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Stewart v. Gilliam, 271 So. 2d 466 (Fla. 4th Dist. Ct. App. 1972), rev'd, No. 43,363 (Fla. Jan. 10 1974)

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prove the injured party's chances of receiving compensation.[37] Had the court refused to grant State Farm indemnity, plaintiffs would still have been able to collect from the vicariously liable owner. The decision does serve to benefit the unauthorized permittee tort-feasor and his insurer. It frees him and his insurer from the cost of his negligence, and puts the cost on the rental agency and ultimately the public. The result is an extension of *Susco* that is unnecessary to carry out the initial purpose of financial responsibility legislation—compensating injured victims and making highway travel more safe.

Torts—Impact Rule—Damages Are Recoverable for Physical Consequences of Emotional Distress Regardless of Whether Injured Party Suffered Physical Impact in the Commission of the Tort.— *Stewart v. Gilliam,* 271 So. 2d 466 (Fla. 4th Dist. Ct. App. 1972) *rev'd,* No. 43,363 (Fla., Jan. 10, 1974).

Two cars driven by the defendants collided. The car driven by defendant Bradley then struck the Stewart home, and the defendant Gilliam's car struck a tree in the Stewart yard. Mrs. Stewart, who was in her house when the Bradley car struck it, ran outside to see if anyone was hurt. Soon after returning to the house, she felt chest pains. Two hours later she was placed in the intensive care unit of a nearby hos-

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37. The court contended that its ruling would in the long run make recovery easier for injured third parties:

> Often such permittees of rental car lessees temporarily driving rental cars would not be as fortunate as Roth and have the protection of their own personal auto liability insurance coverage, rendering it even more difficult for injured members of the public to recover their losses arising from the negligence of drivers of rental cars.

269 So. 2d at 7.

This reasoning fails because the fact that a permittee tort-feasor might "not be as fortunate as Roth and have the protection of . . . liability insurance coverage" is irrelevant in terms of protecting the public. Protection of injured members of the public requires only that *some* source of recovery be made available; Florida law has provided that that source will be the vicariously liable owner. Once that primary source of recovery has been supplied, different concerns should govern determination of which insurance company shall ultimately bear the cost. This was recognized by Justice Dekle in his dissenting opinion:

> Of course there is liability [on the part of the lessor] to the injured party and no rental contract agreement can prevent it. With that there is complete accord. Here, however, that question has been settled and the respective insurance companies are litigating indemnification. . . .

Id.

pital. Four weeks after that she died. Death was caused by complications resulting from a myocardial infarction.[1]

As administrator of his wife's estate, Mr. Stewart sued Bradley and Gilliam. A physician testified that the infarction resulted from the fright that Mrs. Stewart suffered upon hearing the sound of the accident. Recognizing that Florida law precluded recovery for injuries produced by unintentional torts absent physical impact with the plaintiff,[2] the trial court granted summary judgment for the defendants. The Fourth District Court of Appeal reversed. Abandoning the established rule in Florida, the court discarded impact with the plaintiff as a necessary element in actions seeking to recover for physical injuries resulting from negligently inflicted emotional distress.

First formulated by the English courts in the late nineteenth century,[3] the so-called "impact rule" arose from a reluctance to recognize

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1. Myocardial infarctions are commonly referred to as "coronaries" or as "heart attacks." A more technical explanation of the term follows:

> The effect of local anemia on tissues varies with the degree of deprivation of blood to which the tissue is subjected. When no blood can reach the tissue, because of the complete obstruction of the supplying blood-vessel, the tissue dies and is said to be infarcted. The process is called infarction. This complete anemia of tissue is usually due to a plugging of the blood vessel by a blood clot, a bubble of air, or a globule of fat.
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> When a portion of the heart is thus deprived of blood, an infarct of the myocardium results.
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> If the infarct is extensive or includes a vital part, death ensues. If less extensive, healing may take place, a scar forms, and the patient recovers.

Brahdy & Kahn, *Clinical Approach to Alleged Traumatic Disease,* 23 BOSTON U.L. REV. 238, 244 n.27 (1943). Mrs. Stewart also later suffered a cerebral embolus—a blood clot in the brain not originating in the brain—that caused partial paralysis. *See* 271 So. 2d at 468 & n.2.

