HOUSE OF REPRESENTATIVES
COMMITTEE ON
FINANCIAL SERVICES
FINAL BILL RESEARCH & ECONOMIC IMPACT STATEMENT

BILL #: HB 2117 (PCB FS 97-06)

RELATING TO: Liability reform

SPONSOR(S): Committee on Financial Services, Representative Safley & others

COMPANION BILL(S): CS/SB 874 (c)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) FINANCIAL SERVICES YEAS 9 NAYS 5
(2) CIVIL JUSTICE & CLAIMS
(3)
(4)
(5)

I. FINAL ACTION STATUS:

HB 2117 died in the Committee on Civil Justice & Claims. The Legislature did pass a bill related to the issues contained in this bill in CS/SB 874. CS/SB 874 was subsequently vetoed by the Governor on May 18, 1998.

II. SUMMARY:

HB 2117 creates the Florida Accountability and Individual Responsibility (FAIR) Liability Act, reforming laws relating to liability, as follows:

- requiring certain products liability actions to be commenced no later than 12 years after the product leaves the possession and control of the manufacturer.
- limiting the circumstances in which the owner of personal property is liable for the operation or use of the personal property by another person.
- disallowing vicarious liability as a basis of recovery against a defendant in the case of intentional torts upon plaintiff by a third party.
- providing a defendant with a defense in a civil action based on the plaintiff being under the influence of drugs or alcohol.
- limiting circumstances in which punitive damages may be awarded to cases involving intentional misconduct, providing a process for determining a claim for punitive damages, and dividing punitive damages awards between the plaintiff and the state.
- abolishing the doctrine of joint and several liability for cases involving noneconomic damages of $25,000 or less and removing the monetary distinction governing the application of joint and several liability in the case of economic damages.
- creating a cause of action under which a person could sue for damages arising out of a person's violation of substance abuse laws (entitled the "Drug Dealer Liability Act").

III. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Statutes of Limitation and Statutes of Repose

Statutes of limitation impose a time limit within which legal proceedings must be commenced in court after a cause of action has accrued. Statutes of limitation are predicated on public policy and are designed to encourage plaintiffs to assert their cause of action with reasonable diligence, while witnesses are available and memories of events are fresh. Limitation statutes further act as a shield which protects defendants against the necessity of defending stale claims which, because of their antiquity, would work a disadvantage for the defendant at trial.

Statutes of limitation are procedural in nature in that they restrict only the remedy available to a particular plaintiff, and do not operate as a limitation upon the underlying substantive right of action. As an example, a cause of action alleging a breach of a written contract carries a 4 year state of limitation period, which begins to run from the date the breach occurs. One may file a lawsuit more than four years after the breach occurred, and obtain a judgment stating that a breach did in fact occur. However, due to the running of the statute of limitation period, one may not recover monetary damages resulting from the breach.

As another example, a lien which one may have on property as security for a debt is not impaired because the remedy at law for the recovery of a debt is barred due to operation of the statutes of limitation. Highland Crate Cooperative v. Guaranty Life Ins. Co., 154 Fla 332, 17 So. 2d 515 (1944). In Highlands, the Florida Supreme Court upheld the enforceability of a lien created in a deed of sale as against the land even though the notes evidencing the indebtedness were barred by the statute of limitations.

Statutes of limitation are different from statutes of repose. Although couched in similar terms, a statute of repose is not a true statute of limitations since it begins to run not from accrual of a cause of action, but from an established time or fixed event, such as the delivery of a product or the completion of work, which is unrelated to the accrual of the cause of action. Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992). For instance, if one filed a products liability action in January, 1997, alleging personal injury due to a fall from a ladder manufactured in 1984, the suit would be dismissed outright due to the running of the 12 year statute of repose. This would be the case even if the fall did not occur until 1997 at which time, in comparison, the statute of limitation would have just begun to run.

