

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

SPONSOR(S): Judiciary Committee, 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	12 Y, 4 N, As CS	Jones	Poche

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 Caterpillar loader and held the lessor of the loader liable for damages caused by the lessee.

CS/CS/CS/HB 355 contracts the expansion of the dangerous instrumentality doctrine by:

- Revising the factors that the court must consider when determining whether an instrumentality is dangerous, rather than ordinary, by replacing case law with statutory law.
- Providing that a leased 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 does not appear to have a fiscal impact on state or local governments.

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.¹

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).² 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.³

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."⁴

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."⁵ 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.

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

² *Id.* at 1014.

³ *S. Cotton Oil Company v. Anderson*, 86 So. 629, 631 (Fla. 1920).

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

⁵ *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 is dispositive, including:

- Whether the instrumentality is a motor vehicle.⁶
- Whether the instrumentality is frequently operated near the public, regardless of whether the incident at issue occurred on public property.
- 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.⁷

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

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."¹²

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.¹³
- In the case of a vessel, limiting the doctrine's application to the operator, and not the owner, unless the owner is present.¹⁴
- 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;
 - The motor vehicle is not used for commercial activity, other than a motor vehicle rental company; and

⁶ 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)).

⁷ *Newton*, 253 So. 3d at 1056.

⁸ *S. Cotton Oil*, 86 So. at 629.

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

¹⁰ *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).

¹¹ *Meister*, 462 So. 2d at 1072.

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

¹³ S. 768.093, F.S.

¹⁴ S. 327.32, F.S.

- 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.¹⁵
- *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.¹⁶

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.¹⁷

In 2005, Congress enacted the Graves Amendment to prohibit states from imposing vicarious liability on car rental companies.¹⁸ Federal law supersedes Florida's dangerous instrumentality doctrine when a rental car company rents a car to a driver who negligently injures another person.¹⁹

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,²⁰ 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.

¹⁵ S. 324.021(9)(b), F.S.

¹⁶ *Id.*

¹⁷ 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).

¹⁸ AUTO RENTAL NEWS, The Graves Amendment: Challenges, Interpretations, Answers, <https://www.autorentalnews.com/156611/the-graves-amendment-challenges-interpretations-and-answers> (last visited Mar. 21, 2019).

¹⁹ 49 U.S.C. § 30106.

²⁰ 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, (last visited Mar. 21, 2019); Bobcat's skid steer loaders by Doosan, <https://www.bobcat.com/loaders/skid-steer-loaders/features>, (last visited Mar. 21, 2019); and John Deere's compact track loaders, <https://www.deere.com/en/loaders/compact-track-loaders/>, (last visited Mar. 21, 2019).

The Court agreed and held Caterpillar liable, emphasizing that if a particular instrumentality is "frequently operated near the public"—regardless of whether the particular instrumentality at issue was used on public land—it can be a dangerous instrumentality.²¹

Effect of Proposed Changes

CS/CS/CS/HB 355 addresses the expansion of the dangerous instrumentality doctrine by:

- Revising the factors that the court must consider when determining whether an instrumentality is dangerous, rather than ordinary, by replacing case law with statutory law.
- Providing that a piece of leased "special mobile equipment"²² 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 changes the dangerous instrumentality doctrine, as follows:

	Current Common Law	Statute Created by the Bill
Is 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?
	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 pose a significant risk of death or destruction when used improperly?

²¹ *Newton*, 253 So. 3d at 1056.

²² "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.

For purposes of the bill, "public property" includes privately-owned property where members of the public are welcomed as invitees.

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 for the operation, maintenance, or use by the lessee, the lessee's agent, or the lessee's employee, if:²³

- 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.

If the lessee's insurance lapses, the lessor's immunity from liability is not affected. A plaintiff maintains the right to assert liability against a lessor who is at fault, whether directly or under the doctrine of respondeat superior.²⁴ The bill does not alter a plaintiff's ability to recover under alternative tort theories, such as negligent entrustment.

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

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.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

²³ The bill provides that the terms "lease agreement," "lessee," and "lessor" include a sublease, sublessee, and sublessor, respectively, unless the context clearly indicates otherwise.

²⁴ 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).

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate impact on the private sector. Changing the dangerous instrumentality doctrine may lower insurance rates and prices. Also, providing a safe harbor when insurance is purchased will restrict recovery in court but will increase the possibility of recovery through insurance.

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:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

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 adopted two amendments and reported the bill favorably as a committee substitute. The amendments:

- Clarified 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.
- Required the court to compare an instrumentality to other instrumentalities that have not been determined to be dangerous, rather than to "ordinary instrumentalities."
- Provided 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.
- Maintained the lessor's immunity from liability if the lessee's insurance lapses during the lease period.
- Made technical and clarifying changes to the bill.

On March 21, 2019, the Judiciary Committee adopted one amendment and one amendment to the amendment. The amendments:

- Expanded the definition of public property to include property where the public is welcomed as invitees.
- Clarified when the lessor of special mobile equipment is not liable for damages caused by another person.

- Removed language specifying that a lessor may be liable for damages caused by the lessor's gross negligence or criminal wrongdoing.
- Clarified that a lessor is not liable for damages caused by a lessee of special mobile equipment that does not maintain insurance coverage during the term of the lease.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.