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I'VE GOT A BEEF WITH YOU: THE INCREASED LIABILITY OF ANIMAL PRODUCERS IN KENTUCKY AFTER THE REPUDIATION OF THE IMPACT RULE

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INTRODUCTION

A large-scale hog processing facility has legally operated in Louisville, Kentucky, for forty-three years.[1] The plant employs 1,300 workers and is a major foundation of the city's economy, surpassed only by the Ford Motor Company and General Electric.[2] But there is a problem. Processing about 10,000 pigs a day into the products that are enjoyed across the nation is not a clean or pleasant operation.[3] An odor, which is described by some as "piercing," "definitive," and "extremely offensive," emits from the facility during its operation.[4] The unpleasant smell is persistent, unavoidable, and detectable up to a half mile from the plant.[5] While many inhabitants of the surrounding area are actually not significantly bothered by the odor, some individuals find it to be intolerable.[6] Suppose members of this unhappy contingent secure counsel and subsequently are all examined by the same "sympathetic" doctors. These medical professionals might be quick to attribute a variety of unobservable ailments (i.e. migraines, nausea, and dizziness) to the smell the plant produces.

Suddenly, a flood of negligent infliction of emotional distress suits targeting the hog-processing plant are filed. These claims ultimately become a stagnant battle between experts and healthcare professionals.

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[1] Lauren Etter, *Trendy District Roasts Hog Plant*, THE WALL ST. J. (Nov. 16, 2009, 12:01 AM), http://www.wsj.com/articles/SB125832156249749411.

[2] *Id.*

[3] *Id.*

[4] James Bruggers, *Slaughterhouse Odor Police Rely on their Noses*, THE COURIER J. (Nov. 4, 2014, 12:08 PM), http://www.courier-journal.com/story/tech/science/environment/2014/11/03/jbs-slaugherhouse-odors/18435581/.

[5] *Id.*

[6] *Id.*

Meritorious suits and specious, but difficult to disprove, cases form a cacophony of litigation that clogs the court's dockets. Meanwhile, the embattled company that owns the facility debates whether to move the operations somewhere else entirely. While this unpleasant scenario is at present only hypothetical, it is a very real possibility under the current legal rules in Kentucky.

As an increasing population's demand for agricultural products shrinks the divide between commercial and residential zones, inevitable conflicts arise between individuals and corporations. In order to ensure that the Commonwealth remains an attractive market for industries, the threat of excessive or spurious litigation must be restricted. Until very recently, the agricultural industry in the state of Kentucky had been well-insulated from tort liability.[7] However, changes to the traditional rules of recovery have greatly broadened the category of those who may seek damages for emotional distress; as a result, a wide range of companies are now faced with the threat of an inordinate amount of potential litigation.[8] To eliminate this looming threat and safeguard the economic viability of the Commonwealth, the Kentucky Legislature should adopt measures to ensure that only meritorious claims may be brought.

Since the beginning of the twentieth century, the rule in Kentucky was that, in negligence cases, there could be no recovery for "fright, shock, or mental anguish that was unaccompanied by physical contact or injury."[9] The "impact rule," though it was the majority view in the United States for quite some time, eventually fell out of favor in all but a small number of jurisdictions.[10] Kentucky was a committed member of this minority until 2012 when, in *Osborne v. Keeney*, the Kentucky Supreme Court repudiated the impact rule and adopted the majority approach of evaluating emotional distress claims under general negligence principles.[11] For the first time in state history, a plaintiff was able to bring suit for negligent infliction of emotional distress caused by sources which would reasonably cause severe mental distress, but otherwise may not have a physical effect.

The demise of the impact rule has major ramifications for the agricultural industry of the Commonwealth. Prior to *Osborne*, suits for emotional distress caused by intangible sources, such as odors or noise, would be dismissed because they failed to physically impact the plaintiff.[12]

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[7] *See* Reed v. Ford, 122 S.W. 600, 601 (Ky. 1908).
[8] *See* Osborne v. Keeney, 399 S.W.3d 1, 17 (Ky. 2012).
[9] *Reed*, 112 S.W. at 601.
[10] *Osborne*, 399 S.W.3d at 14.
[11] *Id.* at 17.
[12] *See* Kentucky Traction & Terminal Co. v. Roman's Guardian, 23 S.W.2d 272, 275 (1929).

A nuisance action could potentially be brought, but "only if" the defendant caused an unreasonable and substantial annoyance.[13] Furthermore, one could only recover for the loss in fair market value of property, not for annoyance, discomfort, sickness, or emotional distress.[14] As a result, agricultural corporations enjoyed a distinct legal protection that has now evaporated with the ruling in *Osborne*.

Slaughterhouses and animal processing plants are most immediately at risk from the termination of the impact rule. It should be noted that animal products are a major source of income for the Commonwealth.[15] Poultry is the most valuable agricultural commodity in Kentucky, with cattle and swine ranking fifth and tenth, respectively.[16] However, industrial farm animal production directly contributes to poor air quality in the surrounding area through the release of "significant quantities of toxic gases and odorous substances, as well as particulates and bioaerosols containing a variety of microorganisms and human pathogens."[17] Clearly, exposure to such noxious emissions could cause "severe emotional distress." As a result, animal production companies are particularly susceptible to voluminous litigation in the future.

As this note will discuss, the recent decision in *Powell v. Tosh* confirms the vulnerability of animal production companies.[18] In *Powell*, the court held that emotional distress claims stemming from the odor caused by defendants' hog farming operations would be actionable, contingent upon medical proof.[19] *Powell* convincingly demonstrates that in a post-*Osborne* legal system, expert testimony will ultimately be the most important factor in determining recovery. The conclusions reached in *Powell*, combined with the case law of other jurisdictions that repudiated the impact rule, further illustrate that animal production companies now face major risks.

