Introduction

Ten years ago, Florida's highest court dramatically changed how automotive products liability crashworthiness cases were handled in the state by restricting the circumstances in which the jury could apportion fault to those other than the vehicle manufacturer. This was a profound change. Prior to 2001, Florida utilized a comprehensive system of apportionment, one that required juries to compare the fault of all actors — even non-parties — responsible for bringing about an occupant injury. This practice ended with the 2001 Florida Supreme Court ruling in *D'Amario v. Ford*, 806 So. 2d 424 (Fla. 2001).

*D'Amario* exempted crashworthiness cases from Florida's broad apportionment of liability scheme, holding that principles of comparative fault do not apply to crashworthiness cases when the fault to be compared is that which caused the initial car crash. *Id.* at 441. The court also created a blanket evidentiary rule precluding admission of evidence as to how and why the initial crash occurred, believing such would only serve to confuse the jury in determining...

---

1. *See e.g., Kidron, Inc. v. Carmona*, 665 So. 2d 289, 292 (Fla. 3d DCA 1995) (“[F]airness and good reason require that the fault of the [truck manufacturer] and of the plaintiff should be compared with each other with respect to all damages and injuries [...]”), citing *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993), ultimately adopted by the Florida Legislature as a modified joint and several tortfeasor reform statutory law. See Fla. Stat. § 768.81 (1999). The Florida Supreme Court's decision in *Fabre* stands for the proposition that each tortfeasor is responsible for the damages caused by their own tortuous conduct. Under *Fabre*, when litigation involves a single injury caused by multiple tortfeasors, a defendant can have the jury apportion fault to any party or non-party responsible for bringing about a single injury (even those who were never sued, who had previously settled, or who were earlier dismissed from the action).
whether the manufacturer was liable for a purported defect in the vehicle’s crash protections. \textit{Id.} at 440.

\textit{D‘Amario} quickly became a sword used by the plaintiffs’ bar against automakers across Florida. Plaintiffs routinely cited \textit{D’Amario} to exclude all manner of evidence unfavorable to their cases that would otherwise be relevant in explaining how the plaintiff came to be injured. No longer were juries allowed to hear about a plaintiff’s culpable actions behind the wheel. Evidence of driver intoxication or fatigue became off limits. In essence, \textit{D‘Amario} allowed the plaintiff’s bar to try cases on limited facts, \textit{i.e.}, the proof and evidence generated after the initial car crash. This article examines the history and effect of the \textit{D’Amario} decision, the recent legislative abrogation, and how Florida crashworthiness cases may be handled in the future.

\textit{Enhanced Injury Cases}

In 1968, the Eighth U.S. Circuit articulated a new common law principle in auto products liability cases known as the crashworthiness or, "enhanced injury" doctrine. See, \textit{Larsen v. General Motors}, 391 F.2d 495 (8th Cir. 1968). This doctrine held that, although an automobile is not built to be crashed, automakers have a duty to use reasonable care in designing their vehicles to avoid unreasonable risk of injury to occupants in foreseeable accidents. The crashworthiness doctrine imposes liability on vehicle manufacturers when, due to some product defect, reasonably avoidable enhanced injuries (\textit{i.e.}, those beyond what would have occurred in the car crash itself) are sustained in a "second collision" between the passenger and an interior part of the automobile. See \textit{id.} at 502.\footnote{\textit{D’Amario}, 806 So. 2d at 426 (internal citation omitted) (finding two purportedly distinct accident events: "an initial accident and a [...] secondary collision caused by a [...] defective condition [...] unrelated to the cause of the initial accident but which causes additional [...] injuries beyond those suffered in the primary collision"); \textit{Id.} at 433 ("The crashworthiness doctrine imposes liability on automobile manufacturers for design defects that enhance, rather than cause, injuries").} The systems and components at issue in crashworthiness cases are those designed to protect occupants during a collision: airbags, interior padding, seatbelts, seatbacks (in rear-end collisions), laminated glass (purportedly protecting against occupant ejections), fuel tanks/systems (in post-crash fire cases), and the strength of the roof and its supporting pillars. See Charles T. Wells, \textit{et al.}, \textit{D’Amario v. Ford: Time to Expressly State the Decision Is No Longer Viable}, Florida Bar Journal, Vol. 85, No. 4, April 2011.

