HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 145 Apportionment of Damages in Civil Actions
SPONSOR(S): Brown
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary Committee	7 Y, 5 N	Hogge	Hogge
2) Justice Council	8 Y, 2 N	Hogge	De La Paz
3)			
4)			
5)			

SUMMARY ANALYSIS

This bill would repeal the last vestiges of joint and several liability in apportioning economic damages in negligence cases in favor of a comparative fault approach. As a result, one's degree of liability would be limited to one's degree of fault (e.g., a defendant 10 percent at fault would be 10 percent liable for damages). This would complete a trend begun by the Legislature in 1986 and continued in further reforms in 1999.

The bill would take effect upon becoming a law, but would apply only to those causes of action accruing on or after the effective date. A cause of action accrues on the date of the incident or occurrence of injury or damage to the plaintiff.

At common law, the doctrine of joint and several liability developed concurrently with the doctrine of contributory negligence. In its purest form, liability that is "joint" and "several" renders each party at fault individually liable for an entire judgment awarded to a plaintiff, regardless of the individual's percentage of fault. It effectively renders each defendant a guarantor of the obligation of all persons found to be at fault for a particular injury, allowing the plaintiff to recover from one or any combination of persons at fault. The doctrine has evolved from the pure form over time with states varying in the way in which they assign liability. Several states have abolished joint and several; some have retained or abolished it except as to certain torts, some have linked it to the degree of plaintiff fault, others have abolished it as to particular types of damages (e.g., noneconomic).

Currently, in applying joint and several liability in negligence cases, Florida has drawn a distinction between economic and noneconomic damages, dispensing with it for noneconomic damages in favor of a comparative fault approach and retaining it in modified form for economic damages. For instance, Florida has eliminated joint and several liability against a defendant whose percentage of fault is less than that of a particular plaintiff or when a defendant is found to be 10 percent or less at fault as part of a tiered approach to its application.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill implicates the following House Principle:

Promote personal responsibility--

The bill reduces the ability of plaintiffs in negligence cases to recover economic[1] damages from persons or entities in amounts that exceed their degree of fault.

B. EFFECT OF PROPOSED CHANGES:

Proposed Changes

This bill would repeal the last vestiges of joint and several liability in apportioning economic damages in negligence cases in favor of a comparative fault approach. As a result, one's degree of liability would be limited to one's degree of fault, without regard to the degree of fault on the part of the plaintiff or defendant, or the amount of economic damages as determined by the finder of fact (i.e., jury or, in a non-jury action, judge), as currently provided under Florida law.[2]

The bill would take effect upon becoming a law, but would apply only to those causes of action accruing on or after the effective date. A cause of action accrues on the date of the incident or occurrence of injury or damage to the plaintiff.

Background

At common law, the doctrine of joint and several liability developed concurrently with the doctrine of contributory negligence. In its purest form, liability that is "joint" and "several" renders each party found to be at fault individually liable for an entire judgment in favor of a plaintiff, regardless of the individual's percentage of fault. It effectively renders each defendant a guarantor of the obligation of all persons found to be at fault for a particular injury, allowing the plaintiff to recover from one or any combination of persons at fault. As a result, although no longer the law in Florida, a party found to be 1 percent at fault could be required to pay 50 percent of the judgment.[3] When this occurs, the paying party may have a right of contribution (i.e., partial reimbursement) and indemnity (i.e., full reimbursement) from the nonpaying parties. This form of liability is distinct from "several" liability in that liability that is "several" is separate and distinct from the liability of another. "Joint" liability is liability shared by two or more individuals or entities.

Joint and several liability in negligence cases has evolved from the pure form over time, with states varying in the way in which they assign liability. Several states have abolished joint and several; some have retained or abolished it except as to certain torts, some have linked it to the degree of plaintiff fault, others have abolished it as to particular types of damages (e.g., noneconomic).