This note will not argue for a return to the impact rule standard, but rather seek to encourage the Kentucky Legislature to adopt the changes necessary to protect animal production companies under the current law. Part II will discuss the impact rule and why it is irreparably flawed. Part III will examine the reasoning of the *Osborne* court, the changes it

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[13] KY. REV. STAT. ANN. § 411.530 (West 2015).

[14] *Id.* § 411.560.

[15] *Kentucky Economy*, NETSTATE.COM, http://www.netstate.com/economy/ky_economy.htm (last visited Apr. 22, 2015).

[16] *Kentucky Agriculture Facts*, KY. FARM BUREAU, https://www.kyfb.com/media/files/fed/home-page/2013/CommodityBooklet.pdf (last visited Jan. 21, 2015).

[17] ROLF U. HALDEN & KELLOG J. SCHWAB, *Environmental Impact of Industrial Farm Animal Production*, PEW COMM'N ON INDUS. FARM ANIMAL PROD. (2006), http://www.ncifap.org/_images/212-4_EnvImpact_tc_Final.pdf.

[18] *See* Powell v. Tosh, No. 5:09-CV-00121-TBR, 2013 WL 1878934 (W.D. Ky. May 3, 2013).

[19] *Id.* at *5.

implemented, and the ultimate effect of its decision. Part IV will illustrate how animal producers in particular face significant vulnerability with an analysis of *Powell v. Tosh*. Finally, Part V will suggest two solutions that can help remedy the issues with the current system. First, a "certificate of merit," similar to that used in medical malpractice cases of other jurisdictions, should be adopted to help ensure that only objective, reputable experts are able to be retained by plaintiffs for these suits.[20] Additionally, a liability exemption that weighs criteria similar to those of KRS 411.550 should be used sparingly in order to ensure fairness and protect the most economically important companies.[21]

I. WHAT IS WRONG WITH THE IMPACT RULE

A. Origin of the Impact Rule

In the United States, the impact rule dates back to the late 19th century and was derived from the English case of *Victorian Railways Commissioners v. Coultas*,[22] where the House of Lords concluded that an emotional disturbance unaccompanied by an actual, physical injury would overextend the liability of future defendants and open the courts to a barrage of false claims.[23] American courts shared similar concerns and favored this easily applicable and seemingly practical approach, for a time at least.[24] The Court of Appeals of New York in *Mitchell v. Rochester Railway Co.*, denied recovery to a plaintiff who suffered a miscarriage and illness, but no physical injury, from nearly being struck by the defendant's horse-drawn car.[25] The court held:

> The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and, if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims.

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[20] *See* Culver v. Specter, No. 1:CV-11-2205, 2014 WL 4717836, at *2 (M.D. Pa. Sept. 22, 2014).

[21] KY. REV. STAT. ANN. § 411.550 (West 2015).

[22] Pieters v. B-Right Trucking, Inc., 669 F. Supp. 1463, 1467 (N.D. Ind. 1987).

[23] BARRY A. LINDHAL, 4 MODERN TORT LAW: LIABILITY AND LITIGATION § 32:15 (2d ed.) (citing Victorian Rys. Com'rs v. Coultas, 13 App. Cas. 222 (P.C. 1888)).

[24] *Id.*

[25] Mitchell v. Rochester Ry. Co., 45 N.E. 354, 355 (1896) *overruled* by Battalla v. State, 176 N.E.2d 729 (1961).

> To establish such a doctrine would be contrary to principles of public policy.[26]

The Massachusetts Supreme Court similarly embraced the impact rule, as the wide range of different factual circumstances and the inherent subjectivity of emotional injuries led to the conclusion that, "it is impossible satisfactorily to administer any other rule."[27] In light of these jurisprudential concerns and the scientific limits of the time, which prevented a truly informed examination of a plaintiff's condition, the impact rule appeared to be a useful legal standard worthy of widespread use.

Concerns about fraudulent claims of emotional distress guided the Kentucky courts' adoption of the impact rule and its long-time adherence to this standard.[28] An abundance of case law holds that damages for emotional distress unaccompanied by a physical injury "are too remote and speculative, are easily simulated and difficult to disprove, and there is no standard by which they can be justly measured."[29] Additionally, until *Osborne*, the Supreme Court of Kentucky expressed great apprehension that a shift away from the traditional impact rule principles would lead to a "flood of new litigation."[30] These two reasons, essentially the identical rationale of the *Mitchell* court, were apparently so compelling that they led to a strict adherence to impact rule for over one hundred years after its adoption in the state.[31]

B. Failings of the Impact Rule

The impact rule was the subject of severe and widespread criticism almost from its inception.[32] For a doctrine whose supposed benefits were practicality and ease of application, the impact rule ultimately provides neither particularly well. Bizarrely enough, determining what met the criteria of an "impact" became a frustrating and convoluted endeavor.[33]

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[26] *Id.*

[27] Spade v. Lynn & B.R. Co., 47 N.E. 88, 89 (1897) *abrogated by* Dziokonski v. Babineau, 380 N.E.2d 1295 (1978).

[28] *See* Steel Technologies, Inc. v. Congleton, 234 S.W.3d 920, 929 (Ky. 2007) *abrogated by* Osborne v. Keeney, 399 S.W.3d 1 (Ky. 2012); *see also* Reed v. Ford, 112 S.W. 600, 601 (1908).

[29] Morgan v. Hightower's Adm'r, 163 S.W.2d 21, 22 (1942) *abrogated by Osborne*, 399 S.W.3d 1.

[30] *Osborne*, 399 S.W.3d at 15.

[31] *See* Morse v. Chesapeake & O. Ry. Co., 117 Ky. 11, 77 S.W. 361, 362 (1903) *abrogated by Osborne*, 399 S.W.3d 1.

[32] *Osborne*, 399 S.W.3d at 14.

[33] BARRY A. LINDHAL, 4 MODERN TORT LAW: LIABILITY AND LITIGATION § 32:16 (2d ed.).

There is considerable judicial leeway in making such a determination.[34] For example, smoke inhalation[35], a "jolt" caused by the falling of an elevator[36], and even, ridiculously, particles of dust landing in the plaintiff's eye have all satisfied what appears to be a token requirement of physical impact.[37] Rather than protecting against fraud, the impact rule seemed to function more as a legal hurdle that could often be overcome through clever characterization of circumstances.

Furthermore, the concern that abrogation of the impact rule would bring a flood of fraudulent litigation came to be largely rejected by most jurisdictions across the country.[38] In overruling *Mitchell*, the New York Court of Appeals observed that, "[t]he argument from mere expediency cannot commend itself to a Court of justice, resulting in the denial of a logical legal right and remedy in all cases because in some a fictitious injury may be urged as a real one."[39] Fictitious claims are omnipresent threats that are not limited solely to suits for emotional distress.[40] The public policy requirement to provide an appropriate remedy for legitimately injured plaintiffs outweighs the need to bar fictitious claims.[41] The blanket prohibition given by the impact rule is too broad and judicially unsound.

Advances in medical science and psychiatric evaluation also permit a more individualized consideration of emotional distress suits that were not possible when the impact rule was adopted.[42] The relatively rudimentary procedures of the late-nineteenth and early twentieth centuries have been replaced by significantly more insightful examination procedures. As a result, it is much easier to evaluate subjective mental states and calculate the appropriate amount of compensation that must be paid.[43] Similarly, modern medicine alleviates the difficulty "in tracing the causal connection between the injuries and the claimed negligent conduct."[44] The idea that

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[34] *Id.*

[35] Morton v. Stack, 170 N.E. 869 (1930), *abrogated by* Paugh v. Hanks, 451 N.E.2d 759 (1983).

[36] McCardle v. George B. Peck Dry Goods Co., 177 S.W. 1095, 1096 (1915) *abrogated by* Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983).

[37] Porter v. Del., 63 A. 860, 860 (N.J. 1906), *abrogated by* Ortiz v. John D. Pittenger Builder, Inc., 889 A.2d 1135 (Super. Ct. 2004).

[38] LINDHAL, *supra* note 33.

[39] Battalla v. State, 176 N.E.2d 729, 731 (1961) (citing Green v. T.A. Shoemaker & Co., 73 A. 688, 691 (1909)).

[40] LINDHAL, *supra* note 33.

[41] *See id.*

[42] Robb v. Penn. R.R. Co., 210 A.2d 709, 712 (1965).

[43] Orlo v. Conn. Co., 21 A.2d 402, 404 (1941).

[44] *Id.*

emotional distress damages lacking an accompanying physical injury are "too remote and speculative" is simply outdated and inapplicable today.[45]

Finally, the most egregious failing of the impact rule is that it produces decisions repugnant to the public and contradictory to the notion of just compensation. The oft-cited Tennessee case of *Camper v. Minor* clearly illustrates the problem.[46] Camper, a cement truck driver, was involved in a horrific fatal accident when another driver suddenly pulled out in front of his truck.[47] Although Camper received no physical injuries from the incident, he sought recovery for post-traumatic stress, which resulted from viewing the other driver's body.[48] Camper claimed he "sustained mental and emotional injuries resulting in loss of sleep, inability to function on a normal basis, outbursts of crying, and depression[,]" but the court granted summary judgment for the defendants because the requirements for a prima facie case of negligent infliction of emotional distress had not been met.[49] The Tennessee Supreme Court, upon subsequent examination, seized the opportunity to repudiate the impact rule entirely, holding that "[it] has proved to be inflexible and inadequate in practice; and . . . completely ignores the fact that some valid emotional injuries simply may not be accompanied by a contemporaneous physical injury or have physical consequences."[50] Clearly an approach so arbitrary and underinclusive is irreconcilable with modern notions of justice and jurisprudence.

C. Widespread Repudiation

Tennessee is far from the only jurisdiction to have eliminated the use of this flawed standard for evaluating emotional distress claims. In fact, the impact rule never achieved universal adherence in the United States at any point.[51] Texas, for example, explicitly allowed recovery for emotional distress suffered in the absence of a physical impact.[52] National repudiation of the impact rule was swift as well. The Minnesota and South Carolina Supreme Courts rejected the impact rule before the end of the nineteenth century.[53] By 1920, a majority of jurisdictions had ceased using this

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[45] *See* Morgan v. Hightower's Adm'r, 163 S.W.2d 21, 22 (1942) *abrogated by* Osborne v. Keeney, 399 S.W.3d 1 (Ky. 2012).

[46] Camper v. Minor, 915 S.W.2d 437 (Tenn. 1996).

[47] *Id.* at 439.

[48] *Id.*

[49] *Id.* at 439-40.

[50] *Id.* at 446.

[51] JACOB STEIN, 3 STEIN ON PERSONAL INJURY DAMAGES TREATISE § 10:31 (3d ed.).

[52] Hill v. Kimball, 13 S.W. 59, 60 (1890).