The Florida Supreme Court adopted the crashworthiness doctrine in 1976, holding that a manufacturer may be held liable for defects that cause injury but are not the cause of the primary collision. See, \textit{Ford Motor Co. v. Evancho} 327 So. 2d 201, 202 (Fla. 1976).\footnote{\textit{Later, the Florida Supreme Court applied strict liability to a crashworthiness cause of action in \textit{Ford Motor Co. v. Hill}, 404 So. 2d 1049, 1051-52 (Fla. 1981). Since then, the plaintiffs’ bar has successfully extended the crashworthiness doctrine to motorcycles (\textit{Nicolodi v. Harley-Davidson Motor Co.}, 370 So.2d 68, 70-71 (Fla. 2d DCA 1979); pleasure boats (\textit{Rubin v. Brutus Corp.}, 487 So. 2d 360, 364 (Fla. 1st DCA 1986); forklifts (\textit{Santos v. Crown Equipment Corp.}, Case No. 08-80161-CIV-DTKH (S.D. Fla. 2009)); and airplanes (\textit{McGee v. Cessna Aircraft Co.}, 188 Cal. Rptr. 542 (App. 1983)).} The Florida’s \textit{D’Amario} Doctrine

In \textit{D’Amario}, a child passenger was injured in a Ford vehicle which struck a tree because its driver was intoxicated and speeding. \textit{D’Amario}, 806 So. 2d at 427. To undermine the relevance of the driver’s intoxication, plaintiff alleged damages not for injuries sustained in the initial car
crash, but rather injuries suffered during the post-collision fire, purportedly due to a defective fuel relay switch. Applying the crashworthiness doctrine, the trial court nevertheless instructed the jury that, if appropriate, it could compare Ford's fault with that of the intoxicated driver. See fn. 1, supra. The jury returned a verdict for Ford.

The Florida Supreme Court ultimately reversed that decision. It reasoned that a driver's fault in causing the primary accident is immaterial to whether an automobile manufacturer designed a crashworthy product. D'Amario, 806 So. 2d at 433. The court held that in crashworthiness cases, tortfeasors who caused the "first collision" — including the plaintiff — cannot be on the verdict form for apportionment of fault. The court believed this was proper because in such cases, liability is premised upon later, enhanced injuries resulting from a failure to provide reasonable crash protection. Id. In exchange, the Court held that events surrounding the "first collision" cannot be the legal cause of the enhanced injuries to the occupant due to a crashworthiness defect. In so ruling, D'Amario exempted crashworthiness cases from Florida's apportionment of liability scheme when the fault to be compared was that which caused the "first collision." In an ill-advised and unnecessary move, the court also imposed a blanket evidentiary rule which held that the facts concerning the cause of the "first collision" were generally irrelevant in such cases. Id. at 440-441. This aspect of the D'Amario holding was imprudent because the variability of facts in each individual case might make a driver's fault in causing the primary car crash relevant to a crashworthiness claim. For example, if the driver was recklessly traveling at 100 mph when the crash occurred, such velocity might explain why crashworthiness protections were overcome. The evidentiary rule announced in D'Amario was also unnecessary because the court could have instead, relied on a rule of evidence already on the books to exclude the driver's intoxication there: Fla. Stat. § 90.403 (Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, [....]). See D'Amario, 806 So. 2d at 442-443 (Wells, C.J., dissenting).

Use of D'Amario by the Plaintiffs' Bar

D'Amario came to stand for the proposition that parties cannot litigate the cause of the primary car crash in products liability crashworthiness cases. By definition, the decision broadened the class of plaintiffs with viable claims by removing plaintiff's own fault for the "first collision" from consideration. A plaintiff driver who caused a crash — be it through texting or cell phone distraction, falling asleep, intoxication, or recklessness behind the wheel — no longer had to confront such facts before the jury. With no risk that the jury would ever learn of a plaintiff's own culpable behavior, the number of crashworthiness cases filed in Florida increased dramatically, and manufacturers faced exponentially higher exposure as typically the only entity on the verdict form. In a 2010 hearing before the Florida Senate Judiciary Committee, Doug Lampe of Ford Motor Company said that Ford saw crashworthiness-related cases go up 400% in Florida over the previous 10 years because of D'Amario. See The Florida Bar News, "Senate Moves Tort Bill," Feb. 1, 2011.

In addition, the plaintiffs' bar used the decision to accomplish a host of unintended and unjust purposes. D'Amario created a legal fiction by concealing from the jury the actual facts of the accident, resulting in a false analysis as to the scope of liability. See Charles T. Wells, et al., D'Amario v. Ford: Time to Expressly State the Decision Is No Longer Viable, Florida Bar Journal, Vol. 85, No. 4, April 2011. Under well settled principles of tort law, a plaintiff-occupant could bring claims against a drunk driver who caused him injury in a car crash, blaming the driver's drunkenness and obtaining settlement leverage with the threat of punitive damages. That same plaintiff could then bring a crashworthiness lawsuit against the vehicle
manufacturer while prohibiting the jury from ever hearing about the very intoxication previously cited as the proximate cause of plaintiff's injuries.

*D'Amario* was also used as a tool for excluding critical and otherwise relevant defense evidence that also happened to touch upon the issue of fault for the "first collision" car crash. Recently, the authors tried an automobile crashworthiness "roof crush" case in Ft. Myers, Florida that well demonstrates this strategy. See *Duarte v. Kia Motors Corporation*, Case No. 08-CA-026481, Twentieth Judicial Circuit Court, Lee County, Florida. The accident at issue occurred when the mother-driver inexplicably drove off a quiet rural roadway, colliding sideways with an embankment, resulting in a high-energy overturn. Tragically, the mother's young son suffered mortal injuries in the crash after being thrown about the passenger compartment and ultimately entrapped between the top of the rear seat and the deformed roof. Despite the mother's insistence the decedent was seatbelted at all times, a primary defense was that the boy had unbuckled his belt without his mother's knowledge sometime during the long trip. When phone records demonstrated the mother's nearly ceaseless cell phone use while behind the wheel, plaintiff's counsel tenaciously fought to exclude such evidence under *D'Amario*, claiming it could be used by the jury to compare the mother's fault in driving off the roadway. The trial court ultimately admitted the evidence on the issue of whether the mother was credible in claiming uninterrupted observation of the seatbelt status of her son; a ruling plaintiff's counsel appealed based on *D'Amario*.

Finally, because such matters also touch upon the issue of fault for the "first collision," the plaintiffs' bar routinely cited *D'Amario* to exclude key findings of defense accident reconstructions: high speed, erratic steering maneuvers, or the presence or absence of brake use, among others. As a result, jurors tasked with deciding what happened in an off-road rollover crash for example, were presented with evidence that arose only after the vehicle has left the roadway. Essentially, jurors in a crashworthiness case governed by *D'Amario* were left to speculate about the cause of the crash and why those facts were kept from them. The confusion created by such an artificial and truncated presentation of proof ran contrary to very purposes behind the *D'Amario* Court's holding.

