential lot. During the course of work, the operator negligently released a tree stump from the loader's bucket, injuring an independent contractor's hand. The independent contractor sued Caterpillar as the lessor of the loader, arguing vicarious liability for the operator's negligence under the dangerous instrumentality doctrine.

<sup>15</sup> S. 324.021(9)(b), F.S.

<sup>16</sup> See, e.g., *Palmer v. R. S. Evans, Jacksonville, Inc.*, 81 So. 2d 635 (Fla. 1955) (where purchaser of a used car struck a motorcyclist the day he drove the car off the lot but did not fully complete the sales paperwork until the day after purchase, Court did not hold used car dealer vicariously liable).

<sup>17</sup> AUTO RENTAL NEWS, The Graves Amendment: Challenges, Interpretations, Answers, <https://www.autorentalnews.com/156611/the-graves-amendment-challenges-interpretations-and-answers> (last visited Mar. 2, 2019).

<sup>18</sup> 49 U.S.C. § 30106.

<sup>19</sup> A multi-terrain loader is a compact, mobile, multifunction piece of equipment run by an onboard operator that is common to construction sites. They are manufactured by several companies. Examples include: Caterpillar's skid steer loader, [https://www.cat.com/en\\_US/products/new/equipment/skid-steer-loaders.html](https://www.cat.com/en_US/products/new/equipment/skid-steer-loaders.html), (last visited Mar. 11, 2019); Bobcats skid steer loaders by Doosan, <https://www.bobcat.com/loaders/skid-steer-loaders/features>, (last visited Mar. 11, 2019); and John Deere compact track loaders, <https://www.deere.com/en/loaders/compact-track-loaders/>, (last visited Mar. 11, 2019).

The Court agreed and held Caterpillar liable. When applying the dangerous instrumentality doctrine factors to the Newton case, the Court found:<sup>20</sup>

- “Loaders are self-propelled, powered by an engine, and can be wheeled conveyances. Common knowledge and plain language demonstrate that loaders, like farm tractors and forklifts, are motor vehicles for the purpose of the dangerous instrumentality doctrine.”
- “Further, as we noted in *Rippy*, ‘the dangerous instrumentality doctrine is not limited to motor vehicles being operated on a public highway and may apply to a motor vehicle operated on private property.’”<sup>21</sup>
- “. . . ‘the loader is a serious piece of machinery with the capacity to do great harm.’”
- “. . . we hold that Newton’s status as an independent contractor does not exclude him from protection under the dangerous instrumentality doctrine. The doctrine has not treated construction workers as separate from the general public when injured in a public place. [citations omitted] Newton may not have been ‘a member of the unsuspecting public,’ [citation omitted] but his accident occurred on a public street. Newton’s employment does not disqualify his accident from coverage under the doctrine.”

The Court did not analyze the extent to which loaders are regulated by the Legislature. Ultimately, the Court determined “that a loader is a dangerous instrumentality as a matter of law.”<sup>22</sup>

### Effect of Proposed Changes

The bill addresses the expansion of the dangerous instrumentality doctrine in two ways. First, it revises the factors that the court must consider when determining whether an instrumentality is dangerous, rather than ordinary, by replacing case law with statutory law and, second, it provides that a piece of “special mobile equipment”<sup>23</sup> is not a dangerous instrumentality and the lessor is immune from liability under the doctrine, if certain conditions are met.

### Dangerous Instrumentality Doctrine, Generally

The bill replaces the dangerous instrumentality doctrine provided by case law with a statutory doctrine for the purposes of determining liability for negligent operation of instrumentalities determined by the court to be dangerous. The doctrine is changed, as follows:

	Current Common Law	Statute Created by the Bill
Any single factor dispositive of the determination?	No.	No.
Factors:	Is the instrumentality a motor vehicle?	Is the instrumentality a motor vehicle?
	Is it frequently operated near the public, but not necessarily so at the time of the accident?	Is it frequently operated within or upon public property?
		Were the damages sustained while on public property?

<sup>20</sup> *Newton*, *supra* note 7, at 1057.

<sup>21</sup> *Rippy*, 80 So. 3d at 305.

<sup>22</sup> *Newton*, *supra* note 19.

<sup>23</sup> “Special mobile equipment” is “[a]ny vehicle not designed or used primarily for the transportation of persons or property and only incidentally operated or moved over a highway, including, but not limited to, ditchdigging apparatus, well-boring apparatus, and road construction and maintenance machinery, such as asphalt spreaders, bituminous mixers, bucket loaders, tractors other than truck tractors, ditchers, leveling graders, finishing machines, motor graders, road rollers, scarifiers, earthmoving carryalls and scrapers, power shovels and draglines, and self-propelled cranes and earthmoving equipment. The term does not include house trailers, dump trucks, truck-mounted transit mixers, cranes or shovels, or other vehicles designed for the transportation of persons or property to which machinery has been attached.” S. 316.003(75), F.S.

