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Outmoded Impact Rule Retained By Florida

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CASES NOTED

OUTMODED IMPACT RULE RETAINED BY FLORIDA

While lying awake in bed, plaintiff heard the sound of a car striking her residence following a two car collision at an intersection. She allegedly suffered fright that led to an immediate heart attack and a subsequent stroke. In her suit, plaintiff asserted that her physical injuries were proximately caused by both drivers' negligence, but the trial court granted summary judgment for the defendants since plaintiff failed to allege impact. The District Court of Appeal, Fourth District, reversed and remanded the case for trial, declaring that the time had come to eliminate impact as a prerequisite to recovery for physical consequences of mental disturbances.[1] At a rehearing the district court certified the question to the supreme court.[2] On conflict certiorari, the Supreme Court of Florida quashed the decision of the district court with directions to reinstate the trial court's summary judgment and *held*: Where a plaintiff suffers an objective physical injury as a result of emotional stress induced by allegedly negligent conduct, no action may be maintained in the absence of some impact upon the person of the plaintiff. *Gilliam v. Stewart*, 291 So. 2d 593 (Fla. 1974).

There is probably no more confused area of tort law than that dealing with recovery for the physical consequences of negligently inflicted mental disturbance.[3] Based on the erroneous belief that "normal" people do not suffer physical injuries as a natural consequence of fright,[4] the early decisions denied recovery for the physical consequences of fright where the plaintiff had not suffered any impact from the negligent act.[5] Later cases gradually relaxed the amount of impact required[6] in an effort to do justice until the requisite impact was reduced to an absurdity.[7] Nevertheless, many jurisdictions, including Florida,[8] persisted in retaining the impact rule as a hedge against a feared plethora of fraudulent lawsuits[9] despite a deluge of dissent from numerous legal theorists.[10]

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1. Stewart v. Gilliam, 271 So. 2d 466 (Fla. 4th Dist. 1972).
2. *Id.*
3. *See* 38 AM. JUR. 2d *Fright, Shock, Etc.* § 13 (1968).
4. *E.g.*, Ward v. W. Jersey & Seashore R.R., 65 N.J.L. 383, 47 A. 561 (1900).
5. *See, e.g.*, Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896); Victorian Rys. Comm'rs. v. Coultas, 13 App. Cas. 222 (1888).
6. *E.g.*, Homans v. Boston Elevated Ry., 180 Mass. 456, 62 N.E. 737 (1902) (slight blow); Kentucky Traction & Terminal Co. v. Roman's Guardian, 232 Ky. 285, 23 S.W.2d 272 (1929) (a trifling burn); Clark v. Choctawhatchee Elec. Co-operative, 107 So. 2d 609 (Fla. 1958) (electric shock); Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930) (inhalation of smoke).
7. Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928) (horse evacuates bowels on lap).
8. *See* Crane v. Loftin, 70 So. 2d 574 (Fla. 1954).
9. The three most common arguments offered in support of the impact rule are (1)

A keen awareness of the injustice being dispensed to the honest plaintiff who failed to allege a nominal impact[11] plus an improved understanding of medical causation finally convinced some courts to replace the requirement of impact with a zone-of-danger concept.[12] That is, the plaintiff did not have to be touched but did have to be located where the defendant owed him a duty of due care.[13] It soon became apparent that the feared flood of fraudulent litigation did not materialize,[14] and the overwhelming majority of jurisdictions have now abandoned the impact rule.[15]

The earliest apparent application of the impact rule in Florida was *International Ocean Telegraph Co. v. Saunders*,[16] involving mental pain and suffering resulting from the negligent delivery of a telegram. In a two-to-one decision,[17] the Florida Supreme Court adopted the conservative view that mental pain was not an element of damages, despite the fact that a majority of other jurisdictions passing on the question had already reached contrary results on similar facts.[18] Along with other states explicitly retaining the impact rule,[19] Florida has minimized the degree of impact required to sustain a recovery[20] and created an exception to the impact requirement where malice can be implied.[21]

Several recent district court of appeal decisions[22] suggested a willing-

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the difficulty in proving causation between the claimed damages and the alleged mental disturbance, (2) a fear of fraudulent lawsuits, and (3) a fear that the absence of an impact rule would produce a vast increase in litigation.

10. Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Harper and McNeely, *A Re-examination of the Basis for Liability for Emotional Distress*, [1938] WIS. L. REV. 426; Smith, *Relation of Emotions to Injury and Disease*, 30 VA. L. REV. 193 (1944); Note, 16 U. FLA. L. REV. 540 (1964).

11. In a highly readable, yet scorching denunciation of the illogic of the impact rule, Justice Musmanno of the Pennsylvania Supreme Court laid bare the fallacies of this doctrine with his dissenting opinion in Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958).

12. *E.g.*, Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965); Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970).

13. Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933); Hambrook v. Stokes Bros., [1925] K.B. 141.

14. See cases cited at note 12 *supra*.

15. Annot., 64 A.L.R.2d 100, 143 (1959). There appear to be only eight jurisdictions, including Florida, explicitly retaining the impact rule. See note 19 *infra*.

16. 32 Fla. 434, 14 So. 148 (1893).

17. In 1893 the Florida Supreme Court consisted of only three justices.

18. International Ocean Telegraph Co. v. Saunders, 32 Fla. 434, 14 So. 148 (1893). Justice Mabry, dissenting, said: "a decided majority of the American state courts have held the [telegraph] company liable . . . ." *Id.* at 450, 14 So. at 153.

19. *Ark.*: St. Louis, I. M. & S. R.R. v. Bragg, 69 Ark. 402, 64 S.W. 226 (1901); *Ill.*: Braun v. Craven, 175 Ill. 401, 51 N. E. 657 (1898); *Ind.*: Boston v. Chesapeake & O.R.R., 223 Ind. 425, 61 N.E.2d 326 (1945); *Ky.*: Kentucky Traction & Terminal Co. v. Roman's Guardian, 232 Ky. 285, 23 S.W.2d 272 (1929); *Mass.*: Sullivan v. H.P. Hood & Sons, Inc., 341 Mass. 216, 168 N.E.2d 80 (1960); *Mo.*: Gambill v. White, 303 S.W.2d 41 (Mo. 1957); *Ohio.*: Miller v. Baltimore & O.S.W.R.R., 78 Ohio St. 309, 85 N.E. 499 (1908).

20. Clark v. Choctawhatchee Elec. Co-op., 107 So. 2d 609 (Fla. 1958).

21. Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950).

22. Johnson v. Herlong Aviation, Inc., 271 So. 2d 226 (Fla. 2d Dist. 1972). In *Johnson*, the court certified the impact question to the Florida Supreme Court, which reversed in a

ness on the part of some Florida courts to abandon the impact requirement, but in the instant case, the supreme court has reaffirmed the rule. In so doing, it chastised the Fourth District[23] for attempting to overrule prior supreme court decisions. Retired Justice Drew, speaking for the majority, said "[w]e do not agree that, especially under the facts in this case, there is any valid justification to recede from the long standing decisions of this Court in this area."[24] The majority opinion then adopted the view held by dissenting Judge Reed of the Fourth District, who had declared that

> there is more underlying the impact doctrine than simply problems of proof, fraudulent claims, and excessive litigation. The impact doctrine gives practical recognition to the thought that not every injury which one person may by his negligence inflict upon another should be compensated in money damages. *There must be some level of harm which one should absorb without recompense as the price he pays for living in an organized society.*[25]

The brief majority opinion offered no additional reasons for refusing to abandon the impact doctrine.

Thus, the majority failed to reach the merits of either the district court's opinion,[26] or the elucidation thereof by dissenting Supreme Court Justice Adkins.[27] Although complimenting the district court for an able argument,[28] the majority simply ignored the fact that the lower court demolished all logic and reason for retaining the rule.[29] Worse, since the plaintiff eventually succumbed as a result of her injuries,[30] the supreme court seems to be saying that, absent impact, a Florida plaintiff must accept *death* as the "level of harm which one should absorb without recompense as the price he pays for *living* in an organized society,"[31] when the harm is the result of negligently inflicted mental disturbance.

This proposition is patently absurd. It directly conflicts with the Florida Constitution, which provides that Florida courts are to provide

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companion decision to the instant case, Herlong Aviation, Inc. v. Johnson, 291 So. 2d 603 (Fla. 1974). Hollie v. Radcliffe, 200 So. 2d 616 (Fla. 1st Dist. 1967) (dictum); Way v. Tampa Coca-Cola Bottling Co., 260 So. 2d 288 (Fla. 2d Dist. 1972) (a contract action).

23. 291 So. 2d at 594. The court said "the greater question . . . is the action of the majority below in openly overruling previous decisions of this Court. The constitutional system of courts in this State contemplates that only the Supreme Court may overrule its own decisions."

24. *Id.* at 595.

25. Stewart v. Gilliam, 271 So. 2d 466, 477 (Fla. 4th Dist. 1972) (emphasis added).

26. Stewart v. Gilliam, 271 So. 2d 466 (Fla. 4th Dist. 1972).

27. 291 So. 2d at 596.

28. *Id.* at 595.