A statute of repose abolishes or completely eliminates the underlying substantive right of action, not just the remedy available to the plaintiff, upon expiration of the limitation period specified in the statute of repose. See Carr v. Broward County, 541 So. 2d 92 (Fla. 1989). In Carr, the Florida Supreme Court recognized that the Legislature may properly take into account the difficulties of defending against a stale fraud claim in determining a reasonable period for a statute of repose. The case that upheld the 7-year statute of repose for medical malpractice actions. The medical malpractice law absolutely barred a person from instituting a medical malpractice action more than 7 years after the incident giving rise to the injury (even in cases of fraud). The Florida Supreme Court relied on Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) and other

cases to hold that the Legislature had established the overriding public necessity required by Kluger v. White, 281 So.2d 1 (Fla. 1973) (the "whereas" clauses of the bill described the crisis in availability of medical malpractice insurance).

Chapter 95, Florida Statutes, addresses statutes of limitations and repose. Specifically, for fraud actions, s. 95.11, F.S. provides a 4 year statute of limitation, and s. 95.031(2), F.S., provides a 12 year statute of repose. This means that a legal or equitable cause of action alleging fraud must be commenced within 4 years after the cause of action accrues, or a legal remedy for that action may be denied. In any case, an action for fraud must be commenced within 12 years from when the victim knew or should have known that he or she was defrauded, or the action will be substantively barred. For products liability actions, section 95.11, F.S., provides for a 4 year statute of limitation and no statute of repose.

Construing a prior 12-year statute of repose for products liability actions, the Florida Supreme Court carved out an exception for the drug diethylstilbestrol (DES) in the case of Diamond v. E. R. Squibb and Sons, Inc., 397 So.2d 671 (Fla. 1981). DES caused injuries that remained latent for many years after the drug was consumed, and by the time the injuries became apparent, the 12-year statute of repose had run out. The Supreme Court held that applying the statute to DES cases would violate Article I, section 21 of the State Constitution, which guarantees access to courts for redress of injuries. When the Supreme Court later upheld the constitutionality of the statute of repose in general (see Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), it preserved the exception for DES cases. In a recent case construing the old statute of repose, the Third District Court of Appeal relied on the Diamond case to create a similar exception for asbestos cases (see Owens-Corning Fiberglass Corp. v. Corcoran, 679 so.2d 691 (Fla. 3d DCA 1996).

Vicarious Liability and The Dangerous Instrumentality Doctrine

Vicarious liability imposes liability on Person A for the tortious conduct of Person B, even though there is no negligent conduct by Person A. The conduct of Person A is not relevant to find Person A liable under the doctrine of vicarious liability (as it would if a claim were brought against Person A under a general negligence theory of liability). Vicarious liability may arise from a relationship between two people such as a principal and agent, or an employer and employee.

Under the doctrine of *respondeat superior*, an employer is liable for the negligence of an employee toward those to whom the employer owes a duty of care, if the employee's failure to use care occurred in the course of employment, or with the consent or knowledge of the employer.

Another common law doctrine that makes an employer responsible for the acts of the employee is the "dangerous instrumentality" doctrine, which holds that when an object is highly dangerous in and of itself or is capable of being misused in a way that causes danger, the employer will be responsible for misuse by the employee. This doctrine is a means of imputing to one person liability for the acts of another, and is not the same as strict liability for ultra-hazardous acts or nuisances.

As applied to automobiles, Florida courts have extended the dangerous instrumentality doctrine beyond its traditional employer-employee (or "master and servant") scope. The general rule is described by Prosser and Keeton as follows:

> If the owner is not present in the car, but has entrusted it to a driver who is not his servant, there is merely a bailment, and there is usually no basis for imputing the driver's negligence to the owner. It is here that the owner's liability to the injured plaintiff stops at common law. *Only the courts of Florida have gone the length of saying that an automobile is a 'dangerous instrumentality,' for which the owner remains responsible when it is negligently driven by another.* Courts in other states have refused to accept this simple but sweeping approach, and have instead struggled hard to find some foundation for vicarious liability in the circumstance of the particular case.
>
> Prosser and Keeton on Torts, 5th ed. 1984, 523-524, emphasis supplied.

