SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Judiciary Committee

BILL:	SB 2006
INTRODUCER:	Senator Webster and others
SUBJECT:	Damage Apportionment/Civil Actions
DATE:	March 21, 2006
REVISED:	03/23/06

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Maclure	JU	**Favorable**
2.				
3.				
4.				
5.				
6.				

I. Summary:

This bill largely abolishes the application of joint and several liability for economic damages in negligence cases. Joint and several liability generally is not available for non-economic damages under existing statutes. As a result of the bill, a defendant's liability for damages will be based on the defendant's percentage of fault for an injury.

Currently, a defendant's joint and several liability for economic damages is capped under a complex tiered system of caps. These caps account for the fault of the plaintiff and the proportional fault of defendants. The maximum amount economic damages for which a defendant may be jointly and severally liable is limited to $2 million. This figure is in addition to the economic and non-economic damages apportioned to the defendant based on the defendant's percentage of fault.

This bill substantially amends section 768.81, Florida Statutes.

II. Present Situation:

This Present Situation is divided into three main components. The Short Present Situation defines joint and several liability and provides a brief description of the current law. The second component is the Evolution of Joint and Several Liability in Florida. That section describes some notable cases and significant changes in liability law. The last component is Hypothetical Cases. That section shows how a solvent defendant's liability for damages caused by others has changed over time.

Short Present Situation

Joint and several liability may be defined as:

> liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion. • Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from nonpaying parties.[1]

The judicially created doctrine of joint and several liability fully applied to damage awards in negligence[2] cases before 1986. As such, one defendant could be held financially responsible for all damages caused by others, including insolvent defendants, persons immune from suit, and non-parties. In 1986, the Legislature adopted the comparative fault statute, s. 768.81, F.S. That statute limited the application of joint and several liability in negligence cases. The comparative fault statute was revised in 1999 and is substantially the same today. The major components of the current version of s. 768.81, F.S.:

- Diminish a plaintiff's recovery in proportion to the plaintiff's fault for the plaintiff's own injuries;[3]
- Eliminate joint and several liability for non-economic damages;[4]
- Place a tiered system of caps on the amount of economic damages[5] for which a defendant may be jointly and severally liable;
- Eliminate the application of joint and several liability to a defendant whose percentage of fault is less than the fault of a particular plaintiff; and
- Authorize the allocation of fault to a non-party.[6]

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[1] BLACK'S LAW DICTIONARY (8th ed. 2004).

[2] The concept of negligence may be described as set forth below.

> The term "negligence" has been variously defined, with some definitions stated in terms of the conduct of a prudent person and others in terms of the risk of harm involved in certain acts. Thus, negligence forming the basis of a civil action may be defined as the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances, or the doing of what a reasonable and prudent person would not have done under the circumstances. Negligence has also been defined as failure to observe, for the protection of another's interest, such care and vigilance as the circumstances justly demand and the want of which caused the injury. In addition, negligence has been defined as such an omission by a responsible person to use that degree of care, diligence, and skill that was his or her legal duty to use to protect another person from injury that, in a natural and continuous sequence, causes unintended damage to the latter.
>
> Negligence is a relative term, and its existence must depend in each case upon the particular circumstances that surround the parties at the time and place of the events upon which the controversy is based.

38 Fla. Jur. 2d Negligence s. 1 (Database updated January 2006) (citations omitted).

[3] In effect, this provision is the codification of the doctrine of comparative negligence as adopted by the Florida Supreme Court in *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

[4] Non-economic damages may include damages for pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other non-financial losses. See s. 766.202(8), F.S. (defining non-economic damages in medical malpractice actions).

[5] Economic damages include damages for lost income, medical and funeral expenses, lost support and services, the market value of lost personal property, loss of value to real property, costs of repairs, and other economic losses. Section 768.81(1), F.S.

The tiered system of caps on joint and several liability for economic damages is complex. The applicable cap depends upon whether the plaintiff is at fault and a defendant's percentage of fault for an injury.[7] Under the caps, the highest amount of economic damages for which a defendant may be jointly and severally liable is $2 million.[8] If the plaintiff is at fault, however, the highest amount of economic damages for which a defendant may be jointly and severally liable is $1 million.[9] In any case, a defendant's joint and several liability for economic damages is in addition to the economic and non-economic damages attributed to that defendant.