29. See note 9 *supra*. The district court systematically rebutted each of the reasons previously offered in support of the rule. Stewart v. Gilliam, 271 So. 2d 466, 472-77 (Fla. 4th Dist. 1972).

30. *Id.* at 468 n.1.

31. *Id.* at 477 (emphasis added).

every person with a remedy by due course of law.[32] The Florida Supreme Court itself has long adhered to the rule "that for every legal wrong there is a remedy and that every litigant is entitled to have his cause submitted to the arbitrament of the law."[33]

Dissenting Justice Adkins amplified and clarified[34] the well reasoned[35] district court opinion in a thorough analysis of the law in this field. The dissent recounted the history of the rule from its origin[36] and rapid demise[37] in England, described the adoption of the rule in the United States,[38] outlined some of the major cases in other jurisdictions overthrowing the rule,[39] and traced the development and application of the rule in Florida.[40] Justice Adkins then noted that the rule had been eroded through the years by affirming the rule itself, but allowing recoveries.[41] In discussing *Lyng v. Rao*[42] and *Clark v. Choctawhatchee Electric Co-operative*,[43] Adkins said:

> recovery was allowed without testimony of impact where the facts, together with the genuineness of the injury, demonstrated that there must have been an impact even though the plaintiff may not have been conscious of it. Therefore, we continued to pay homage to the impact requirement by indulgency in a legal fiction and implying impact. It is now time to "tell it like it is."[44]

The dissent agreed with the district court's rebuttal of each of the three usual arguments[45] made in defense of the impact rule, and declared

32. FLA. CONST. art. I, § 21.

33. Stewart v. Gilliam, 271 So. 2d 466, 475 (Fla. 4th Dist. 1972), *citing* Tidwell v. Witherspoon, 21 Fla. 359 (1885).

34. Two questions were answered that had not been adequately dealt with in the district court decision: (1) how much physical injury must there be to permit a recovery, and (2) whether the plaintiff must be in the zone of danger.

35. The lower court had faced the question of contrary precedents by pointing out that the rule of stare decisis is meant to give the law stability, not to petrify it. Stewart v. Gilliam, 271 So. 2d 466, 471-72 (Fla. 4th Dist. 1972). The district court quoted from and adopted the rationale of a number of the recent decisions in other jurisdictions. *Id.* at 472-77. See cases cited at note 39 *infra.*

36. Victorian Rys. Comm'rs v. Coultas, 13 App. Cas. 222 (1888).

37. Coyle v. John Watson, Ltd., [1915] A.C. 1.

38. Ewing v. Pittsburgh C. & St. L. Ry., 147 Pa. 40, 23 A. 340 (1892); Haile's Curator v. Texas & Pac. R.R., 60 F. 557 (5th Cir. 1894); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896). *See also* Ward v. West Jersey & S.R.R., 65 N.J.L. 383, 47 A. 561 (1900).

39. Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965); Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970); Daley v. LaCroix, 384 Mich. 4, 179 N.W.2d 390 (1970); Colla v. Mandella, 1 Wis. 2d 594, 85 N.W.2d 345 (1957); Battalla v. State, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961); Trent v. Barrows, 55 Tenn. App. 182, 397 S.W.2d 409 (1965); Dillon v. Legg, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968).

40. International Ocean Telegraph Co. v. Saunders, 32 Fla. 434, 14 So. 148 (1893); Dunahoo v. Bess, 146 Fla. 182, 200 So. 541 (1941); Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950); Crane v. Loftin, 70 So. 2d 574 (Fla. 1954); Clark v. Choctawhatchee Elec. Co-op., 107 So. 2d 609 (Fla. 1958).

41. 291 So. 2d at 601.

42. 72 So. 2d 53 (Fla. 1954).

43. 107 So. 2d 609 (Fla. 1958).

44. 291 So. 2d at 601.

45. See notes 9 and 29 *supra.*

that "[i]t is apparent from [the district court] opinion that the reasons for the rule no longer exist."[46]

The district court carefully limited its analysis to cases involving physical injuries resulting from a mental disturbance.[47] Justice Adkins adopted that view and suggested that five further limitations were necessary for "clarity" in rejecting the impact rule:[48]

> (1) A substantial physical injury must be shown.[49] (2) Recovery should not be permitted unless the plaintiff was in the area of physical risk (or "zone of danger"), presumably so that the defendant owed the plaintiff a duty of due care. (3) The resultant physical injury should follow as a natural result of fright.[50] (4) No recovery should be permitted for "hypersensitive mental disturbance"[51] in excess of that which would afflict a normal person under the circumstances. (5) Injuries which will sustain a recovery "should not only be proximately caused by negligence of the defendant, but should also follow closely in point of time to the negligent conduct. . . ."[52]