2. *See* pp. 673-74 *infra.* The principal decision was presented to the supreme court on certified question and was argued on April 5, 1973. Gilliam v. Stewart, No. 43,363 (Fla., filed Feb. 8, 1973). It "travels with" Johnson v. Herlong Aviation, Inc., 271 So. 2d 226 (Fla. 2d Dist. Ct. App. 1972), which is also before the supreme court on certified question. *Herlong Aviation* was argued to the court on June 7, 1973. Herlong Aviation, Inc. v. Johnson, No. 43,431 (Fla., filed Feb. 26, 1973). The two decisions were not consolidated for review. The supreme court has handed down a decision in both cases. *See* note 42 *infra.*

3. The seminal decision was Victorian Rys. Comm'rs v. Coultas, 13 A.C. 222 (P.C. 1888) (Can.). James and Mary Coultas were frightened when they drove over a railroad crossing and were almost struck by an oncoming train. An employee of the defendants had opened the gate to allow the plaintiffs to cross while the train was approaching. Mrs. Coultas, although never touched by the train, allegedly suffered from "delicate health and impaired memory and eyesight" as a result of the incident. The supreme court rejected contentions that the damages were too remote, since there had been no impact and allowed the recovery. The Privy Council reversed and held that impact must be shown before recovery would be allowed for such injuries. Their Lordships were concerned with opening the courts to false claims:

> [I]n every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury.

mental distress as a compensable injury. Absent impact, mental distress was thought too ethereal to warrant legal redress.[4] This reluctance later expanded to deny recovery for physical injuries that resulted from mental distress when there had been no impact.[5] Physical injuries produced by fright or shock were also viewed as too remote for the law to attribute liability to the tort-feasor.[6] The lack of medical sophistication at the time of the rule's creation may have afforded some basis for its early acceptance. Physicians possessed only a rudimentary understanding of the physiological nature of fright or shock and of its relationship to apparently resulting physical injuries.[7] Requiring plaintiffs to sustain direct physical injury as a condition precedent to recovery, it was thought, would guarantee the validity of mental distress claims. All these fears were eventually absorbed and confused in the contention that permitting recovery without requiring a showing of impact would throw open the judicial "floodgates" to frivolous claims.[8] Despite the repudiation of the rule by the English courts only thirteen years after they had created it,[9] the doctrine was quickly embraced in several

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> The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims.

Id. at 225-26.

4. *See* International Ocean Tel. Co. v. Saunders, 14 So. 148, 154 (Fla. 1893). Speaking of recovery for mental anguish, the court believed that "[i]t goes too much into the realm of psychology, and there is no reliable way of ascertaining the injury to such an intangible and spiritual thing as the mind." *See also* Herrick v. Evening Express Publishing Co., 113 A. 16 (Me. 1921). *See generally* Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Lynch v. Knight, 11 Eng. Rep. 854, 863 (L.C. 1861) ("Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone . . . .").

5. *See* Spade v. Lynn & B.R.R., 47 N.E. 88 (Mass. 1897); Mitchell v. Rochester Ry, 45 N.E. 354 (N.Y. 1896) ("Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. . . . These results merely show the degree of fright . . . .").

6. *See* Mitchell v. Rochester Ry., 45 N.E. 354 (N.Y. 1896); Ewing v. Pittsburg, C.C. & St. L. Ry., 23 A. 340 (Pa. 1892); Victorian Rys. Comm'rs v. Coultas, 13 A.C. 222 (P.C. 1888) (Can.).

7. *Compare* Bosley v. Andrews, 142 A.2d 263, 267 (Pa. 1958), *with* Niederman v. Brodsky, 261 A.2d 84, 86 (Pa. 1970); *cf.* Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944).

8. *See* Spade v. Lynn & B.R.R., 47 N.E. 88, 89 (Mass. 1897); Mitchell v. Rochester Ry., 45 N.E. 354 (N.Y. 1896); Bosley v. Andrews, 142 A.2d 263, 267 (Pa. 1958); Huston v. Borough of Freemansburg, 61 A. 1022, 1023 (Pa. 1905); Victorian Rys. Comm'rs v. Coultas, 13 A.C. 222, 226 (P.C. 1888) (Can.).