Evolution of Joint and Several Liability in Florida

The Florida Supreme Court described the logic and history of the doctrine of joint and several liability as follows:

> Originally, joint and several liability applied when the defendants acted in concert, the act of one being considered the act of all, and each was therefore liable for the entire loss sustained by the plaintiff. The doctrine was later expanded by eliminating the requirement that the parties act in concert and allowing joint and several liability to apply when separate independent acts of negligence combined to produce a single injury. *See Louisville and Nashville Railroad Co. v. Allen*, 67 Fla. 257, 65 So. 8 (1914). The doctrine was based on the assumption that injuries were indivisible and there was no means available to apportion fault.[10]

The doctrine of joint and several liability was adopted by the Florida Supreme Court in 1914.[11]

Contributory and Comparative Negligence

Prior to *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973), a plaintiff who was partially at fault for an accident was barred from recovering damages as a result of the doctrine of contributory negligence. The basis of the doctrine was that the plaintiff's negligence "unite[ed] with the defendant's negligence in constituting the sole and single indivisible proximate negligence cause of the damage sued for."[12] The historical purpose of the contributory negligence rule was "to protect the essential growth of industries, particularly transportation."[13] However, the *Hoffman* Court determined that the doctrine of contributory negligence was too harsh on partially-at-fault plaintiffs. As a result, the Court replaced the doctrine of contributory negligence with the doctrine of comparative negligence. Under the doctrine of comparative negligence, a plaintiff who is partially at fault may recover damages proportionate with the negligence of a defendant.

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[6] In effect, this provision is the codification of the holding of the Florida Supreme Court in *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).
[7] Section 768.81(3), F.S.
[8] Section 768.81(3)(b)4., F.S.
[9] Section 768.81(3)(a)4., F.S.
[10] *Smith v. Department of Insurance*, 507 So. 2d 1080, 1091 (Fla. 1987).
[11] *Y.H. Investments v. Godales*, 690 So. 2d 1273, note 6 (Fla. 1997). The case in which joint and several liability was adopted was *Louisville & Nashville Railroad Co. v. Allen*, 65 So. 8 (Fla. 1914).
[12] *Sears, Roebuck & Co. v. Geiger*, 167 So. 658, 660 (Fla. 1936).
[13] *Hoffman v. Jones*, 280 So. 2d 431, 437 (Fla. 1973) (citation omitted).

Joint and Several Liability

At common law, the doctrine of joint and several liability applied when the negligent acts of several parties acting in concert or individually produced a single injury.[14] These injuries were deemed to be indivisible.[15] Each liable party for the injury was individually liable for the full amount of damages. As such, a solvent defendant was liable for damages caused by others.[16]

The harshness of the doctrine of joint and several liability on defendants became clear to many in the case of *Disney v. Wood*.[17] Liability in *Disney* was determined under the common law doctrine of joint and several liability. The facts of *Disney* were as follows:

> Aloysia Wood was injured in November 1971 at the grand prix attraction at Walt Disney World (Disney), when her fiance, Daniel Wood, rammed from the rear the vehicle which she was driving. Aloysia Wood filed suit against Disney, and Disney sought contribution from Daniel Wood. After trial, the jury returned a verdict finding Aloysia Wood 14% at fault, Daniel Wood 85% at fault, and Disney 1% at fault. The jury assessed Wood's damages at $75,000. The [trial] court entered judgment against Disney for 86% of the damages.[18]

Disney sought to have its damages apportioned based on its percentage of fault rather than joint and several liability. The Florida Supreme Court ultimately determined that the viability of the doctrine of joint and several liability should be determined by the Legislature. Thus, the damage award against Disney was upheld.

> [T]he main argument for retaining joint and several liability was that in the event one of the defendants is insolvent the plaintiff should be able to collect the entire amount of damages from a solvent defendant.[19]

Statutory Limitations on Joint and Several Liability

Today, "Florida law only permits joint and several liability under the limited circumstances set forth by statute."[20] Statutory limitations are permissible because a plaintiff does not have a constitutional "right to recover for injuries beyond those caused by [a] particular defendant."[21] Further, under current law, the solvent defendant can seek contribution from other responsible parties for their share of the damage award.[22] Of course, a contribution will not be obtained from an insolvent person.

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[14] *Smith v. Department of Insurance*, 507 So. 2d 1080, 1091 (Fla. 1987).
[15] *Hudson v. Weiland*, 8 So. 2d 37, 38 (Fla. 1942).
[16] *Disney v. Wood*, 489 So. 2d 61, 62 (Fla. 4th DCA 1986).
[17] *Disney v. Wood*, 515 So. 2d 198 (Fla. 1987).
[18] *Id.* at 199.
[19] *Fabre v. Marin*, 623 So. 2d 1182, 1186 (Fla. 1993).
[20] *Metropolitan Dade County v. Frederic*, 698 So. 2d 291, 292 (Fla. 3d DCA 1997).
[21] *Smith v. Department of Insurance*, 507 So. 2d 1080, 1091 (Fla. 1987).
[22] *See* s. 768.31, F.S., which is the statutory provision governing contribution among tortfeasors.

The Legislature enacted the first version of the comparative fault statute, s. 768.81, F.S., in 1986 to limit the application of joint and several liability.[23] Under that statute, the doctrine of joint and several liability generally no longer applied to non-economic damages (pain and suffering, etc.), meaning that a defendant usually was only liable for his or her share of non-economic damages. The doctrine of joint and several liability remained applicable to economic damages (lost income and medical bills, etc.) when a defendant's fault equaled or exceed that of the plaintiff. However, under the 1986 law, the doctrine of joint and several liability applied to all cases in which total damages were $25,000 or less. In addition, s. 768.81, F.S. (1986), did not limit the application of joint and several liability at all in cases resulting from pollution and actions based on intentional tort, meaning that the common law continued to apply to these kinds of cases.

In 1988, the Legislature eliminated the application of joint and several liability for economic and non-economic damages to teaching hospitals sued for medical malpractice. Damages against a teaching hospital must be based on the hospital's percentage of fault and not on joint and several liability.

In 1999, the Legislature significantly revised the statutory limitations on the applicability of joint and several liability contained in s. 768.81, F.S. The 1999 changes prescribed when a defendant may be jointly and severally liable and for what amount of damages. These are substantively the limitations that are in place today.

Specifically these limitations provide that a defendant is liable for economic and non-economic damages based on the defendant's percentage of fault for an accident. In addition to damages based on a defendant's percentage of fault, a defendant may be liable for economic damages for fault attributed to others. This additional liability only is imposed on a defendant whose fault equals or exceeds the fault of the plaintiff. When the additional liability is imposed, however, the amount of the liability is subject to a complex tiered system of caps.[24] The applicable cap is based on whether the plaintiff contributed to the accident and the percentage of fault allocated to the defendant. These caps favor innocent plaintiffs, plaintiffs that did not contribute to their damages.[25]

Under current law, the caps on the amount of economic damages for which a defendant may be jointly and severally liable are determined as follows:

- A defendant whose fault is 0-10% is not subject to joint and several liability; except, if the plaintiff is without fault, a defendant whose fault is less than 10% is not subject to joint and several liability;

[23] In 1887, the Legislature enacted a statute providing for comparative negligence in railroad accidents. *Hoffman*, 280 So. 2d at 437. The statute was later held found to be unconstitutional because it was not a statute of general application. *Id.* In 1943, the Legislature enacted another comparative fault statute, but it was vetoed by the Governor. *Id.* at 437-438.

[24] One law review article describes the system of caps as a "scheme so Byzantine that it can only be explained as a creature of political compromise." Robert S. Peck *et al.*, *Tort Reform 1999: A Building Without a Foundation*, 27 FLA. ST. U. L. REV. 397, 408 (Winter 2000).

[25] The system of caps favoring innocent plaintiffs may reflect back to the doctrine of contributory negligence, which prohibited at-fault plaintiffs from recovering damages. *See also McDonough Power Equipment, Inc. v. Brown*, 486 So. 2d 609, 612 (Fla. 4th DCA 1986) (stating: "It is fairer that one wrongdoer be burdened with a fellow-wrongdoer's liability than that the innocent victim be saddled with the loss.").