**New Legislation, New Legal Battles**

In response to *D'Amario*'s exclusion of crashworthiness cases from comparative fault principles, the Florida Legislature passed a bill on May 3, 2011 to abrogate *D'Amario* and restore the jury's ability to compare the wrongdoing of those responsible for the "first collision." On June 23, 2011, the bill was signed into law by Florida Governor Rick Scott. The new statute explicitly requires the jury consider the fault of all who contributed to the accident when apportioning fault in any products liability lawsuit alleging that injuries were enhanced by a defective product. And, in an unusually public rebuke, the legislature included a specific statement that the law was intended to "overrule *D'Amario v. Ford Motor Co*, [...] which [...] fails to apportion fault for damages consistent with Florida's statutory comparative fault system."

The Florida Legislature also required "this act be applied retroactively." The Legislature included specific findings that the statute:

> is remedial in nature [and] that the retroactive application of this act does not unconstitutionally impair vested rights. Rather, the law affects only remedies,

permitting recovery against all tortfeasors while lessening the ultimate liability of each consistent with this state’s statutory comparative fault system.

Simply because the Florida Legislature indicates a statute is remedial does not necessarily make it so. *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 61 (Fla. 1995). Florida courts may refuse to retrospectively apply such a statute if it impairs rights, creates new obligations, or imposes new penalties. *Id.* Retroactive application of the new law creates the first post-*D'Amario* battleground. Plaintiffs will surely argue that combined with Florida's previous abolition of joint and several liability, a jury's ability to apportion damages amongst the manufacturer and other (likely judgment-proof) wrongdoers responsible for the underlying crash substantively impairs the plaintiff's vested right to recover all his damages.

Such interpretation would be erroneous. The legislature's abrogation of *D'Amario* does not reduce the amount of damages a plaintiff can recover in a crashworthiness case. Indeed, as the legislature stated, the new law actually "permit[s] recovery against all tortfeasors," both those responsible for the so-called "first collision" and those responsible for the "second collision" accidents. Nor does the new law decrease the preexisting legal liability of a manufacturer for potential defects in a vehicle's crash protections. Instead, the new law sets up a method by which the liability of each purported tortfeasor will be limited to its particular responsibility for the injuries, whether "enhanced" or caused by the underlying crash. Such an act may be applied retroactively because it affects only the source for the remedy owed to plaintiff, not the existing right to such remedy.\(^6\)

The fight to permit Florida jurors to hear all relevant and material evidence in crashworthiness cases is sure to continue on other fronts as well. For example, Rule 403 gives trial judges the discretion to exclude relevant evidence when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *Id.* Well versed in *D'Amario* arguments, the Florida plaintiffs' bar will likely craft Rule 403 rationales for excluding "first collision" evidence despite the legislative abrogation. They will certainly assert that evidence as to the cause of the primary crash detracts by its very nature from the proper focus of the crashworthiness case. Alternately, they will assert the existence of unfair prejudice should jurors be reminded of plaintiff's own culpability behind the wheel when deciding whether injuries were exacerbated by a crashworthiness defect. In short, plaintiffs will transfer to Rule 403 their prior *D'Amario* strategies.

Unlike the *D'Amario* evidentiary rule however, Rule 403 requires the exclusion of logically relevant "first collision" evidence only if its probative value is "substantially outweighed" by any of the rule's enumerated dangers. As compared to *D'Amario*, Rule 403 leans in favor of admissibility and puts the burden on plaintiff to demonstrate an absence of sufficient probative value. Nonetheless, in the post-*D'Amario* crashworthiness case, the manufacturer's attorney must be well prepared to demonstrate the logical strength of all helpful "first collision" evidence. Such counsel would be wise to consider the *D'Amario* decision and its progeny in preparing for plaintiff's inevitable Rule 403 motion. For example, defense experts should

---

\(^5\) Fla. Stat. § 768.81 as amended by s.1, ch. 2006-6, effective April 26, 2006.