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[1] These include past lost income and future lost income reduced to present value, medical and funeral expenses, lost support and services, replacement value of lost personal property, loss of appraised market value of real property, costs of construction repairs…and any other economic loss which would not have occurred but for the injury giving rise to the cause of action. Fla. Stat. s. 768.81(1) (2005).

[2] Fla. Stat. s. 768.81(3) (2005).

[3] Part of the impetus for this no longer being the law in Florida results from the oft-cited case of *Walt Disney World Co. v. Wood,* 515 So.2d 198 (Fla. 1987), in which Disney World was found to be 1 percent at fault, the plaintiff 14 percent at fault, and another person 85 percent at fault, yet the plaintiff was entitled to collect the entire award from Disney.

In 1986, the Legislature eliminated joint and several liability in negligence cases for noneconomic damages except in cases where the total amount of damages was $25,000 or less,[4] but preserved it for economic damages except when the plaintiff is found to be more at fault than the defendant. At the same time, the Legislature also codified the doctrine of comparative fault in negligence cases, first adopted by the Florida Supreme Court in 1973.[5] Unlike under joint and several liability,[6] under comparative fault, liability is apportioned directly in proportion to fault. Therefore, a person found to be 10 percent at fault is liable for 10 percent of the award. In addition, a plaintiff's award is reduced by the plaintiff's percentage of fault.

Currently, in applying joint and several liability in negligence cases, Florida has drawn a distinction between economic and noneconomic damages, dispensing with it for noneconomic[7] damages in favor of a comparative fault approach and retaining it in modified form for economic damages. For instance, Florida has eliminated joint and several liability against a defendant whose percentage of fault is less than that of a particular plaintiff or when a defendant is found to be 10 percent or less at fault as part of the following tiered approach to its application:[8]

If Plaintiff is also at fault, each defendant is responsible as follows:

- Defendant 10% or less at fault = no j/s liability.
- Defendant 10% - 25% at fault = j/s liability limited to $200,000.
- Defendant 25% - 50% at fault = j/s liability limited to $500,000.
- Defendant more than 50% at fault = j/s liability limited to $1,000,000.

If Plaintiff is not at fault, each defendant is responsible as follows:

- Defendant 10% or less at fault = no j/s liability.
- Defendant 10% - 25% at fault = j/s liability limited to $500,000.
- Defendant 25% - 50% at fault = j/s liability limited to $1,000,000.
- Defendant more than 50% at fault = j/s liability limited to $2,000,000.

Comparative fault applies in negligence cases even in cases where the tortfeasor with the greatest percentage of fault is bankrupt or otherwise judgment proof.

In a significant decision construing the interrelationship between the doctrines of joint and several liability and comparative fault in negligence cases, the Florida Supreme Court ruled that a defendant

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[4] Ch. 86-160, Laws of Florida.

[5] *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973).

[6] *See* Ch. 99-225, Laws of Florida. Prior to the 1999 repeal of the final vestiges of joint and several liability in apportioning noneconomic damages, the Legislature imposed a $450,000 cap on compensatory damages as part of the Tort Reform Act of 1986. The Florida Supreme Court subsequently declared the cap unconstitutional on the grounds that it violated the right of access to the courts. *See Smith v. Dept. of Ins.*, 507 So.2d 1080 (Fla. 1987). The 1999 Act repealed the lone exception then existing to the application of joint and several liability—that being in cases where the total amount of damages was $25,000 or less. In addition, the 1999 Act makes provision for the reporting of information relating to negligence case settlements and jury verdicts including the verdict, the percentage of fault of each plaintiff and defendant, the amount of damages, and those damages to be paid jointly and severally. *See* Fla. Stat. s. 25.077 (2005). According to the Office of the State Courts Administrator, no information has been reported to date. It also required the Office of Program Policy Analysis and Government Accountability (OPPAGA) to contract with a national 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. As of February 6, 2006, the OPPAGA had not yet entered into a contract for the completion of the report, but is in the process of determining the scope of work and the associated costs.