• For a defendant whose fault is more than 10% but less than 25%, joint and several liability does not apply to that portion of economic damages in excess of $200,000; except, if the plaintiff is without fault, then for a defendant whose fault is at least 10% but less than 25%, joint and several liability does not apply to that portion of economic damages in excess of $500,000;
• For a defendant whose fault is at least 25% but not more than 50%, joint and several liability does not apply to that portion of economic damages in excess of $500,000; except, if the plaintiff is without fault, then joint and several liability does not apply to that portion of economic damages in excess of $1,000,000; and,
• For a defendant whose fault is greater than 50%, joint and several liability does not apply to that portion of economic damages in excess of $1,000,000; except, if the plaintiff is without fault, then joint and several liability does not apply to that portion of economic damages in excess of $2,000,000.[26]

In addition to the tiered system of caps adopted in 1999, the Legislature repealed the provision that provided for joint and several liability in cases in which total economic and non-economic damages for an accident were $25,000 or less. Lastly, under the 1999 changes, defendants were authorized to plead that a non-party was at fault for an accident to reduce the defendant's own liability. In such cases, a jury would have the opportunity to allocate fault to a non-party on a jury verdict form. This authorization to attribute fault to a nonparty appears to be the codification of the Supreme Court's holding in *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).

Actions Based on an Intentional Tort

In an issue of ongoing controversy, the Florida Supreme Court has ruled that a jury may not allocate fault to a non-party intentional tortfeasor[27] and thereby reduce a defendant's liability. In *Merrill Crossings v. McDonald*, 705 So. 2d 560 (Fla. 1997), plaintiff McDonald was shot while in the parking lot of a Wal-Mart. The plaintiff brought a personal injury suit against Wal-Mart and its landlord for negligent security. Wal-Mart argued that the shooter, a non-party, was responsible for the injuries. Wal-Mart further argued that the jury should be able to allocate fault to the shooter on the jury verdict form and thereby reduce Wal-Mart's liability. To resolve the issue, the Court analyzed s. 768.81(4)(b), F.S., which states that the ability to allocate fault to a nonparty does not apply to any action based upon an intentional tort. The Court ruled that the lawsuit, though not against the intentional tortfeasor, was "based upon an intentional tort." Thus, the jury could not allocate fault to the shooter on the jury verdict form and thus reduce or eliminate Wal-Mart's liability.

Last session, the defense lobby argued that the Florida Supreme Court misinterpreted the statutory provision at issue in *Merrill Crossings.* According to the defense lobby, the provision was designed to prevent intentional tortfeasors from benefiting from the statutory limitations on joint and several liability. According to the Academy of Trial Lawyers, allowing damages to be

[26] Peck *et al.*, *supra* note 24, at 408.
[27] A tort is "a civil wrong . . . for which a remedy may be obtained usually in the form of damages . . . ." BLACK'S LAW DICTIONARY (8th ed. 2004). In contrast, an intentional tort is a tort "in which the actor[, an intentional tortfeasor,] exhibits a deliberate intent to injure or engages in conduct which is substantially certain to result in injury or death." *D'Amario v. Ford Motor Co.*, 806 So. 2d 424, 438 (Fla. 2001).

allocated to intentional tortfeasors would mean that plaintiffs would recover little or nothing in negligent security actions.

Hypothetical Cases

As described previously, laws governing the applicability of the doctrine of joint and several liability are complex and have changed over time. As such, *one hypothetical situation cannot illustrate fully how a solvent defendant's liability would have changed under different governing laws.*

Table 1 shows the extremes possible under the doctrine of contributory negligence before the doctrine of comparative negligence was adopted in *Hoffman v. Jones* in 1973. Under the doctrine of contributory negligence, a plaintiff's contributory negligence was a complete bar to recovery.

