



Tort Reform: Impact of HB 837 on Jury Instructions

Governor Ron DeSantis signed Senate Bill 2-A into law in December 2022, followed by his signing of HB 837 on March 24, 2023. One of the many features of this tort reform was the move from a pure comparative fault state to a system of modified comparative fault. Now, new standard jury instructions are being considered to facilitate the apportionment of fault by a jury in light of Florida's new modified system of comparative fault.

Adjusting Comparative Fault

Florida has traditionally been a pure comparative fault state, where plaintiffs could recover damages in a personal injury action even if they were mostly—or even nearly entirely—at fault for their own damages. *See* Section 768.81(2), Florida Statutes (“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.*”). **HB 837 modified Florida’s comparative fault law to bar a plaintiff’s recovery if they are more than 50% at fault for their own harm.**

Changes to Comparative Fault Statute

Florida Statute § 768.81(6) (*effective March 23, 2023*) titled **Comparative Fault** now states: **Greater percentage of fault.** – In a negligence action to which this section applies, any party found to be greater than 50 percent at fault for his or her own harm may not recover any damages.

§ 768.81(6) does not apply to an action for damages for personal injury or wrongful death arising out of medical negligence pursuant to chapter 766.

Proposed Jury Instructions

The Supreme Court Committee on Standard Jury Instructions in Civil Cases has proposed new instructions and a new verdict form in light of section 9, Chapter 2023-15, Laws of Florida. This law, commonly known as section 9, HB837, is codified at section 768.81(6), Florida Statutes. The committee proposed new instructions based on the following existing instructions: 409.13, 412.2, 412.8, 501.1, 501.3, 502.1, and model verdict form 1.

409.135 DAMAGES

If you find for (defendant), [or if you have assigned greater than 50% of any [negligence] [fault] to (claimant)], you will not consider the matter of damages. But, if you find for (claimant), [and if you have assigned 50% or less of any [negligence] [fault] to (claimant),] you should award (claimant) an amount of money that the greater weight of the evidence shows will fairly and adequately compensate (claimant) for (describe appropriate elements of those damages incurred by claimant).



This instruction should be used in cases to which section 9, Chapter 2023-15, Laws of Florida applies.

**412.25 CONTRIBUTION SOUGHT BY THIRD PARTY CLAIM IN INJURED
PARTY'S ORIGINAL ACTION-
CASES APPLYING SECTION 9, CHAPTER 2023-15**

This instruction follows the conventional instructions on plaintiff's claim.

There is an additional claim that you must also decide. (Third party claimant) **seeks to recover from** (third party defendant) **part of any money which** (third party claimant) **may be called on by a judgment in this action to pay to** (claimant).

If you find for (defendant and third party claimant) **on** (claimant's) **claim, [or if you have assigned greater than 50% of any [negligence] [fault] to** (claimant)], **you need not consider this additional claim by** (third party claimant) **against** (third party defendant). **But, if you find for** (claimant) **on [his] [her] [its] claim for damages against** (defendant and third party claimant), **[and if you have assigned 50% or less of any [negligence] [fault] to** (claimant)], **you must also decide the following additional issues on the claim by** (third party claimant) **against** (third party defendant).

The issues on that claim are whether (third party defendant) **as well as** (defendant and third party claimant) **were negligent and, if so, whether such negligence contributed as a legal cause of injury and damage to** (claimant). **If the greater weight of the evidence does not support the claim of** (third party claimant) **against** (third party defendant), **your verdict on that claim will be for** (third party defendant). **However, if the greater weight of the evidence does support the claim of** (third party claimant) **against** (third party defendant), **your verdict on that claim should be for** (third party claimant) **and you should determine by your verdict what percentage of the total negligence of [both] [all] defendants (name) was caused by each. The court will then determine the amount that** (third party claimant) **should recover from** (third party defendant) **in the event** (third party claimant) **is required to pay a judgment in favor of** (claimant).

**412.85 ISSUES ON CLAIM AND BURDEN OF PROOF-
CASES APPLYING SECTION 9, CHAPTER 2023-15**

This instruction follows the conventional instructions on plaintiff's claim.

The issues for you to decide on (claimant's) **claim are whether** (defendant or person for whose negligence defendant is responsible) **was negligent in** (describe negligence) **and, if so, whether such negligence was a legal cause of injury and damage to** (claimant).



If the greater weight of the evidence does not support the claim of (claimant), [against a particular defendant], [or if you have assigned greater than 50% of any [negligence] [fault] to (claimant)], your verdict should be for [that] defendant.