[53] Purcell v. St. Paul City Ry. Co., 50 N.W. 1034, 1035 (1892); Mack v. S.-Bound R. Co., 52 S.C. 323, 29 S.E. 905, 909 (1898).

doctrine.[54] Even the Restatement of Torts had abandoned the impact rule by 1934, yet a small minority still adhered to it into the modern era.[55] Florida, Georgia, Kansas, Indiana, Nevada, and Kentucky (until *Osborne*) valued the supposed practicality and freedom from fraud that the impact rule theoretically provides.[56] However, widespread and vehement repudiation by every other jurisdiction reinforces the almost unassailable conclusion that the impact rule is a fundamentally flawed doctrine that serves only to frustrate the judicial process.

II. *OSBORNE V. KEENEY* AND KENTUCKY'S CURRENT APPROACH TO EMOTIONAL DISTRESS CLAIMS

Interestingly enough, *Osborne*, a case that had such a major impact on the animal production industry, has absolutely nothing to do with agriculture at all, further highlighting the far-reaching effects of the Kentucky Supreme Court's broad holding. The court's decision in *Osborne* has opened a Pandora's box of concerns that extends beyond its expectations.

Osborne, like other difficult negligent infliction of emotional distress cases, involved an accident where the plaintiff suffered emotional harm, but no physical injury.[57] Brenda Osborne's house was struck by a disabled plane, which crashed through the second story and set the structure on fire.[58] Though Osborne was home during the incident, "[n]o debris from the airplane or the house struck Osborne in any manner, and she suffered no physical injury as a result of the crash."[59] Her doctor, however, testified that her pre-existing mental conditions were exacerbated by the accident and that "Osborne was emotionally unstable as a result of the destruction of her home and her personal belongings."[60] She received medical treatment for her ailments for an extended period of time following the incident.[61]

On its face, it appears as though Osborne's claim for emotional distress cannot be satisfied under the impact rule. The crash failed to touch her at all, let alone cause any sort of identifiable physical injury. The Court of Appeals agreed with this line of logic and vacated the damages previously

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[54] STEIN, *supra* note 51, § 10:31.
[55] *Id.*
[56] Osborne v. Keeney, 399 S.W.3d 1, 14 n.39 (Ky. 2012).
[57] *Id.* at 6.
[58] *Id.*
[59] *Id.* (emphasis added).
[60] *Id.*
[61] *Id.*

awarded to Osborne.[62] Both the trial court and the Kentucky Supreme Court characterized the situation differently.[63] The "sound waves" emitted by the crash were, in their view, sufficient to constitute a physical impact.[64] Once again, the main failing of the impact rule became apparent. It is impossible to use the doctrine in a non-arbitrary fashion when the circumstances are open to interpretation. Here, a claim that by all means appears legitimate (a real emotional injury supported by evidence from a medical professional) is barred just as if it was a fraudulent suit. Obviously, a change in policy had to be made. However, the solution would unfortunately prove to be imperfect as well.

A. The Reasoning of Osborne

The *Osborne* court echoed the traditional arguments against the impact rule in support of their decision to repudiate it. It first noted the historical criticism of the doctrine, and how the majority of jurisdictions had abandoned the rule.[65] The court then illustrated the unnecessary harshness and erratic applicability of the impact rule by scrutinizing the holdings of *Deutsch v. Shein* and *Wilhoite v. Cobb*.[66]

An examination of *Deutsch* and *Wilhoite* demonstrates why the impact rule is not a viable standard, perhaps even more clearly than *Camper*. In *Deutsch*, the court found one of the single most attenuated physical impacts in the history of Kentucky law. The plaintiff in the case suffered emotional distress after terminating her pregnancy because the fetus had inadvertently been exposed to x-rays.[67] The court concluded that being "bombarded by x-rays" constituted a physical impact.[68] In *Osborne*, the court correctly noted that, based on *Deutsch*, any trivial physical touching can be characterized as an impact in Kentucky.[69]

Wilhoite demonstrates the other well-recognized failing of the impact rule at play in Kentucky: The application of the doctrine results in decisions which are contrary to public policy and notions of fundamental fairness.[70] In *Wilhoite*, the plaintiff suffered severe emotional distress when

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[62] *Id.* at 8.
[63] *Id.* at 16.
[64] *Id.*
[65] *Id.* at 14.
[66] *Id.* at 15.
[67] Deutsch v. Shein, 597 S.W.2d 141, 143 (Ky. 1980) *abrogated by Osborne*, 399 S.W.3d 1.
[68] *Id.* at 146.
[69] *See Osborne*, 399 S.W.3d at 15.
[70] Wilhoite v. Cobb, 761 S.W.2d 625, 626 (Ky. Ct. App. 1988) *abrogated by Osborne*, 399 S.W.3d 1.

she witnessed her child being killed by an out of control truck.[71] Because she was not physically impacted during the event, there was no permissible recovery under Kentucky's draconian interpretation of the impact rule.[72] The potential for such distasteful outcomes obviously must be offset by some strong reasoning in support of the rule. While the *Osborne* opinion only acknowledges stare decisis as support for the impact rule[73], concerns about a potential flood of litigation are quickly disregarded because other jurisdictions that have repudiated the impact rule have not faced such a problem.[74] Of note, however, is the court's focus only on the volume of suits, rather than their validity, when conducting this analysis.[75] A significant increase in the number of spurious claims specifically is not discussed with any particularity.

One cannot ignore how the court in *Osborne* placed enormous emphasis on the testimony of medical experts in preventing fraud. Like other jurisdictions, the Kentucky Supreme Court acknowledged that advances in science and medicine have made the harshness of the impact rule unnecessary.[76] Examinations of intangible, emotional injuries are no longer entirely speculative, as they were in the late nineteenth century.[77] Fulfilling what it had previously postulated in *Steel Technologies, Inc. v. Congleton*, the court abrogated the impact rule, believing that the truth-finding function is best served by scrutinizing medical expert and eyewitness testimony.[78] This assessment is beyond reproach. As previously discussed, the impact rule can be surmounted in many cases by a cleverly plead claim. However, the deference given to medical experts should not be ignored. A "sympathetic" expert may be almost as easy to produce as a trivial impact.