Table 1 Contributory Negligence

Plaintiff's Fault	***Insolvent Defendant's Fault***	***Solvent Defendant's Fault***	***Solvent Defendant's Liability for Total Damages***
1%	Greater than 0%	Greater than 0%	0%
98%	1%	1%	0%

Table 2 shows that, after *Hoffman v. Jones*, a plaintiff's recovery was reduced by the plaintiff's comparative negligence. Additionally, the table shows that a defendant could be jointly and severally liable for damages caused by all persons other than the plaintiff.

Table 2 Comparative Negligence

Plaintiff's Fault	***Insolvent Defendant's Fault***	***Solvent Defendant's Fault***	***Solvent Defendant's Liability for Total Damages***
1%	98%	1%	99%
98%	1%	1%	2%

Table 3 shows that, under s. 768.81, F.S. (1986), joint and several liability could only apply to a defendant when the defendant's liability equaled or exceeded that of the plaintiff. Joint and several liability no longer applied to non-economic damages.

Table 3 1986 Comparative Fault Statute

Plaintiff's Fault	***Insolvent Defendant's Fault***	***Solvent Defendant's Fault***	***Solvent Defendant's Liability for Total Damages***
0%	99%	1%	100% of economic & 1% of non-economic
25%	60%	15%	15% of economic & 15% of non-economic
25%	15%	60%	75% of economic & 60% of non-economic

Table 4 illustrates the current limitations on the applicability of joint and several liability. Current law provides a tiered system of caps on damages for which a defendant may be jointly and severally liable when the defendant's fault equals or exceeds the fault of the plaintiff. The specific cap depends on whether the plaintiff was at fault and the defendant's percentage of fault.

Table 4 1999 Comparative Fault Statute

Plaintiff's Fault	***Insolvent Defendant's Fault***	***Solvent Defendant's Fault***	***Solvent Defendant's Liability for Total Damages***
98%	1%	1%	1% of economic & non-economic
51%	38%	11%	11% of economic damages & 11% of non-economic damages; no J & S liability b/c defendant's fault is less than plaintiff's fault
51%	24%	25%	25% of economic damages & 25% of non-economic damages; no J & S liability b/c defendant's fault is less than plaintiff's fault
14%	35%	51%	51% of economic damages, plus up to $1M of add'l economic damages, plus 51% of non-economic damages
0%	91%	9%	9% of economic & non-economic; no J & S liability b/c defendant's fault is less than 10%
0%	90%	10%	10% of economic damages, plus up to $500K of add'l economic damages, plus 10% non-economic damages
0%	75%	25%	25% of economic damages, plus up to $1M of add'l economic damages, plus 25% non-economic damages
0%	49%	51%	51% of economic damages, plus up to $2M of add'l economic damages, plus 51% non-economic damages

III. Effect of Proposed Changes:

This bill largely abolishes the application of joint and several liability for economic damages in negligence cases. Joint and several liability generally is not available for non-economic damages under existing statutes. As a result of the bill, a defendant's liability for damages will be based on the defendant's percentage of fault for an injury.

Under existing law, a defendant's joint and several liability for economic damages is capped under a complex tiered system of caps. These caps account for the fault of the plaintiff and the proportional fault of defendants. The maximum amount economic damages for which a defendant may be jointly and severally liable is $2 million. This figure is in addition to the economic and non-economic damages apportioned to the defendant based on the defendant's percentage of fault.

This bill does not eliminate a person's joint and several liability where it is specifically provided for under existing law. For example, s. 403.141, F.S., provides for joint and several liability for pollution discharges. Section 767.05, F.S., imposes joint and several liability on dog owners whose dogs harm dairy cattle. Section 766.207, F.S., imposes joint and several liability on defendants who participate in voluntary arbitrations of medical negligence. Further, this bill does not apply to actions based on pollution or an intentional tort. Lastly, by operation of s. 768.71(3), F.S., other provisions of law that are in conflict with this bill will take precedence over the provisions of this bill.

This bill takes effect upon becoming a law and applies to causes of action that accrue on or after the effective date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Damages in negligence cases will be apportioned based on a defendant's percentage of fault and not on the basis of joint and several liability. As such, a defendant will not be liable for damages caused by others, and plaintiffs may be less likely to recover the full amount of the judgments in their favor.

C. Government Sector Impact:

Injured persons who do not collect sufficient portions of their judgments may seek government assistance.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.