\(^6\) See *Village of El Portal v. City of Miami Shores*, 362 So. 2d 275, 278 (Fla. 1978) (Legislature's abrogation of the common law rule of no contribution applied retroactively because: (a) it did not increase the liability of any tortfeasor, (b) it merely lessened the ultimate liability of each tortfeasor by providing for an equitable distribution of the common burden and this, (c) the statute only changed the form of the remedy without impairing substantial rights).
prepare in advance to explain why the proffer of plaintiff's mistakes in the driver's seat impacted the energy, trajectory, direction of forces, occupant kinematics, and physics of the crash; matters clearly relevant to the performance of the vehicle's crash protections.

Additionally, neither Rule 403 nor D'Amario prohibit the introduction of evidence of another's wrongdoing when it is relevant to determining the cause of the enhanced injuries being alleged. Where the manufacturer has evidence that another's culpable actions were an alternate cause of the enhanced injuries, basic principles of fairness and due process necessitate admissibility over any Rule 403 challenge. For example, in the authors' recent trial, evidence of the mother's cell phone distraction was relevant to demonstrate that she failed to attend to her son's seatbelt status and thus, bore responsibility for his enhanced injuries. True, the evidence regarding cell phone distraction was probative of why the mother drove off the road initially. Nonetheless, it was also relevant to show how the decedent came to be unrestrained and in a position to sustain the enhanced injury. Neither D'Amario nor Rule 403 would prohibit the manufacturer from proffering evidence of another's wrongdoing for such issues. In the crashworthiness case, defense counsel must always be alert to the possibility that evidence of driver distraction, intoxication, fatigue, or other culpable conduct may survive a Rule 403 attack when also relevant to show how the driver undermined the vehicle features designed to minimize enhanced injuries during a crash.

Finally, the manufacturer's right to have the jury compare the accident-causing fault of another works best in crashworthiness cases where the wrongdoing to be compared is that of the plaintiff seeking recovery. Where the bad actor who caused the accident is instead a third party, the situation becomes more complicated. When the fault of the third party to be compared is particularly egregious (i.e., involving drugs, intoxication, extremely reckless driving, etc.), the jury may react to such gross misconduct with outrage. The manufacturer in such cases may be harmed by focusing the jury on the incendiary misconduct of a third party if it inflates the overall damages to be apportioned (or worse, to be directly paid by the manufacturer in a joint and several liability jurisdiction). In such a scenario, a decision to highlight the third party's egregious fault works best where the jury can use the evidence to apportion 100% of the accident and injury-causing fault to the third party.

Scott Paxton is a Partner in the Minneapolis office of Bowman and Brooke, LLP (www.bowmanandbrooke.com) whose practice is focused on defending foreign and domestic automakers in catastrophic product liability cases. Mr. Paxton has over 10 years of trial experience, including second-chair responsibility on six multi-million dollar automotive products liability cases that were tried to defense verdicts in Florida, Nevada, Kentucky, California and Puerto Rico.

Brian Baggot is a Partner at Rumberger, Kirk and Caldwell (www.rumberger.com), a law firm in Florida and Alabama which practices in products liability and civil litigation defense. Mr. Baggot is a member of

7 D'Amario, 806 So. 2d at 434 (“W]e recognize that in some cases a valid issue may exist as to whether the plaintiff's negligence contributed to the cause of the enhanced injuries. In that case, the automobile manufacturer should be permitted to assert that plaintiff's negligence was a legal cause of the enhanced injuries.”); Bearint ex rel. Bearint v. Dorell Juvenile Group, Inc., 389 F. 3d 1339, 1346 (11th Cir. 2004) (D'Amario does not prevent the parties from litigating the cause of the alleged enhanced injuries).

8 See Cybroski v. Wright, 927 So. 2d 1089 (Fla. 4th DCA) (Summary Judgment of claim against parents for failing to ensure child was seat belted was improper as parents have a common law duty in Florida to protect their children from harm).
the Florida and Alabama bars, the Defense Research Institute, the Florida Defense Lawyers' Association, and has defended products liability cases involving everything from factory machinery and wheeled construction equipment to motor vehicles, helicopters, and more.