[However, if the greater weight of the evidence supports the claim of (claimant), [and if you have assigned 50% or less of any [negligence] [fault] to (claimant)], you should also determine whether the amount of money paid by (claimant) to (name) was reasonable under all the circumstances shown by the evidence. If the greater weight of the evidence shows that the amount of money paid by (claimant) to (name) in settlement did not exceed a reasonable amount under all the circumstances, you should so find by your verdict. However, if the amount of money paid by (claimant) to (name) exceeded a reasonable amount, you should determine the amount which would have been reasonable under all the circumstances for (claimant) to pay (name) in settlement. The court will then determine the amount that (claimant) will recover from (defendant).]

[You should also determine by your verdict what percentage of the total negligence of [both] [all] parties to this action (name them) you apportion to each of them. The court will then determine the amount of (claimant's) recovery.]

Use the first two paragraphs in all cases. Use the first bracketed paragraph if there is an issue about the reasonableness of the amount paid in settlement. This instruction assumes that the burden of proving reasonableness – that the settlement paid the injured party way, under the circumstances, reasonable – is on the claimant.

**501.15 PERSONAL INJURY AND PROPERTY DAMAGES: INTRODUCTION-
CASES APPLYING SECTION 9, CHAPTER 2023-15**

When directed verdict is given on the claimant's cause of action and there is no issue of comparative negligence by the claimant:

You should award (claimant) an amount of money that the greater weight of the evidence shows will fairly and adequately compensate [him] [her] for [his] [her] [loss] [injury] [or] [damage], including any damage (claimant) is reasonably certain to [incur] [experience] in the future. You shall consider the following elements:

All other cases:

[If your verdict is for (defendant)(s)], [or] [If] [if] you have assigned greater than 50% of any [negligence] [fault] to (claimant)], you will not consider the matter of damages. But [if the greater weight of the evidence supports (claimant's) claim,] [and] [if you have assigned 50% or less of any [negligence] [fault] to (claimant)], you should determine and write on the verdict form, in dollars, the total amount of [loss] [injury] [or] [damage] which the greater weight of the evidence shows will fairly and adequately compensate [him] [her] for [his] [her] [loss] [injury] [or] [damage],



including any damages that (claimant) is reasonably certain to incur or experience in the future. You shall consider the following elements:

If there is an issue of limitation on damages because of F.S. 627.727(2), use instruction 501.3 instead of instruction 501.1 and 501.2. If there is comparative fault or Fabre issue, use the applicable parts of instruction 501.4 following either instruction 501.2 or 501.3. To complete the instructions for Personal Injury and Property damages, use the applicable parts of instructions 501.6-501.9.

501.35 MOTOR VEHICLE NO-FAULT INSTRUCTION-
CASES APPLYING SECTION 9, CHAPTER 2023-15

[If your verdict is for (defendant)(s))] [or] [If] [if] you have assigned greater than 50% of any [negligence] [fault] to (claimant), you will not consider the matter of damages. But [if the greater weight of the evidence supports (claimant's) claim] [and] [if you have assigned 50% or less of any [negligence] [fault] to (claimant)], you should determine and write on the verdict form, in dollars, the total amount of money that the greater weight of the evidence shows will fairly and adequately compensate (claimant) for the following elements of damage [to the extent that they have not been paid and are not payable by personal injury protection benefits], including damage that (claimant) is reasonably certain to incur in the future:

a. Medical expenses:

Care and treatment of claimant:

The reasonable [value] [or] [expense] of [hospitalization and] medical [and nursing] care and treatment necessarily or reasonably obtained by (claimant) in the past [or to be so obtained in the future].

Care and treatment of minor claimant after reaching majority:

The reasonable [value] [or] [expense] of [hospitalization and] medical [and nursing] care and treatment necessarily or reasonably to be obtained by (minor claimant) after [he] [she] reaches the age of (legal age).

b. Lost earnings, lost time, lost earning capacity:

When lost earnings or lost working time shown:

[Any earnings] [Any working time] lost in the past [and any loss of ability to earn money in the future].

When lost earnings or lost working time not shown:

Any loss of ability to earn money sustained in the past [and any such loss in the future].



c. *Property damage:*

Any damage to [his] [her] [its] (identify automobile or other personal property). The measure of such damage is:

[the difference between the value of the (name property) immediately before (incident complained of) and its value immediately afterward.]

[the reasonable cost of repair, if it was practicable to repair the (name property), with due allowance for any difference between its value immediately before the (incident complained of) and its value after repair.]

You shall also take into consideration any loss to (claimant) [for towing or storage charges and] by being deprived of the use of [his] [her] [its] (name property) during the period reasonably required for its [replacement] [repair].

You must next decide whether (claimant's) [injury] [or] [disease], resulting from the incident in this case, is permanent. An [injury] [or] [disease] is permanent if it, in whole or in part, consists of:

[(1) a significant and permanent loss of an important bodily function;] [or]

[(2) a significant and permanent scarring or disfigurement;] [or]

[(3) an injury that the evidence shows is permanent to a reasonable degree of medical probability].