The Florida Supreme Court first recognized the dangerous instrumentality doctrine in Southern Cotton Oil Co. v. Anderson, 86 So.2d 629, 631 (Fla. 1920). In this case, the Florida Supreme Court imposed liability on Southern Cotton Oil when its employee, authorized to use a company-owned vehicle, caused an accident while using the vehicle for personal reasons. Despite the fact the employee was using the vehicle for personal reasons, the employer was held liable because it put the power to mismanage a highly dangerous item in the employee's hands. The focus of the court's reasoning was not on the relationship between the employee and the employer, but on the fact that the owner of an instrument as dangerous as an automobile should be responsible for its misuse by another. The Court found the employer, as the vehicle owner and not as the employer, liable for several reasons:

> due to the vehicle's dangerous nature, the responsibility for operating it, regardless of who actually does the operating, cannot be delegated by the owner.
>
> if the owner were not liable, then rules regarding use of vehicles could slacken, thus increasing the potential of danger to the public.
>
> the responsibility for a dangerous item should be commensurate with the dangers to which its owners subject the public.
>
> the Florida Legislature has recognized the highly dangerous nature of automobiles by requiring owners to register the style, factory number, and motor power of the vehicle with the state; requiring the name, age, residence and business address of any driver be filed with the state; requiring that no one under [fifteen] years old may drive; requiring that all automobiles have adequate brakes, signaling devices, and lights, all to be used in certain ways.

As a result of Southern Cotton Oil Co., items not inherently dangerous but of a peculiarly dangerous character *when operated* are treated as if they are inherently dangerous for the purpose of imposing liability on their owners. The dangerous instrumentalities doctrine imposes a legal obligation on a vehicle owner, based on the peculiarly dangerous nature of vehicles *when operated*, to ensure the vehicle is properly operated when used by anyone-- employee or otherwise-- with the owner's knowledge or consent, and to accept liability in the event harm results from its use. The dangerous instrumentalities doctrine makes a vehicle owner vicariously liable for acts of another

who, with the owner's consent or knowledge, drives the owner's car, even though there is no negligence on the part of the owner.

Subsequent Florida courts have followed Southern Cotton Oil Co. In 1984, the Florida Supreme Court used the dangerous instrumentalities doctrine to hold a country club liable for injuries to a patron in a golf cart accident. Meister v. Fisher, 462 So.2d 1071 (Fla. 1984). The Court pointed out that the doctrine in Florida has been applied to motor vehicles, that pertinent statutes in other states codifying the doctrine address motor vehicles, and finally that golf carts are defined in the Florida Statutes as motor vehicles, so golf cart owners are subject to the dangerous instrumentalities doctrine. The Court supported its holding by declaring that it is irrelevant that a golf cart is driven on a golf course, and that golf carts have the same ability to cause serious injury as any motor vehicle operated on a public highway.

In Roth v. Old Republic Ins. Co., 269 So.2d 3, 5 (Fla. 1972), the Florida Supreme Court held a car rental agency/owner liable for the negligent act of a person who had been permitted by someone who rented a car from the agency to drive the rental car. The Court reached this decision despite the fact that the agency had a contract with the renter that no one other than the renter would drive the car. The significance of Roth is that only conversion or theft of an automobile relieved the automobile's owner of liability under the dangerous instrumentality doctrine. Commercial Carrier Corp. v. S.J.G. Corp., 409 So.2d 50, 52 (Fla. 2d DCA 1981).

In 1986, the Legislature carved out a statutory exception to the dangerous instrumentality doctrine for long-term lease arrangements (Chapter 86-229). In section 324.021(9)(b), F.S., a lessor is not considered the owner if, under the terms of a lease agreement of one year or longer, the lessee is required to obtain insurance of not less than $100,000/$300,000 bodily injury liability and $50,000 property damage liability or $500,000 combined. In that event, the lessor is not considered the owner under law and, therefore, not vicariously liable for the tortious conduct of the lessee. In Abdala v. World Omni Leasing, 583 So.2d 330 (Fla. 1991), the Florida Supreme Court upheld the constitutionality of the statute. Five years later, in Ady v. American Honda Finance Corp., 675 So.2d 577 (Fla. 1996), the Court concluded there must be a "strict compliance with the express provisions of section 324.021(9)(b) before a title owner of a motor vehicle can receive the benefits of this statutory exception to the dangerous instrumentality doctrine." [Ady, above, at p. 580 (exception available only if lessee and not lessor supplies the insurance)]. The Court quoted from one of its previous opinions from 1990 in which it noted that "[t]he dangerous instrumentality doctrine is unique to Florida and has been applied with very few exceptions."