[7] For example, pain and suffering, mental anguish, inconvenience, loss of capacity for enjoyment of life, and other non-pecuniary losses.

[8] Fla. Stat. s. 768.81(3) (2005)

could apportion fault to non-party wrongdoers.[9] Specifically, the court held that fault must be apportioned among all responsible entities whether or not they were named or joined as defendants in the lawsuit (giving rise to the term "empty chairs"). This appears to be the position of a majority of states and apparently commentators.[10] As one commentator characterized the issue:

> …(those) who believe defendants should only be liable for their percentage of liability, argue that the negligence of nonparty tortfeasors must be considered in order to fairly determine the percentage of fault of named defendants….Those who believe the primary focus should be on adequate compensation for the plaintiff argue that the fault of nonparties should not be considered.[11]

The Florida Supreme Court later indicated[12] 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.[13] In addition, the defendant has the burden of presenting evidence that the non-party's negligence contributed to the claimant's injuries. The *Fabre* holding has not been extended to the apportionment of fault between negligent and intentional tortfeasors.[14]

In 1999, the Legislature effectively codified the holding in both the *Fabre* and *Nash* decisions.[15]

C. SECTION DIRECTORY:

Section 1. Amends s. 768.81, F.S., repealing the use of joint and several liability in its entirety for the purpose of apportioning economic damages.

Section 2. Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

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[9] *Fabre v. Marin*, 523 So.2d 1182 (Fla. 1993).

[10] *Apportionment of Damages: Evolution of a Fault-Based System of Liability for Negligence,* 61 J. Air L. & Com. 365, 378-379 (December 1995-January 1996). "In the absence of a specific statutory provision, courts have been virtually unanimous in holding that true apportionment cannot be achieved unless it includes all negligent parties, regardless of whether they are parties to the lawsuit." The commentator continued: "It appears that a majority of commentators support apportionment of damages to nonparties." Further in the article at 381, the commentator noted that "in other jurisdictions where apportionment of fault to nonparties is permitted, statutes contain specific procedural safeguards, such as notice to plaintiffs and specific burdens of proof."

[11] *Id.* at 378.

[12] *Nash v. Wells Fargo Guard Services, Inc.,* 678 So.2d 1262 (Fla. 1996).

[13] In *Clark v. Polk County*, 753 So.2d 138 (2d DCA 2000), Polk County argued that *Nash* did not require it literally to plead and prove the name of the nonparty tortfeasor. Rather, it maintained that it satisfied its burden by identifying a specific tortious act by a specific person, albeit a person whose name is unknown. The court indicated the position might have merit, as indirectly suggested by the Florida Supreme Court's decision in *Merrill Crossings Associates v. McDonald*, 705 So.2d 560 (Fla.1997). The court found it "telling that the defendants' inability to furnish the assailant's name was not a basis for the court's decision. If *Nash* requires a defendant literally to furnish the name of the nonparty tortfeasor, it is curious that this requirement was not mentioned or applied in *McDonald.*" As it turned out, the court found that "the circumstances in this case permit us to leave that question for another day."

[14] *Merrill Crossings Associates v. McDonald*, 705 So.2d 560 (Fla. 1997).

[15] Fla. Stat. 768.81((3)(d) and (e) (2005).

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Although the specific monetary impact cannot be quantified in the absence of particular cases, to the extent private sector entities as defendants would otherwise be subject to payment of damages in excess of their degree of fault, they would benefit from an approach that limits one's degree of liability to degree of fault. However, the opposite is also true. To the extent private sector entities are plaintiffs with claims against defendants that might be unable to pay, limiting liability to fault may result in these entities not being made whole.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The National Conference of Commissioners on Uniform State Laws has promulgated three acts related to the apportionment of tort responsibility, with the first completed in 1939, the second in 1955, and the third in 1977. The latest act is the *"Uniform Apportionment of Tort Responsibility Act"* adopted in 2002.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES