FINAL BILL ANALYSIS

BILL #: CS/SB 142

FINAL HOUSE FLOOR ACTION:
80 Y's 35 N's

SPONSOR: Sen. Richter (Rep. O'Toole)

GOVERNOR'S ACTION: Approved

COMPANION BILLS: CS/HB 201

SUMMARY ANALYSIS

CS/SB 142 passed the House on May 4, 2011. The bill was approved by the Governor on June 23, 2011, chapter 2011-215, Laws of Florida, and became effective on that date.

Under general tort law, the doctrine known as comparative negligence provides that a jury must apportion fault between all persons found to be liable for the injury. The liable parties are then responsible for their portion of the damages.

A subset of negligence is a product liability claim, where a manufacturer of a product is held liable for a defect in their product that causes damages.

Crashworthiness cases are a subset of product liability claims in which the plaintiff claims that a defect in the manufacture or design of an automobile caused or enhanced injuries suffered during an automobile accident. Florida courts do not allow juries to hear evidence relating to the initial cause of the automobile accident because the court views the initial accident and the subsequent enhanced injury as two separate incidents.

The bill, in a crashworthiness case, requires the trier of fact to consider the fault of all persons who contributed to the accident when apportioning fault between or among them. The bill also provides that the jury must be appropriately instructed by the trial judge on the apportionment of fault. The bill provides that the rules of evidence apply to crashworthiness cases.

This bill may have a minimal nonrecurring expense to the State court system. The bill does not appear to have a fiscal impact on local government.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Contributory Negligence and Comparative Negligence in Florida

Prior to 1973, Florida courts followed the legal doctrine of contributory negligence in tort actions.[1] Contributory negligence is a defense against a claim of negligence which provides that if a plaintiff is responsible in any way for his or her injury the plaintiff will not be able to recover any damages from the defendant.[2] For example, if the plaintiff was five percent responsible for the accident and the defendant was ninety-five percent responsible, the plaintiff would not be able to recover any damages from the defendant since he or she was partly responsible. The Florida Supreme Court, in *Hoffman v. Jones*, retreated from the application of contributory negligence and adopted pure comparative negligence.[3] The court reasoned that:

> . . . the most equitable result that can ever be reached by a court is the equation of liability with fault. Comparative negligence does this more completely than contributory negligence, and we would be shirking our duty if we did not adopt the better doctrine.[4]

The doctrine of comparative negligence is now codified in Florida law. The law provides that "any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery."[5] Current law explicitly provides that the comparative fault principles apply in products liability actions.[6] Under comparative negligence, if the plaintiff is five percent liable and the defendant is ninety-five percent, the plaintiff's awarded damages will be reduced by his or her amount of liability, in this case, five percent.

The legal doctrine of joint and several liability evolved with contributory negligence.[7] The application of joint and several liability allows a plaintiff to collect the full amount of damages against one of the defendants in a multiple defendant case.[8] For example, if one defendant was thirty-five percent at fault and the other defendant was sixty-five percent at fault, the plaintiff could recover the total amount of damages from either defendant regardless of the amount at fault.

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[1] *Louisville and Nash Railroad Company v. Yniestra*, 21 Fla. 700 (Fla. 1886) (Case in which Florida adopted contributory negligence).
[2] "The contributory negligence doctrine, which evolved from an 1809 English case, is described as an 'all or nothing rule' for the plaintiff" *Smith v. Dep't of Insurance*, 507 So.2d 1080, 1090 (Fla. 1987) (Describing English case *Butterfield v. Forester*, 103 Eng.Rep. 926 (K.B. 1809)).
[3] *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973).
[4] *Id*. at 438.
[5] Section 768.81(2), F.S.
[6] Section 768.81(4)(a), F.S.
[7] *Smith v. Department of Insurance*, 507 So.2d 1080, 1091 (Fla. 1987).
[8] *Id*. at 1092.

In 2006 the Legislature generally repealed the application of joint and several liability for negligence actions.[9] It amended s. 768.81, F.S., to provide, subject to limited exceptions, for apportionment of damages in negligence cases according to each party's percentage of fault, rather than under joint and several liability.[10]

Evolution of Crashworthiness Doctrine

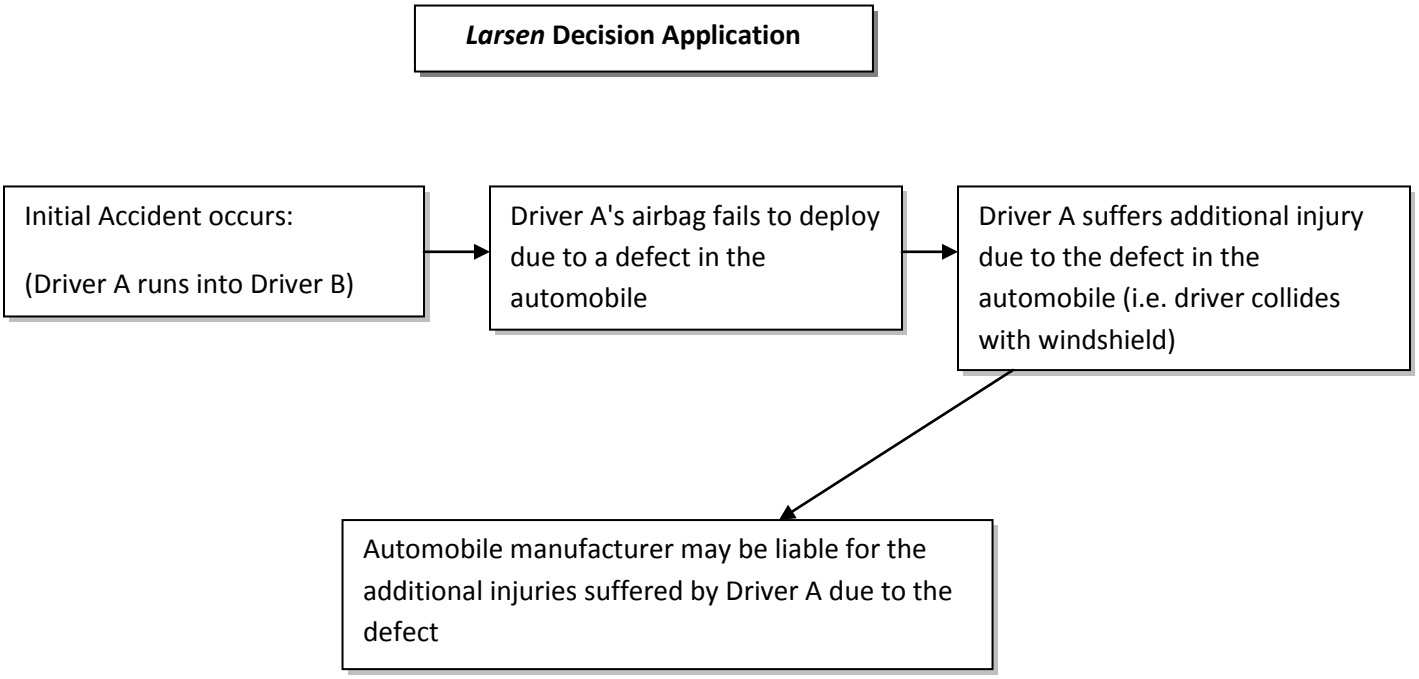
Larsen Decision

Prior to 1968, courts in the United States did not allow those injured in automobile accidents to hold automobile manufacturers liable for injuries sustained where the negligence of the driver or a third party caused the accident, including scenarios in which an automobile defect contributed to the injuries sustained.[11] This changed with the U.S. Court of Appeal Eighth Circuit's decision in *Larsen v. General Motors Corp*.[12]

In *Larsen*, the plaintiff was injured after a head-on collision that caused the steering mechanism to strike the plaintiff in the head. The federal court held that, because automobile accidents involving collisions are often inevitable and foreseeable, manufacturers have a duty to exercise reasonable care in designing vehicles for the safety of users.[13]

When faced with the practical application of the crashworthiness doctrine, many jurisdictions continue to grapple with whether a defendant automobile manufacturer may introduce evidence of, or assert as a defense, the comparative fault or contributory negligence of the driver or a third party in causing the initial collision.[14] Some state courts have concluded that "introduction of principles of negligence into what would otherwise be a straightforward product liability case is not allowed."[15] Conversely, a majority of courts have allowed defendants to introduce evidence of the driver's or a third party's negligence in causing the initial collision.[16]

[9] Chapter 2006-6, s. 1, L.O.F.
[10] Section 768.81(3), F.S.
[11] Schwartz, Victor E., *Fairly Allocating Fault Between a Plaintiff whose Wrongful Conduct Caused a Car accident and a Automobile Manufacturer Whose Product Allegedly "Enhanced" the Plaintiff's Injuries* (2010). Available on file with the House of Representatives Civil Justice Subcommittee.
[12] *Larsen v. General Motors Corp*., 391 F.2d 495 (8th Cir. 1968).
[13] *Id*. at 502.
[14] Mary E. Murphy, Annotation, *Comparative Negligence of Driver as Defense to Enhanced Injury, Crashworthiness, or Second Collision Claim*, 69 A.L.R. 5TH 625, 625 (1999).
[15] *Id*.
[16] *Id*.



Majority View

A majority of states have adopted the view that a manufacturer's fault in causing additional or enhanced injuries may be reduced by the fault of a plaintiff or third party who caused or contributed to the primary collision.[17] For example, in a Delaware crashworthiness case, the plaintiff's automobile was struck by another vehicle when the plaintiff allegedly failed to stop at a stop sign.[18] As a result, the automobile's airbag deployed and crushed the plaintiff's fingers. The defendant automobile manufacturer argued that the plaintiff's recovery should be reduced by his comparative fault in failing to stop at the stop sign and causing the initial accident. The court concluded that the cause of the initial accident is a proximate cause of the subsequent collision and the resulting enhanced injuries to the plaintiff's fingers. The court further opined that:

> "[i]t is obvious that the negligence of a plaintiff who causes the initial collision is one of the proximate causes of all of the injuries he sustained, whether limited to those the original collision would have produced or including those enhanced by a defective product in the second collision."[19]

Some courts following the majority position have reasoned that, in crashworthiness cases, the person causing the initial collision may be liable for the subsequent negligence of the automobile manufacturer because any enhanced injuries resulting from the second collision are foreseeable consequences of the first collision.[20] For example, in an Alaska crashworthiness case, the court allowed the automobile manufacturer to assert that its liability for a defective seatbelt system should be reduced because the

[17] Edward M. Ricci et al., *The Minority Gets It Right: The Florida Supreme Court Reinvigorates the Crashworthiness Doctrine in D'Amario v. Ford*, 78 FLA. B.J. 14, 14 (June 2004). Some of the states recognizing the majority view include: Alaska, Arkansas, California, Colorado, Delaware, Louisiana, Indiana, North Carolina, North Dakota, Oregon, Tennessee, Washington, Wyoming, and Iowa.
[18] *Meekins v. Ford Motor Co.*, 699 A.2d 339 (Del. Super. Ct. 1997).
[19] *Id.* at 346.
[20] Ricci, *supra* note 17, at 18.

initial head-on collision was caused by a third party.[21] The court sided with the manufacturer, citing that "[a]n original tortfeasor is considered a proximate cause, as a matter of law, of injuries caused by subsequent negligen[ce]" of the manufacturer of the defective product.[22]

Other courts holding the majority view have also ruled that "general fairness and public policy considerations require that the fault of the original tortfeasor be considered in apportioning liability for enhanced injuries."[23] Courts have also recognized that the application of comparative fault in crashworthiness cases enhances the public's interest in deterring drivers from driving negligently.[24]

Minority View

A minority of courts have adopted the belief that an automobile manufacturer should be solely responsible for any product defects, therefore the manufacturer should also be solely liable for the enhanced injuries caused by those defects. The minority position results from "a stricter construction of the crashworthiness doctrine that treats each collision[25] as a separate event with independent legal causes and injuries."[26] Further reasoning behind the minority view is that a manufacturer maintains a duty to anticipate the foreseeable negligence of users of the automobile, as well as the foreseeable negligence of third parties.[27]

One federal court applied the minority view in a crashworthiness case and ruled that:

> Because a collision is presumed, and enhanced injury is foreseeable as a result of the design defect, the triggering factor of the accident is simply irrelevant. . . . Further, the alleged negligence causing the collision is legally remote from, and thus not the legal cause of, the enhanced injury caused by a defective part that was supposed to be designed to protect in case of a collision.[28]

A federal district court in Ohio excluded evidence of a driver's intoxication at the time of the accident in a products liability action against the automobile manufacturer.[29] In addition to ruling that the probative value of the evidence of intoxication was outweighed by the danger that the jury could misuse the information, the court reasoned that it was foreseeable that front-end collisions occur and that an automobile manufacturer is under an obligation under Ohio law to use reasonable care in designing vehicles that do not expose a user to unreasonable risks.[30]

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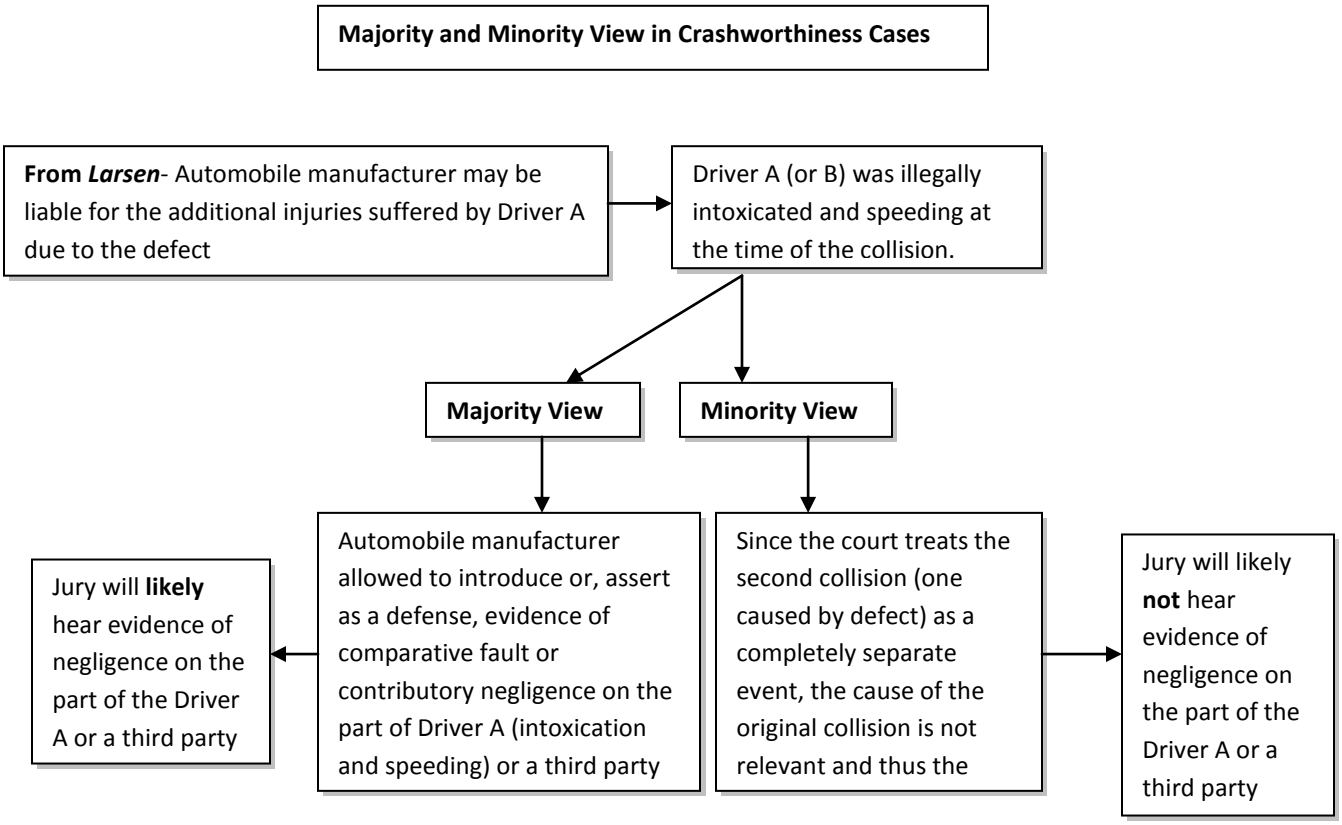
[21] *General Motors Corp. v. Farnsworth*, 965 P.2d 1209 (Alaska 1998).
[22] *Id.* at 1217-18.
[23] Ricci, *supra* note 17, at 18 (citing W*hitehead v. Toyota Motor Corp.*, 897 S.W.2d 684, 695 (Tenn. 1995)).
[24] *Moore v. Chrysler Corp.*, 596 So.2d 225, 238 (La. Ct. App. 1992).
[25] The multiple collisions referenced to are the initial collision of the automobile with another automobile or some object, and the second collision between the physical body of the occupant and some other object which is typically some portion of the interior of the automobile.
[26] Ricci, *supra* note 9, at 18.
[27] Schwartz, *supra* note 11, at 10.
[28] *Jimenez v. Chrysler Corp.*, 74 F. Supp.2d 548, 566 (D.S.C. 1999), *reversed in part and vacated*, 269 F.3d 439 (4th Cir. 2001).
[29] *Mercurio v. Nissan Motor Corp.*, 81 F. Supp.2d 859 (N.D. Ohio 2000).
[30] *Id.* at 861.