Punitive Damages

"Punitive damages" are damages imposed not to compensate for a plaintiff's actual losses, but instead to punish the defendant and to deter future misconduct by others. "Compensatory damages" are intended to pay for the actual losses sustained by a plaintiff. For punitive damages to be awarded, the acts complained of must have been committed with malice, moral turpitude, wantonness, willfulness, outrageous aggravation, or reckless indifference to the rights of others.

Punitive damages may be awarded even if the misconduct was not intentional. However, the misconduct:

> must 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.

Pursuant to s. 768.72, F.S., a claim for punitive damages is not allowed unless there is evidence proffered or in the record to provide a reasonable basis for recovery of punitive damages. Discovery of the defendant's financial worth is not allowed until after the court allows the punitive damages claim. 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 of s. 768.72, F.S.--a prerequisite to a punitive damages award. 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, but that certiorari is available to determine whether the trial court complied with the procedural aspects of the statute.

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. In contrast, Florida law does limit 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 which involves willful, wanton, or gross misconduct. In those cases, punitive damages may not exceed three times the amount of compensatory damages awarded.

Recent litigation on asbestos liability and other "mass torts" has raised the issue of whether a defendant can be subject to several punitive damages awards in different trials growing out of the same conduct. In W. R. Grace & Co. -- Conn. 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, and also provided for a bifurcated trial in which the determination of the amount of punitive damages would be separate from the rest of the trial.

The defendants in W. R. Grace essentially argued that, in the context of their asbestos litigation, the public policy behind punitive damages had already been served because punitive damages awards had already 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 do not protect a defendant from future punitive damages awards. Part of the court's reasoning was that such a holding would not be binding on the federal courts or the courts of other states, thereby putting Floridians at a disadvantage. However, the court agreed with the defendants that

evidence of other punitive damages awards could prejudice a jury's determination of whether liability existed. Therefore, the court held that upon motion of a defendant, the determination of the amount of punitive damages may be separated from the rest of the trial. At the first stage of the trial, the jury is to hear evidence on liability for compensatory damages, the amount of compensatory damages, and liability for punitive damages. If liability for punitive damages is found, the jury is to hear evidence on the amount of punitive damages at the second stage of the trial.

Since July 1, 1995, the entirety of punitive damage awards have been, and remain, payable to the claimant. Prior to that date, s. 768.73, F.S., required that all punitive damages awards be divided among the claimant and the state, with 65 percent going to the claimant and 35 percent going to 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 awards based on any other claims, the state's share of the punitive damages award was payable to the General Revenue Fund.

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

> 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.
>
> 600 So.2d at 801-802 (citations omitted).

Several actions in the trial process affect whether punitive damages are actually awarded, which may greatly decrease the number of awards and contribution to the trust funds. First, many cases settle well before the trial commences. Typically, settlement agreements do not provide for, and so never apportion, punitive damages. Second, trial counsel may withdraw his or her client's plea for punitive damages just before the jury goes out. The result may be an award which considers the conduct giving rise to punitive damages, but there is no punitive damage award on the verdict form. Third, a case may settle in the appellate stage, after an award of punitive damages is made. Again, settlement agreements generally do not address punitive damages awards.

Comparative Fault/Joint and Several Liability

Until 1972, Florida operated under a system of contributory negligence in which a person would not receive an award for damages if that person contributed to the injury. Any negligence by a plaintiff, regardless of how minimal, was a complete bar to recovery. Louisville and National Railroad Co. v. Yniestra, 21 Fla. 700 (Fla. 1886)(injury must be solely caused by the acts of another).