If the greater weight of the evidence does not establish that (claimant's) injury is permanent, then your verdict is complete. If, however, the greater weight of the evidence shows that (claimant's) [injury] [or] [disease] is permanent, you should also award damages for [this] [these] additional element[s] of damage:

d. *Injury, pain, disability, disfigurement, loss of capacity for enjoyment of life:*

Any bodily injury sustained by (name) and any resulting pain and suffering [disability or physical impairment] [disfigurement] [mental anguish] [inconvenience] [or] [loss of capacity for the enjoyment of life] experienced in the past [or to be experienced in the future]. There is no exact standard for measuring such damage. The amount should be fair and just in light of the evidence.

e. *Spouse's loss of consortium and services:*

On the claim brought by (spouse) you should award (spouse) an amount of money which the greater weight of the evidence shows will fairly and adequately compensate (spouse) for any loss by reason of [his wife's] [her husband's] injury, of [his] [her] services, comfort, society and attentions in the past [and in the future] caused by the incident in question.

If there is proof that a claimant will incur future damages that are not excluded from recovery by F.S. 627.737 (1991), such as where claimant at trial is not at maximum medical



improvement and will have a limited period of future lost income or medical expenses, it will be necessary to add the following language after the word “question”: “including any such damages as (claimant) is reasonably certain to [incur] [experience] in the future.”

The committee has placed this instruction in the damages section because the statute sets a threshold to the recovery of non-economic damages only. If claimant does not establish permanency, claimant may still be entitled to recover economic damages that exceed personal injury protection benefits. Therefore, negligence will still be an issue for the jury to decide where there are recoverable economic damages even in cases where no permanency is found. If, however, there are no recoverable damages of such damages are not submitted to the jury, then the court may wish to modify the instruction.

F.S. 627.737(2) (1991) does not define “permanent injury within a reasonable degree of medical probability” that is established by expert testimony. Therefore, the instructions do not attempt to define the terms and leave their explanation to the testimony of the experts and argument of counsel.

502.15 WRONGFUL DEATH DAMAGES: INTRODUCTION- CASES APPLYING SECTION 9, CHAPTER 2023-15

- a. *When directed verdict is given on the claimant’s cause of action and there is no issue of comparative negligence by the decedent or survivor:*

You should award (decedent’s) personal representative an amount of money that the greater weight of the evidence shows will fairly and adequately compensate (decedent’s) estate and (decedent’s) survivors for their damages, including any damages that the estate and the survivors are reasonably certain to incur or experience in the future.

- b. *All other cases:*

[If your verdict is for (defendant)(s))] [or] [If] [if] you have assigned greater than 50% of any [negligence] [fault] to [(decedent)] [or] [(survivor(s))], you will not consider the matter of damages. But [if the greater weight of the evidence supports (personal representative’s) claim] [and] [if you have assigned 50 percent or less of any [negligence] [fault] to [(decedent)] [or] [(survivor(s))]] for [his] [or] [her] own harm, you should determine and write on the verdict form, in dollars, the total amount of [loss] [injury] [or] [damages] which the greater weight of the evidence shows the estate of (decedent) and [his] [her] survivors sustained as a result of [his] [her] injury and death, including any damages that the estate and the survivors are reasonably certain to incur or experience in the future.

For Wrongful Death damage instructions, use the applicable parts of instructions 502.1-502.4. If there is a comparative fault or Fabre issue, after giving instructions on the elements of damages, use instruction 502.5. To complete the instructions for Wrongful Death damages, use the applicable parts of instructions 502.6-502.8



**FORM 1.5 MODEL FORM OF VERDICT FOR GENERAL NEGLIGENCE
WITH APPORTIONMENT OF FAULT-
CASES APPLYING SECTION 9, CHAPTER 2023-15**

(Showing changes only)

4. State the percentage of any [negligence] [or fault], which was a legal cause of [loss] [injury] [or] [damage] to (claimant) (decendent) that you charge to:

(defendant)	_____	%
(identify additional person or entity)	_____	%
(claimant)	_____	%

Total must be 100%

If your answer to question 4 assigns greater than 50% of any [negligence] [fault] to (claimant) (decendent), then your verdict is for the defendant, and you should not proceed further except to date and sign this verdict form and return it to the courtroom.

If your answer to question 4 assigns 50% or less of any [negligence] [fault] to (claimant) (decendent) please answer question 5. If you find that (claimant) (decendent) or (identify additional person(s) or entit(y)(ies) [was] [were] [negligent] [or at fault], the court in entering judgment will make an appropriate reduction in the damages awarded.

The Supreme Court Committee on Standard Jury Instructions in Civil Cases invites all interested persons to comment on the proposals reproduced in part herein, and in full at https://www.floridabar.org/news_article_section/notices/ under the Notices Tab. For more information, please contact Julie B. Karron at julie.karron@fmglaw.com, or your local FMG attorney.