B. The Ultimate Effect of Osborne

In spite of the difficulties posed by elimination of the impact rule, the Kentucky Supreme Court was quick to employ a different standard in *Osborne*. The court determined that emotional distress claims would be

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[71] *Id.*

[72] *Id.*

[73] *Osborne*, 399 S.W.3d at 16.

[74] *Id.* at 18.

[75] *Id.* (citing Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983) (using similar analysis)).

[76] *Id.* at 16.

[77] *Id.*; *see* Steel Technologies, Inc. v. Congleton, 234 S.W.3d 920, 930 (Ky. 2007) *abrogated by Osborne*, 399 S.W.3d 1.

[78] *Osborne*, 399 S.W.3d at 16.

evaluated under "general negligence principles."[79] The requirement, therefore, is "[t]he plaintiff must present evidence of the recognized elements of a common law negligence claim: (1) the defendant owed a duty of care to the plaintiff, (2) breach of that duty, (3) injury to the plaintiff, and (4) legal causation between the defendant's breach and the plaintiff's injury."[80] Essentially, the main effect is that the hurdle of the impact rule has simply been removed. What remains are just the ordinary elements of a negligence case. The reasoning behind this approach is that the "proper application of the familiar elements of negligence is the preferable way in which to sort out the genuine from the false, the serious from the trivial."[81] The idea is addition by subtraction; by eliminating the impact rule and its inherent arbitrariness, clearer, more accurate decisions will be reached. This aspect of the policy is just fairly standard procedure.

The interesting aspect of this new doctrine is the safeguard employed to address the issue of dishonest claims. The court explicitly acknowledges that without some form of added protection there is a risk of fraudulent claims.[82] This same logic is part of the reason why the impact rule endured for so long.[83] To replace it, the court adopted Tennessee's requirement that the emotional injury suffered must be "severe" or "serious."[84] The definition of such harm is fairly ambiguous and loose: "A 'serious' or 'severe' emotional injury occurs where a reasonable person, normally constituted, would not be expected to endure the mental stress engendered by the circumstances of the case. Distress that does not significantly affect the plaintiffs [sic] everyday life or require significant treatment will not suffice."[85] In addition to suffering a serious emotional injury, a plaintiff "must present expert medical or scientific proof to support the claimed injury or impairment."[86] This means that not only is the testimony of a medical expert weighted heavily in the evaluation of a claim, it is necessary in order to proceed with a suit at all.

The effect of *Osborne* is two-fold. First, circumstances that in no way could be described as physically contacting a plaintiff are now actionable. Bright light, foul smells, or disturbing visuals, all of which would have failed under the impact rule, are now permissible and valid grievances.

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[79] *Id.* at 17.

[80] *Id.* (citing Pathways, Inc. v. Hammons, 113 S.W.3d 85, 88-89 (Ky. 2003)).

[81] Camper v. Minor, 915 S.W.2d 437, 443 (Tenn. 1996) (internal citations omitted). Tennessee uses an identical approach to emotional distress claims.

[82] *Osborne*, 399 S.W.3d at 17.

[83] *See Congleton*, 234 S.W.3d at 929-30.

[84] *Osborne*, 399 S.W.3d at 17; *see also Camper*, 915 S.W.2d 437, 443 (Tenn. 1996).

[85] *Osborne*, 399 S.W.3d at 17.

[86] *Id.* at 18.

Second, and more importantly, experts will determine whether a negligent infliction of emotional distress case lives or dies. One cannot overstate how much power has been ceded to testifying experts. The impact rule, as ineffective and arbitrary as it may have been, attempted to implement a concrete, objective procedure for weeding out fraudulent claims. Now, the only significant bar to bringing an action is acquiring favorable medical or scientific testimony. The ability to abuse this process warrants serious apprehension and consideration of new safeguards.

III. THE IMMINENT RISK TO ANIMAL PRODUCERS AS SHOWN BY *POWELL V. TOSH*

Based solely on *Osborne*, the threat to animal production companies is only abstract. Clearly, they are often responsible for intangible impacts, especially in the form of foul odors.[87] However, the issue of whether such claims would be actionable is not explicitly resolved. *Powell* bridges the gap between the holding of *Osborne* and the new liability faced by animal processing companies. The decision clearly illustrates the distinct, significant vulnerability of the agriculture sector under the general negligence principles doctrine.

In what seems to be increasingly commonplace[88], the issue in *Powell* centered on the offensive smells that the facilities processing a population of animals emitted.[89] The plaintiffs in the case were a group of homeowners whose property was located within a one-mile radius of the defendant's swine barns.[90] The defendants included not only the operators of the barns, but also "several affiliated companies that are engaged in commercial swine farming in both Kentucky and Tennessee."[91] As a result of the "recurring intolerable noxious odors" continually produced by the hog farming operation, the plaintiffs asserted a spectrum of claims, including "temporary nuisance, permanent nuisance, trespass, negligence, negligence per se, product liability, battery, and civil conspiracy."[92] While their negligence claim for emotional harm was ultimately disallowed, the court's reasoning leaves the door open for similar suits in the future.[93]

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[87] *See, e.g.*, Suzi Parker, *How Poultry Producers are Ravaging the Rural South*, GRIST (Feb. 22, 2006), http://grist.org/article/parker1/.

[88] *See id.*

[89] Powell v. Tosh, 929 F. Supp. 2d 691, 697 (W.D. Ky. 2013) *opinion vacated in part on reconsideration*, No. 5:09-CV-00121-TBR, 2013 WL 1878934 (W.D. Ky. May 3, 2013).