Concerned over the effect of contributory negligence, the Florida Supreme Court abolished the doctrine of contributory negligence and in its place adopted the doctrine of comparative fault. See Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). Under the doctrine of comparative fault, a jury is required to apportion fault among all negligent parties and to apportion total damages according to the proportionate fault of each party. Under this doctrine, which is still the rule in Florida, a plaintiff's damages are diminished only by the plaintiff's own percentage of fault, but a plaintiff is not barred from collecting damages because of his fault. For example, a jury awards $100,000 in damages and finds that the plaintiff is 20 percent at fault and the defendant is 80 percent at fault for the accident. The comparative fault doctrine provides that the defendant is liable for $80,000 ($100,000 x 0.80).

The concept of comparative fault becomes more complex with the introduction of joint tortfeasors (i.e., additional defendants) and results in the application of the concept of joint and several liability. Under joint and several liability, the liability is "joint" in that all defendants may be joined in the action to vindicate a single harm and it is "several" in that each defendant is individually liable for all damages and it is "joint and several" because the liability of no defendant is satisfied until the plaintiff is completely satisfied. For example, a jury awards $100,000 to the plaintiff and finds that defendant A is 40 percent at fault and defendant B is 60 percent at fault. Under the doctrine of joint and several liability, the defendants have not satisfied the plaintiff's damages until the defendants have paid the full $100,000. In other words, the plaintiff may look to either defendant for the full $100,000 regardless of the percentage of fault.

Because of joint and several liability, each defendant was deemed to be totally responsible for the acts of the other defendants. Until 1986, strict joint and several liability was the law in Florida and applied to all damages suffered by a plaintiff. In 1986, the Florida Legislature adopted the Tort Reform and Insurance Act of 1986, Chapter 86-160, Laws of Florida.

The Tort Reform and Insurance Act of 1986 made significant changes to the doctrine of joint and several liability. Specifically, the Legislature bifurcated the application of the doctrine of joint and several liability depending on the type of damages recovered.

With respect to economic damages (e.g., out-of-pocket damages, medical bills, lost wages) the doctrine continues to apply. Thus, each defendant, as long as his fault is greater than the fault of the plaintiff, is entirely responsible for damages incurred. See s. 768.81(3), F.S.

As for non-economic damages (e.g., pain and suffering, inconvenience, mental anguish, loss of capacity for enjoyment of life), the Legislature abrogated the doctrine of joint and several liability and in its place applied comparative negligence. Thus, "each defendant is liable only for his own percentage share of noneconomic damages." Smith v. Department of Insurance, 507 So.2d 1080, 1091 (Fla.1987).

However, joint and several liability continues to apply to all actions in which damages (economic and noneconomic) do not exceed $25,000. [See s.768.81(5), F. S.]

In the past several years, two District Courts of Appeal have rendered divergent opinions on the application of comparative fault to non-economic damages. In Messmer v. Teacher's Insurance Company, 588 So.2d 610 (Fla. 5th DCA 1991) the Fifth District Court of Appeals considered the application of the comparative fault standard to non-economic damages and held that fault may be apportioned among all parties to the action. The court did not interpret "parties" to mean actual parties to the litigation or arbitration. Therefore, defendants could, if sufficient evidence was advanced, place non-parties on the jury verdict form. The effect of the Messmer decision has been to spread liability among not only parties to an action but also to non-parties. In contrast, the Third District Court of Appeal in Fabre v. Marin, 597 So.2d 883 (Fla. 3d DCA 1992), interpreted s. 768.81(3) to require the apportionment of damages against defendants to the lawsuit. Specifically, the court held that it lacked jurisdiction to enter a judgment against nonparties. Id. at 885. On August 27, 1993, the Florida Supreme Court resolved the conflict between Messmer and Fabre and held that "parties" in the context of s. 768.81(3) means all of the entities who contributed to the accident. Fabre v. Marin, 623 So.2d 1182 (Fla. 1993). Subsequent court decisions have upheld Fabre.

B. EFFECT OF PROPOSED CHANGES:

Statutes of Repose

This bill extends the 12 year statute of repose for fraud actions to products liability actions. It further provides that any cause of action which would be barred by operation of this section of the bill, but would not have been barred by existing law, must be filed before June 1, 1998, or the claim will be barred. For instance, a lawsuit against a manufacturer for personal injury resulting from a fall due to the alleged malfunction of a ladder, which was manufactured in 1984, would be substantively barred if the cause of action was not filed until 1997, under the 12 year statute of repose.