The rationale underlying the minority view may also flow from a public policy belief that allowing manufacturers to avoid or reduce their liability through application of comparative fault will reduce the manufacturer's incentive to design a safe automobile for consumer use.[31] One court opined that "[a] major policy behind holding manufacturers strictly liable for failing to produce crashworthy vehicles is to encourage them to do all they reasonably can do to design a vehicle which will protect a driver in an accident."[32]



Crashworthiness in Florida

Prior to 2001, Florida courts generally applied comparative fault principles in crashworthiness cases where the injury was caused by the initial collision or was an enhanced injury caused by a subsequent collision.[33] For example, in *Kidron, Inc. v. Carmona*,[34] a mother and child brought a wrongful death action for the death of the father in a collision with a truck that had stalled, as well as an action against the manufacturer of the truck alleging strict liability for the manufacturer's design of the rear under-ride guard.[35] The court held that “principles of comparative negligence should be applied in the same

[31] Ricci, *supra* note 17, at 18-20.
[32] *Id.* at 20 (quoting *Andrews v. Harley Davidson, Inc.*, 769 P.2d 1092, 1095 (Nev. 1990)).
[33] Schwartz, *supra* note 11, at 6.
[34] *Kidron, Inc. v. Carmona*, 665 So.2d 289 (Fla. 3d DCA 1995).
[35] *Id.*

manner in a strict liability suit, regardless of whether the injury at issue has resulted from the primary or secondary collision."[36] The court further recognized that:

> . . . fairness and good reason require that the fault of the defendant and of the plaintiff should be compared with each other with respect to all damages and injuries for which the conduct of each party is a cause in fact and a proximate cause.[37]

As a result, the court concluded that the decedent's negligence in failing to avoid the collision should be considered along with the manufacturer's liability in the design of the truck, as well as any other entity or person who contributed to the accident regardless of whether that entity was joined as a party.[38]

In 2001, the Florida Supreme Court retreated from the application of comparative fault and the holding in *Kidron, Inc.*, and adopted the minority view in crashworthiness cases. The seminal decision in *D'Amario v. Ford Motor Company* precludes the jury[39] from apportioning fault to a party contributing to the cause of the initial collision when considering liability for enhanced injuries resulting from a second collision.[40]

In its examination of liability and admissibility of evidence in these cases, the Florida Supreme Court concluded that the "principles of comparative fault involving the causes of the first collision do not generally apply in crashworthiness cases."[41] In reaching its conclusion, the court compared crashworthiness cases to medical malpractice actions in which the cause of an initial injury that may require medical treatment is not ordinarily considered as a legal cause of enhanced injuries resulting from subsequent negligent treatment.[42] The court further noted that:

> . . . unlike automobile accidents involving damages solely arising from the collision itself, a defendant's liability in a crashworthiness case is predicated upon the existence of a distinct and second injury caused by a defective product, and assumes the plaintiff to be in the condition to which he is rendered after the first accident. No claim is asserted, however, to hold the defendant liable for that condition. Thus, crashworthiness cases involve separate and distinct injuries–those caused by the initial collision, and those subsequently caused by a second collision arising from a defective product.[43]

The court held that the focus in crashworthiness cases is the enhanced injury; therefore, consideration of the conduct that allegedly caused the enhanced and secondary injuries is pivotal, not the conduct that gave rise to the initial accident.[44] As a result, the court concluded that admission of evidence

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[36] *Id.* at 292.
[37] *Id.*
[38] *Id.* at 293.
[39] Most trials are in front of a jury, but the parties may opt to waive a jury trial and elect to try the case before a judge, but the legal standards are the same.
[40] *D'Amario v. Ford Motor Co.*, 806 So.2d 424 (Fla. 2001).
[41] *Id.* at 441.
[42] *Id.* at 435. In addition, the court recognized that in medical malpractice actions, an initial tortfeasor who causes an injury is not to be considered a joint tortfeasor. *Id.*
[43] *Id.* at 436-37.
[44] *Id.* at 437.

related to the intoxication of the non-party drivers, which caused the initial collisions, unduly confused the jury and shifted the focus away from determining causation of the enhanced injuries.[45]

Effect of Proposed Changes

The bill, in a crashworthiness case, requires the trier of fact to consider the fault of all persons who contributed to the accident when apportioning fault between or among them. The bill also provides that the jury must be appropriately instructed by the trial judge on the apportionment of fault. The bill provides that the rules of evidence apply to crashworthiness cases.

The bill contains legislative intent language that the act is intended to be applied retroactively and overrule *D'Amario v. Ford Motor Co.* It includes a finding that the retroactive application of the act does not unconstitutionally impair vested rights, but affects only remedies, permitting recovery against all tortfeasors while lessening the ultimate liability of each consistent with the state's statutory comparative fault system.

The bill will take effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

This bill may have a minimal nonrecurring expense to the State court system in FY 2011-2012. The judiciary may experience a small increase in workload related to revising the Standard Jury Instructions in civil cases to reflect the changes in apportionment of fault as written in the bill.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

[45] The court also ruled that driving while intoxicated does not fall within the "intentional tort" exception to the comparative fault statute. *See* s. 768.81(4)(b), F.S.

D. FISCAL COMMENTS:

None.