[90] *Id.*

[91] *Id.*

[92] *Id.* at 698-99.

[93] *Id.* at 710.

A. The Mistake of the Powell Claimants

Immediately, it should be noted that none of the plaintiffs in this case suffered anything that can be described as a physical impact. All of the plaintiffs' harm was the result of an intangible, invisible odor.[94] Furthermore, only one of the claimants acknowledged experiencing physical symptoms of any kind.[95] While even the most lenient interpretation of the impact rule would have barred the claim, under the general negligence principles approach the suit was permissible thus far.

The case eventually stalled, however, because the requirement for "severe" or "serious" emotional harm was not sufficiently proven.[96] Though the plaintiffs alleged suffering emotional distress, they never sought any sort of treatment for their injuries.[97] More importantly, they failed to present any expert medical or scientific proof to confirm their accusations, as is mandatory under *Osborne*.[98] Summary judgment was therefore appropriate in the eyes of the court because the genuineness of the harm had not been concretely established.[99]

At first blush, the failure to supply the requisite expert testimony in order to establish emotional harm appears to be either a glaring oversight on the part of the plaintiffs' attorneys, or a sign that the claim was actually disingenuous and therefore correctly decided in favor of the defendants. However, the actual answer is much simpler. The *Osborne* standard did not exist at the time of the plaintiffs' injuries.[100] The operations that caused the offending odor began in 2007 and the complaint was filed in 2009.[101] *Osborne* was not decided for another three years.[102] Nevertheless, the *Powell* court chose to apply the *Osborne* rules retroactively and denied the plaintiffs' pleas for additional time to meet the new requirements.[103] It reasoned that seeking treatment upon learning that it was necessary for such a suit "would fly against *Osborne*'s stated objective of vetting the genuineness of alleged emotional distress injuries."[104] For the *Powell*

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[94] *See id.* at 698.
[95] *Id.* at 709.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *See id.* at 698.
[101] *Id.*
[102] Osborne v. Keeney, 399 S.W.3d 1 (Ky. 2012).
[103] Powell v. Tosh, No. 5:09-CV-00121-TBR, 2013 WL 1878934, at *4 (W.D. Ky. May 3, 2013).
[104] *Id.*

claimants, it was simply a case of too little, too late; however, future plaintiffs are certain to learn from their mistakes.

B. Life After Powell

In the immediate aftermath of *Osborne*, several other emotional distress claims in Kentucky failed because the plaintiffs did not produce the necessary expert medical or scientific proof.[105] The courts proceeded to make the rule absolutely clear: "In Kentucky, plaintiffs seeking damages for emotional distress must adduce expert testimony in support of their claim."[106] In the future, it is virtually certain that medical experts will be retained to support emotional distress actions and prospective plaintiffs will undergo some sort of treatment in order to give their cases the necessary corroboration. Failure to retain such experts would be an egregious oversight on the part of the counsel, bordering on malpractice.[107]

The stated purpose of vetting claims works well when plaintiffs are unaware of the *Osborne* requirements. On its face, it is reasonable to assume that someone suffering from a significant emotional disturbance would seek medical or psychological treatment. Ignoring the wide variety of behaviors and coping mechanisms that the emotionally distressed exhibit, the court's logic fails when it becomes widely known that such a course is required to bring suit. Both the truly harmed and the malingerers are certain to behave in the same way. Once again, the truth may be obfuscated, just as under the impact rule.

Hypothetically, had the *Powell* plaintiffs met the burden of proof in showing a "severe" or "serious" emotional injury, it appears likely that their claim would have been actionable. The court echoes the *Osborne* characterization of severe emotional distress as resulting from harm "that significantly affects the plaintiff's life or requires significant treatment."[108] The former is especially perturbing because of the abundance of situations that could be described as significantly affecting a plaintiff's life. The *Powell* claimants testified "that they no longer host friends and family members at their homes, their children are unable to play outside as frequently, they do not use their homes' swimming pools or patios, and

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[105] Keaton v. G.C. Williams Funeral Home, Inc., 436 S.W.3d 538, 544 (Ky. Ct. App. 2013); Sergent v. ICG Knott Cnty., LLC, No. CIV. 12-118-ART, 2013 WL 6451210 at *8 (E.D. Ky. Dec. 9, 2013).

[106] *Sergent*, No. CIV. 12-118-ART, 2013 WL 6451210, at *8.

[107] KY SUP. CT. R. 3.130.

[108] *Powell*, No. 5:09-CV-00121-TBR, 2013 WL 1878934, at *4.

they are unable to open their windows" as result of the odor.[109] It is beyond dispute that such conditions could significantly affect their lives. Similar complaints are often made about other animal processing plants both nationally and in Kentucky.[110] The inescapable conclusion is that more suits like *Powell* are inevitable.

IV. WHERE WE STAND TODAY: CURRENT CONSEQUENCES AND FUTURE SOLUTIONS

There is no doubt that there was great enthusiasm to get rid of the impact rule in Kentucky.[111] It had proven to be an unworkable, exploitable doctrine that was the product of a less sophisticated time. It cannot be argued that the decision to repudiate it was unwise and judicially unsound. But, in focusing so heavily on the failings of the impact rule, the *Osborne* court overlooked the potential problems that the use of general negligence principles will pose. *Powell* serves as the first example of the broad liability that animal production companies now face. The case also demonstrates that individuals asserting fictitious claims can still satisfy the preconditions necessary to bring an action. The end result is that the agriculture industry now bears an unequal risk under the new rules and faces legitimate impairments.