Vicarious Liability

The owner of personal property would not be considered the owner for purposes of being held vicariously liable for the operation or use of the property by another, provided the use or operation of the personal property is covered by insurance containing limits of not less than $100,000/$300,000 bodily injury liability and $50,000 property damage liability, or not less than $500,000 combined property damage liability and personal injury liability, covering the use or operation of said property. Furthermore, the owner would have no duty to warn the borrower of a defect which is or should be apparent to the ordinary user or a defect unknown to the owner.

Alcohol and Drug Defense

A defendant in a civil action would be able to assert drug or alcohol impairment of the plaintiff as a defense if the plaintiff was under the influence of drugs or alcohol and if, as a result of being under the influence, the plaintiff was more than 50 percent at fault for

the harm to the plaintiff. The defense would apply if the plaintiff was under the influence of an inhalant or controlled substance to the extent his normal faculties were impaired, or if the plaintiff had a blood alcohol level of 0.08 percent or more. The defense would not apply to use of over-the-counter or prescription drugs.

Furthermore, any person committing a tort (such as trespass upon personal property without the owner's consent or committing a battery upon another) while impaired by alcohol or drugs and suffering personal or property damages during the commission of or as a result of the tort, would not be able to recover any damages for the loss or injury unless that person has established by clear and convincing evidence that his or her culpability was less than the person from whom recovery is sought.

Liability for Intentional Tort Committed by a Third Party

Plaintiffs could no longer use the theory of vicarious liability for causes of action alleging intentional torts committed by a third person.

Punitive Damages

The bill provides an exception for fraud in limiting the applicability of punitive damages in civil actions. To make a "reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of an award of punitive damages," a claimant would now have to prove "intentional misconduct" by clear and convincing evidence -- a higher standard -- for establishing a reasonable basis for punitive damages, and the court's ruling on proving reasonable basis would be immediately appealable. "Reasonable basis" would also include necessarily a finding that a punitive damage award is not otherwise disallowed. The hearing on a motion to amend the complaint to plead punitive damages would have to be held not less than 30 days prior to the trial date to give defendant time to prepare rebuttal and avoid surprise.

The liability and award of compensatory damages would have to be tried separately from that of punitive damages. Evidence going solely to the issue of punitive damages would not be admissible into evidence until the plaintiff establishes an entitlement to more than nominal compensatory damages. The same trier of fact would be required for both the compensatory and punitive stages of the trial.

These provisions addressing standards and defenses would be remedial and prospectively applied, and applied to actions filed after October 1, 1997.

Limitations on Punitive Damages

Punitive damages are not permitted under current law absent a reasonable showing of some evidence of willful, wanton, or gross misconduct. Under the bill, in any civil action, other than a contract action, a claim for punitive damages would not be permitted until there is a reasonable showing by clear and convincing evidence that intentional misconduct was committed by the defendant. "Intentional misconduct" would be defined to mean the defendant intentionally participated in the misconduct (whether it is acting or failing to act) with the knowledge of the high probability that injury would result.

Punitive damages would be permitted in cases of vicarious liability if the person, or in cases involving corporations, the officers, directors or managers, intentionally participated in the misconduct (acting or failing to act) which caused injury.

Seventy-five percent (75 percent) of the punitive damages awarded, less costs and attorneys fees, ordered before the enactment of the County Court Article V Trust Fund, would go to the Public Medical Assistance Trust Fund. After the enactment of the County Court Article V Trust Fund, thirty-five percent of the seventy-five percent (35% of 75%) would go to the County Court Article V Trust Fund and forty percent of seventy-five percent (40% of 75%) would go to the Public Medical Assistance Trust Fund. Thus, the claimant's share of the award would be reduced from the 100 percent currently authorized to 25 percent. The public share would increase from zero percent to 75 percent.

Punitive damages would not be allowed if the defendant establishes before trial that punitive damages have been awarded in a prior action in Florida involving the same act or course of conduct, unless the court determines that the prior award was insufficient to punish that defendant's behavior. Any subsequent award of punitive damages would be reduced by the amount of any earlier punitive damages award.