The dissenting opinion is a commendable and convincing appeal for moderation of Florida's regressive position on the impact question, but it, too, has a weakness. Justice Adkins really advocates replacing one arbitrary limit on recovery with another. Why allow recovery for physical consequences of mental disturbance, but not for the mental disturbance itself?[53] A careful reading of both the Fourth District opinion and the Adkins dissent shows that their arguments against the impact rule could have been used to urge recovery for mental disturbance alone, assuming the mental injury is "substantial and manifested by objective symptomatology."[54] While such symptoms may, in fact, be regarded by some jurisdictions as the consequent physical injuries in a worthy case, a truly modern approach demands acceptance of objectively ascertainable traumatic neurosis[55] as a compensable injury when proximate cause can

46. 291 So. 2d at 602.

47. The court said, "we are not herein concerned with any action for recovery for mental or emotional disturbance *unconnected* with a resulting *physical injury*." Stewart v. Gilliam, 271 So. 2d 466, 472 (Fla. 4th Dist. 1972) (emphasis in original).

48. 291 So. 2d at 602-03.

49. Justice Adkins approved the test in Falzone v. Busch, 45 N.J. 559, 569, 214 A.2d 12, 17 (1965).

50. The test proposed in Daley v. LaCroix, 384 Mich. 4, 13, 179 N.W.2d 390, 395 (1970) was offered.

51. 291 So. 2d at 603.

52. *Id.*

53. The courts repeatedly assert the capability of our judicial system to separate meritorious from fraudulent claims with the aid of modern medical science. *See, e.g.*, Lyng v. Rao, 72 So. 2d 53, 56 (Fla. 1954); Daley v. LaCroix, 384 Mich. 4, 12, 179 N.W.2d 390, 395 (1970).

54. Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117, 121 (Me. 1970).

55. Traumatic neurosis is neurosis following an accident experience with only minor or no physical impact. 3 LAWYERS' MEDICAL CYCLOPEDIA OF PERSONAL INJURIES AND ALLIED SPECIALTIES § 20.1 (rev. vol. 1970).

be established.[56] The trend is certainly in that direction.[57] The language of precedent written when medical knowledge was far more limited should not petrify the law.[58] Rather, the courts should recognize that they already have the tools to separate fact from fraud.[59]

Unfortunately, the Florida Supreme Court apparently never considered either the advancing frontiers of science or the trend in other jurisdictions. Instead, the court decided, without explanation, not to shift to the tortfeasor some of the price of living in an urban society that is often placed on the injured person.

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GASOLINE DEALERS' REMEDIES AGAINST DEALERSHIP TERMINATION

Marinello entered into a lease and dealer agreement with appellant Shell Oil Company. The contracts were executed simultaneously, to run for identical three year primary periods and were renewable thereafter from year to year. The lease was terminable by Marinello at any time upon 90 days notice, at the end of the primary period or at the end of the subsequent year. Either party could terminate the dealer contract at any time by giving ten days notice. Shell Oil Company gave notice of termination and brought suit for possession of the premises. The suit was consolidated with Marinello's action seeking injunctive relief and reformation of the agreements. The trial court granted reformation,[1] to include an implied covenant by appellant to renew the agreements so long as respondent substantially performed his obligations thereunder.[2] On direct certification, the Supreme Court of New Jersey, *held*, modified and af-

56. *Id.* at §§ 20.2, 52.

57. *Id.* at § 20.53.

58. *See* Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970). *See also* J. FRANK, LAW AND THE MODERN MIND 148-59 (1930).

59. Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970).

1. Shell Oil Co. v. Marinello, 120 N.J. Super. 357, 294 A.2d 253 (Ch. Div. 1972).

2. Marinello's principal obligations under the lease (prepared by Shell Oil Co.) were: (1) to pay rent; (2) to furnish a security deposit; (3) to keep the station open twenty-four hours a day, subject to local ordinance; (4) to keep the station clean and in good repair; and (5) to use the premises only for the operation of a service station. Shell agreed to sell Shell gasoline and products, and to license respondent to use Shell's trademarks, brandnames and identifications. Shell Oil Co. v. Marinello, 120 N.J. Super. 357, 358, 294 A.2d 253, 257-58 (Ch. Div. 1972).

In the trial court, Shell contended that Marinello had failed to perform obligations three and four. Marinello's evidence indicated knowledge and acquiescence by Shell in his deviations from the specified business hours. He also produced evidence that the station was clean and well run. The supreme court upheld the trial court's finding that respondent had substantially complied with his obligations. *Id.* at 378-82, 307 A.2d at 603.