A. Examining the Direct Consequences on Animal Producers

Animal production companies are vital to the economy of Kentucky. As of 2014, poultry is a $1.2 billion industry that employs 6,300 industry employees with "egg producers contributing approximately $214.7 million" to the state's economy per year.[112] There are 38,000 beef cattle producers in Kentucky, and cash receipts for the sale of these animals totaled over $656.7 million in 2012, accounting for 12.4% of the total cash receipts that

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[109] Powell v. Tosh, 929 F. Supp. 2d 691, 698 (W.D. Ky. 2013) *opinion vacated in part on reconsideration*, No. 5:09-CV-00121-TBR, 2013 WL 1878934 (W.D. Ky. May 3, 2013).

[110] *See* S Heather Duncan, *Class-Action Suit Against Rendering Plant Nearly Settled*, THE TELEGRAPH (Apr. 30, 2010), http://www.macon.com/2010/04/30/1112190/class-action-suit-against-rendering.html; *Odor Complaint Persists at Howard Plant*, CHANNEL 3000 (May 28, 2013, 10:31 AM), http://www.channel3000.com/news/politics/odor-complaints-persist-at-howard-plant/20326742; Etter, *supra* note 1.

[111] Osborne v. Keeney, 399 S.W.3d 1, 14-15 (Ky. 2012).

[112] *Kentucky Poultry Industry Facts*, KY. POULTRY FED'N, http://www.kypoultry.org/pfacts/ (last visited Jan. 21, 2015).

year.[113] Dairy cow production resulted in another $214.6 million.[114] Swine, though the smallest of the three, still accounted for $115.4 million and 2.2% of total cash receipts.[115] Anything that disrupts the ability of the industry to function normally poses severe economic consequences for the Commonwealth. A flood of emotional distress litigation has the potential to harm not just corporations, but the state of Kentucky as a whole.

The wide reach of now-permissible emotional distress suits also raises the specter of costly litigation for all groups involved in animal production. *Powell* shows that not only will the animal producers that caused the alleged injury be potentially liable, but also the companies that rely upon them.[116] The "Tosh Defendants" (Tosh Farms General Partnership and its affiliates) denied an agency relationship with the individuals raising their hogs and asserted that the farmers were independent contractors whose affiliation was "akin to a bailment."[117] The court, however, found that vicarious liability was appropriate.[118] Because the Tosh Defendants provided supplies, paid yearly instead of by the job, and, most importantly, "exercise[d] a great deal of control over crucial aspects of the hog-raising operation," they were responsible for the actions of the farmers.[119]

The Tosh Defendants' experience is not likely an isolated one. Other corporations who follow similar business models that involve close regulation of their animal producers will also be subject to vicarious liability. For example, Tyson Foods, Inc. employs contract chicken growers across the United States, including Kentucky.[120] Tyson supplies these individuals with chickens, "scientifically formulated feed," veterinary aid, and technical advice, "while the poultry producer provides the labor, housing, and utilities."[121] The company clearly exhibits significant control over the grower's operations by sending technical advisors on a weekly basis[122] and strictly requiring facility improvements.[123] Consequently, if one

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[113] *Kentucky Agriculture Facts*, KY. FARM BUREAU, https://www.kyfb.com/media/files/fed/home-page/2013/CommodityBooklet.pdf (last visited Jan. 21, 2015).

[114] *Id.*

[115] *Id.*

[116] Powell v. Tosh, 929 F. Supp. 2d 691, 701-02 (W.D. Ky. 2013) *opinion vacated in part on reconsideration*, No. 5:09-CV-00121-TBR, 2013 WL 1878934 (W.D. Ky. May 3, 2013).

[117] *Id.* at 697-98, 700-01.

[118] *Id.* at 702.

[119] *Id.* at 701.

[120] *See How to Become a Contract Grower*, TYSON, http://www.growwithtyson.com/how-to-become-a-contract-grower/ (last visited Jan. 21, 2015).

[121] *Overview of Contract Poultry Farming*, TYSON, http://www.growwithtyson.com/overview-of-contract-poultry-farming/ (last visited Jan. 21, 2015).

[122] *Id.*

of its producers was sued for negligent infliction of emotional distress, Tyson would likely be liable as well. Rather than deal with the financial burden and headache of being dragged into multiple lawsuits, the company might use its considerable assets to move its operations to a more favorable jurisdiction entirely. Other similarly situated corporations would likely follow suit.

Unlike large companies who can leverage their considerable assets to fight suits or use their existing infrastructure to find a new location for operations, smaller farmers and independent producers do not have the ability to escape these unfavorable circumstances. It is not feasible for ordinary producers to drastically alter their businesses in order to reduce the risk of being continually involved in litigation. Considering the opportunity for potentially unlimited damages verdicts, ordinary producers may be incapable of continuing their operations. Prior to *Osborne*, these individuals primarily would have had to be concerned with nuisance claims. Damages awarded for a private nuisance are "measured by the reduction in the fair market value of the claimant's property caused by the nuisance, but not to exceed the fair market value of the property."[124] No drop in property value would mean no overall liability and, if a loss were to have occurred, the money owed would be easily calculable. Negligent infliction of emotional distress is subject to normal tort damages rules and is awarded in amounts determined by a jury.[125] Such verdicts are of course variable and difficult to anticipate[126], but can also be substantial. Juries may view plaintiffs as innocent victims of careless animal producers and subsequently award high damages.[127] The resulting cost may be too much to bear, which may ultimately cause Kentucky as a whole to suffer the negative effects.

B. Solutions

Noticeably, we've reached an impasse. The impact rule is so fundamentally impaired that returning to it would be harmful and illogical. The doctrine of general negligence principles, though subject to misuse, is the superior option. Unfortunately, there are no modifications that can be applied to sweep away all frivolous and/or fraudulent claims. The best option is for the Kentucky Legislature to implement two procedural

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[123] *The Crutchfields: Life Under Contract*, FARM AID, http://www.farmaid.org/site/apps/nlnet/content2.aspx?c=qlI5IhNVJsE&b=2723875&ct=13135015 (last visited Jan. 21, 2015).