These provisions addressing damages and limitations would be remedial and prospectively applied, and applied to actions filed after October 1, 1997.

Comparative Fault/Joint and Several Liability

The bill eliminates the current exception found in s. 768.81(5), F.S., that joint and several liability applies to economic damages equal to or less than $25,000 regardless of the plaintiff's percentage of fault. Thus, the effect of the bill is that joint and several liability for all economic damages is permitted only if the defendants' fault was greater than the fault of the plaintiff. See s. 768.81(3), F.S.

Additionally, the bill eliminates the current exception that joint and several liability applies to noneconomic damages equal to or less than $25,000. Therefore, for noneconomic damages, a defendant is only required to pay for his or her proportionate fault.

Drug Dealer Liability Act

This bill creates a cause of action for damages resulting from violations of specified controlled substance statutes. The cause of action allows for the imposition of damages equal to three times the amount of actual damages sustained, with a minimum of $1,000, plus reasonable attorney's fees and costs in both the trial and appellate court level.

This bill establishes an effective date of October 1, 1997.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

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

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

No.

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

No.

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

No.

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?

None.

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

None.

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

None.

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

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

No.

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?

No.

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

No.

4. Individual Freedom:

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

Yes. The bill would increase the allowable options of individuals and businesses by limiting the circumstances in which they would be liable for the acts of others. This bill creates a cause of action for damages resulting from violations of specified controlled substance statutes.

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?

N/A

(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?

No.

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?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Chapter 95, F.S.; Chapter 768, F.S.

E. SECTION-BY-SECTION RESEARCH:

Section 1. Creates a title for the Act: The Florida Accountability and Individual Responsibility (FAIR) Liability Act.

Section 2. Amends s. 95.031, F.S., providing that the 12 year statute of repose for fraud actions applies to products liability actions. This section further provides that any cause of action which would be barred by the enactment of this section, but would not have been barred by existing law, must be filed before June 1, 1998, or the claim will be barred.

Section 3. Creates s. 768.291, F.S., establishing that the owner of personal property will not be deemed to be the owner of personal property for the purposes of determining vicarious liability for torts committed by the user of the property or others, which tort action involves such personal property, provided the use or operation of the personal property has or obtains insurance of certain minimum limits. This section further establishes that, apart from defects in the personal property which are either unknown to the owner, or that which are present but not evident, owners of the personal property have no duty to warn the user of defects pertaining to the personal property.

Section 4. Creates s. 768.36, F.S., providing that a defendant in a lawsuit may assert as a defense that the plaintiff was under the influence of drugs or alcohol at the time of the act giving rise to the claim and, as a result of being under the influence, the plaintiff was more than 50 percent at fault for the harm to the plaintiff. The defense would apply if the plaintiff was under the influence of an inhalant or controlled substance to the extent his normal faculties were impaired, or if the plaintiff had a blood alcohol level of 0.08 percent or more. The defense would not apply to use of over-the-counter or prescription drugs.

Any person who commits a tortious act upon property or against person while impaired, as described above, would not be able to recover any damages for loss or injury to his or her person or property unless, by clear and convincing evidence, his or her culpability was less than the person from whom recovery is sought.

Section 5. Creates s. 768.37, F.S., providing that the doctrine of vicarious liability is not available as a theory for a cause of action against a defendant when the claimant's harm was caused by intentional tortious acts committed by a third person.

Section 6. Amends s. 768.72, F.S., establishing standards for proving a reasonable basis for an award of punitive damages. This section further establishes that the court's ruling on proving reasonable basis is appealable, and provides for reasonable time to prepare a rebuttal to the motion for punitive damages. This section defines "intentional misconduct" as a threshold of behavior necessary to hold one liable for punitive damages. This section provides that if the compensatory damages are economic losses only, except in cases of fraud, no claim for punitive damages shall be permitted. This section provides a bifurcation of the issues of liability and compensatory damages and that of punitive damages, and limits evidence going solely to the issue of punitive damages. These provisions shall apply to actions filed after October 1, 1997.