	What are its peculiar dangers relative to other objects that courts have found to be dangerous instrumentalities?	Does it pose extraordinary dangers not posed by instrumentalities not otherwise determined to be dangerous instrumentalities?
	To what extent has the Legislature regulated the instrumentality?	To what extent has the Legislature regulated the instrumentality?
		Does it frequently cause death or destruction?

### Special Mobile Equipment – Limited Exception to the Dangerous Instrumentality Doctrine

The bill provides that an owner who leases out “special mobile equipment” is not liable under the dangerous instrumentality doctrine, if:<sup>24</sup>

- The lease is written; and
- The lessor obtains documentation of the lessee’s insurance coverage that contains limits of at least:
  - \$100,000 per person and \$300,000 per accident for bodily injury liability; and
  - \$50,000 for property damage liability; or
  - \$500,000 combined property damage liability and bodily injury liability.
- In the event the lessee’s insurance lapses, the lessor’s immunity from liability is not affected.

It also provides that an owner who leases out “special mobile equipment” may be liable for damages, despite complying with the bill’s leasing and insurance requirements, if the damages:

- Occurred while the lessor's employee or contractor was operating, maintaining, or using the equipment; or
- Resulted from the lessor's gross negligence or criminal wrongdoing.

These exceptions clarify that a plaintiff maintains the right to assert liability against a lessor who is at fault, whether directly or under the doctrine of respondeat superior.<sup>25</sup>

The bill does not alter a plaintiff’s ability to recover under alternative tort theories, such as negligent entrustment.

#### B. SECTION DIRECTORY:

**Section 1:** Creates s. 768.092, F.S., relating to dangerous instrumentality doctrine.

**Section 2:** Provides an effective date of July 1, 2019.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

<sup>24</sup> The bill provides that the terms “lease agreement,” “lessee,” and “lessor” include a “sublease,” “sublessee,” and “sublessor,” respectively, unless the context clearly indicates otherwise.

<sup>25</sup> The doctrine of respondeat superior holds an employer liable for the employee's wrongful acts committed within the scope of the employment.

Black’s Law Dictionary (10th ed. 2014).

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. The bill's change to the dangerous instrumentality doctrine may lower insurance rates and prices, but excluding recovery of tort damages related to instrumentalities that otherwise may have qualified as dangerous under the current doctrine may negatively impact claimants. Also, excluding special mobile equipment leased under qualifying circumstances from the doctrine will provide certain benefits provided by the insurance, but will also limit claimant's potential recoveries and restrict the pool of possible defendants.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None provided by the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Factors for determining whether an instrumentality is dangerous

Certain factors are specific to the instrumentality involved in the accident at issue. Other factors are generally related to the type or class of instrumentality involved. The factors provided are not drafted to reflect these differences. For example, one factor provides for consideration of "whether the instrumentality frequently causes death or destruction." It is unclear whether this factor requires consideration of the damages caused by one particular instrumentality (i.e., its own accident history) or the overall frequency with which that type of instrumentality is involved in accidents (i.e., the accident history of all pieces of that instrumentality in use across the state or nation). Clarifying the factors to address the specific or general nature of the instrumentality being measured by the factor could avoid confusion.

## Exclusion of “special mobile equipment” from the doctrine upon qualifying conditions

On lines 70 to 75, the bill provides that a lessor “may” be liable for damages that occur in certain circumstances. It is unclear if the lessor is always liable in the specified circumstances or if the liability is contingent on factors, which are not provided. In the first circumstance, i.e., where the lessor’s agents are involved in the accident, it is apparent that other factors outside the control of the lessor could limit or eliminate the lessor’s liability. While in the second circumstance, i.e., where the lessor has committed gross negligence or a crime, one might general believe that the lessor would be liable in every instance. Amending the bill to clarify the contingent or certain nature of the lessor’s liability in the given circumstances may avoid confusion.

### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 6, 2019, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment removed a provision limiting liability for damages caused by a dangerous instrumentality to a person with direct custody and control of the instrumentality.

On March 13, 2019, the Insurance & Banking Subcommittee considered the bill, adopted two amendments, and reported the bill favorably as a committee substitute. The amendments:

- Clarify the definitions of the terms “lease agreement,” “lessee,” and “lessor” to make them consistent with Florida’s Uniform Commercial Code and how the Code applies the terms to lease agreements.
- Require the court when determining whether a particular instrumentality is dangerous to compare the instrumentality to those other instrumentalities that have not been determined to be dangerous, rather than to “ordinary instrumentalities.” This clarifies how the court will make the comparison to resolve this factor.
- Provide that lessors must obtain documentation of the lessee’s compliant insurance at the time of leasing a piece of special mobile equipment in order for the immunity proposed by the bill to apply to the lessor.
- Maintain the lessor’s immunity from liability if the lessee’s insurance lapses during the lease period.
- Make technical and clarifying changes to the bill.

The staff analysis has been updated to reflect the committee substitute.