[124] KY. REV. STAT. ANN. § 411.560 (West 2015).

[125] *Id.* § 411.182.

[126] Valerie P. Hans, *What's It Worth? Jury Damage Awards as Community Judgments*, 55 WM. & MARY L. REV. 935, 966-68 (2014).

[127] *See id.* at 944.

safeguards designed to help ensure that only meritorious suits are brought. A mandatory certificate of merit for emotional distress claims and a limit on the liability of certain animal producers will bring much-needed balance to this difficult situation.

1. Certificate of Merit

Certificates of merit are used for medical malpractice cases in various jurisdictions[128], but may also be employed for professional malpractice, product liability, and certain sexual abuse suits.[129] They serve as a written attestation by a medical professional as to the plaintiff's injuries[130] with the overall goal being to reduce frivolous claims.[131] Typically, the plaintiff is required to file an expert affidavit with the complaint that states that the case has been reviewed by a health professional "who[m they] reasonably believe is knowledgeable in relevant issues . . . and is qualified in the subject of the case."[132] The health professional must also provide a written report in which they have determined that the cause of action is meritorious.[133] The result is an added safeguard against meritless civil suits and a protection for defendants against unfair harm.

Though Kentucky does not currently use certificates of merit, the Kentucky Legislature would be well-advised to adopt them for use in emotional distress claims of this kind. First, their use would be consistent with the *Osborne* requirement of expert medical testimony. The Kentucky Supreme Court was still concerned with the possibility of malingerers in the post-impact rule system and saw expert scientific or medical proof as a way to use modern societal advancements to vet suits.[134] A certificate of merit fits neatly as a supplementary step that adds extra scrutiny to the existing process without making any dramatic changes to the court's design.

The use of a certificate of merit would also promote the *Osborne* court's goal of limiting recovery to only cases of severe emotional distress.[135] The medical professional that reviews the claim and provides a written report on

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[128] *See* Culver v. Specter, No. 1:CV-11-2205, 2014 WL 4717836, at *2 (M.D. Pa. Sept. 22, 2014).

[129] Jefferey A. Parness & Amy Leonetti, *Expert Opinion Pleading: Any Merit to Special Certificates of Merit?*, B.Y.U. L. Rev. 537, 539 (1997).

[130] *Culver*, No. 1:CV-11-2205, 2014 WL 4717836, at *2.

[131] Parness & Leonetti, *supra* note 129, at 541.

[132] *Id.* at 556.

[133] *Id.*

[134] Osborne v. Keeney, 399 S.W.3d 1, 18 (Ky. 2012).

[135] *Id.* at 17.

the merits of the case will corroborate the seriousness of the injury suffered. Unfortunately, there still exists the risk of "sympathetic" experts framing the facts in a way that is favorable to the plaintiffs, but this added hurdle makes dishonesty even more difficult.

Finally, the use of certificates of merit would help to increase animal production companies' confidence in the Kentucky judicial system. Requiring additional scrutiny demonstrates that the courts are actively trying to stamp out frivolous suits and have acknowledged the risks faced by animal producers. The burden placed on a plaintiff in obtaining a certificate of merit is relatively small and the potential assistance to a future defendant is great. From a cost/benefit perspective alone, a certificate of merit requirement is warranted.

2. Limiting Liability

Certain exceptions to the general rule of recovery for emotional distress suits should be made for the most important animal producers. The protected individuals would have to meet several criteria that demonstrate their value and usefulness. KRS 411.550(1) weighs several factors to determine whether a defendant's use of property constitutes a private nuisance and would provide a useful test for this if it were slightly modified for emotional distress claims.[136] The court would examine:

a. The lawful nature of the defendant's use of the property;
b. The manner in which the defendant has used the property;
c. The importance of the defendant's use of the property to the community;
d. The influence of the defendant's use of property to the growth and prosperity of the community;
e. The kind, volume, and duration of the emotional distress caused by the defendant's use of property;
f. The respective situations of the defendant and claimant; and
g. The character of the area in which the defendant's property is located, including, but not limited to, all applicable statutes, laws, or regulations.[137]

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[136] KY. REV. STAT. ANN. § 411.550 (West 2015).

[137] *Id.* Note that "e." has been modified to reflect its application to emotional distress claims.

This test would be applied stringently and only in the most extreme situations. It would ensure that Kentucky's most essential animal producers are able to continue their affairs without the fear of constant litigation, while also reinforcing confidence in the viability of the animal producer's operations within the state. The test's flexibility also allows the court to deny use of the exemption if they determine that the plaintiff's injury outweighs whatever value the animal producer provides. The liability exception is the natural complement to the certificate of merit. The latter provides increased scrutiny in all suits, while the former accounts for extraordinary circumstances. Together, they help to alleviate the most serious problems with the general negligence principles doctrine.

V. CONCLUSION

From its inception, the impact rule was a convoluted, arbitrary metric that succeeded only in denying recovery for some of those who were most in need. The Kentucky Supreme Court correctly decided that a new system was needed. *Osborne* stands as an incredibly important decision that, despite accomplishing much good, unfortunately left animal production companies vulnerable to a flood of litigation. Prospective plaintiffs will learn from the mistakes of the *Powell* claimants and the resulting suits will pose a major economic risk to the state of Kentucky. Therefore, procedural protections for the animal producers are absolutely necessary for both judicial fairness and financial growth. By enacting these changes, the Kentucky Legislature can ensure that some of its most important industries have a productive future.