Section 7. Amends s. 768.73, F.S., provides that, in cases other than contract actions, no claim for punitive damages will be allowed unless there is a reasonable showing of a reasonable basis for punitive damages. This section further provides that punitive damages are only applicable when defendants are found by clear and convincing evidence to have intentionally participated in, or condoned, the intentional misconduct. This section provides when punitive damages may be awarded against a person based on vicarious liability. This section provides that certain percentages of punitive damage awards (less attorneys fees and the costs of the action) which are awarded prior to enactment of the County Court Article V Trust Fund, will go to the Public Medical Assistance Trust Fund. After enactment of the County Court Article V Trust Fund, certain percentages will be split between the County Court Article V Trust Fund, and the Public Medical Assistance Trust Fund. This section also limits the applicability of an award of punitive damages if the defendant establishes that punitive damages were awarded in prior action in a court in Florida--state or federal--involving the same act or course of conduct. Punitive damages will be allowed if, by clear and convincing evidence, the court determines that the prior punitive damage award was totally insufficient to punish the defendant(s) behavior. If further punitive damages are awarded, the later award shall be reduced by the amount of the prior award. These provisions shall apply to actions filed after October 1, 1997.

Section 8. Amends s. 768.81, F.S., to eliminate the exception in law that allows joint and several liability for noneconomic damages less than $25,000. Further, the section establishes that for all economic damages joint and several liability is applicable only if the defendants' proportionate fault is greater that the plaintiff's in accordance the treatment of economic damages in excess of $25,000.

Section 9. Creates s. 772.12 F.S., establishing the Drug Dealer Liability Act. This section establishes threefold the actual damages (with a minimum of $1,000) and reasonable attorneys fees and court costs if the plaintiff proves by the greater weight of the evidence that he or she was injured as a result of the defendant's conviction of a violation of the substance abuse laws. A plaintiff may also recover from the parent or legal guardian of an unemancipated minor, if the plaintiff proves by clear and convincing evidence that the parent or guardian was aware of, or disregarded facts demonstrating that the minor intended to commit the acts which caused the damage.

Section 10. Provides that the intent of this Act is not to alter the law regarding intra-family tort law.

Section 11. Provides a severability clause.

Section 12. Provides a directive to the Division of Statutory Revision.

Section 13. Provides for an effective date.

IV. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

The reenactment of the provisions of the punitive damages section will resume the payments of a portion of all awards of punitive damages to the state in some indeterminate amount.

According to the Department of Banking and Finance collections by the state under the law prior to July 1, 1995 were:

Prior to Fiscal year 1991-92	$ 37,807.86
Fiscal year 1991-92	384,552.35
Fiscal year 1992-93	368,145.30
Fiscal year 1993-94	688,531.22
Fiscal year 1994-95	643,046.00

This bill does not address post-judgment settlement agreements between the parties, the operation of which may eliminate the state's share. Therefore, it would be expected that the state's portion would be less under this law than it was under prior law. However, note that under the current law the state does not get a share of punitive damage awards.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

This bill will result in the state once again sharing in punitive damages awards. Collections for the state would be expected to be less than previous years. Expenditures should remain consistent with prior years.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

The resumption of the division of punitive damages awards between the plaintiff and the state reduces recoveries to successful plaintiffs.

The bill would impose liability on persons who participate in the illegal drug market for damages resulting from an individual's use of illegal drugs.

2. Direct Private Sector Benefits:

Provisions of the bill relating to products liability, vicarious liability, and drug and alcohol defenses should reduce the amount of liability judgments against businesses, thereby lowering their liability insurance costs.

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

None.

D. FISCAL COMMENTS:

See III. A. 2., above.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

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

N/A

VI. COMMENTS:

None.

VII. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

VIII. SIGNATURES:

COMMITTEE ON FINANCIAL SERVICES:

Prepared by:	Legislative Research Director:
Michael A. Kliner/Leonard Schulte	Stephen T. Hogge

FINAL RESEARCH PREPARED BY COMMITTEE ON FINANCIAL SERVICES:

Prepared by:	Legislative Research Director:
Michael Kliner/Leonard Schulte	Stephen T. Hogge