9. The rule announced in *Victorian Railways* was rejected in Dulieu v. White & Sons, [1901] 2 K.B. 669. In *Dulieu* a pregnant woman suffered nervous shock when the defendant's servant crashed his horse-drawn carriage into the tavern in which she was working. As a result she became ill and gave birth prematurely. The court allowed recovery, although there was no impact, since physical injury resulted.

American jurisdictions.[10] The problems created by rigid application of the impact rule were also soon recognized, however, and a number of the rule's early adopters eventually acknowledged that meritorious claims were being refused because the plaintiffs could not demonstrate the talismanic "impact." As a result, some jurisdictions abandoned the rule[11] while others evolved the sometimes ludicrous "slightest impact" approach. The latter approach carried the courts to extremes in order to find "impact" and thus permit recovery.[12] Many jurisdictions simply declined to adopt the rule.[13]

In Florida the impact rule is supported by considerable decisional precedent. As used to deny recovery for mental anguish without resulting physical trauma, the rule dates to 1893.[14] It was not expressly

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10. *See, e.g.*, West Chicago St. R.R. v. Liebig, 79 Ill. App. 567 (1898); Spade v. Lynn & B.R.R., 47 N.E. 88 (Mass. 1897); Mitchell v. Rochester Ry., 45 N.E. 354 (N.Y. 1896); Miller v. Baltimore & O.S.W.R.R., 85 N.E. 499 (Ohio 1908).

11. *Cf.* Purcell v. Saint Paul City Ry., 50 N.W. 1034 (Minn. 1892).

12. *See* note 27 *infra*.

13. *See, e.g.*, Kimberly v. Howland, 55 S.E. 778 (N.C. 1906); Simone v. Rhode Island Co., 66 A. 202 (R.I. 1907).

14. The first use of the impact rule in Florida involved an action seeking recovery for mental anguish without resulting physical trauma. In International Ocean Tel. Co. v. Saunders, 14 So. 148 (Fla. 1893), the plaintiff's wife was in another city, 160 miles away from the plaintiff, when she became critically ill. A telegram was sent through the defendant to the plaintiff informing the latter of his wife's condition and requesting that he either come to the hospital where she was being treated or communicate his wishes by telegraph to the hospital. Although the telegram was properly transmitted and arrived in the plaintiff's city two days before the death of his wife, the message was not delivered to the plaintiff until nearly eleven hours after her death.

Alleging negligence, the plaintiff sought to recover from the telegraph company for "great mortification, anguish, and pain of mind, and injury to his feelings." The court rejected the claim for damages based upon mental anguish. In making its decision, the court seemed largely concerned with the great difficulty that it perceived to be involved in establishing and valuing mental anguish:

> [V]erdicts awarding pecuniary compensation, strictly speaking, must be supported by competent proofs. Can the extent or moneyed value of mental anguish be established, even apprpoximately [*sic*], by any known method of legal proofs? . . . Because of this, as it seems to us, insurmountable difficulty, we cannot agree with the . . . courts that have . . . sustain[ed] pecuniary awards for mental suffering . . . .
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> . . . The resultant injury is one that soars so exclusively within the realms of spirit land that it is beyond the reach of the courts to deal with, or to compensate by any of the known standards of value.

Id. at 151-52.

The narrow holding of *Ocean Telegraph*, denying recovery for mental anguish arising from the breach of a telegraph company's contractual duty, was mitigated by statute in 1913, and the law is still in force. FLA. STAT. § 363.06 (1971); *see* Western Union Tel. Co. v. Taylor, 114 So. 529 (Fla. 1927).

The rule that there can be no recovery for mental anguish absent physical injury has been periodically reaffirmed. *See* Dunahoo v. Bess, 200 So. 541 (Fla. 1941) (improper embalming of the body of plaintiff's wife); Arcia v. Altagracia Corp., 264 So. 2d 865 (Fla. 3d Dist. Ct. App. 1972) (child suffered shock and mental distress when part of

invoked by the supreme court to deny recovery for tangible, physical harm resulting from emotional distress, however, until 1954.[15] In tort actions damages for mental anguish are not recoverable, absent impact, unless the tort is an intentional one of a malicious or wanton nature or unless the harm resulted from malicious recklessness.[16] In actions founded solely in contract, however, mental anguish is not a proper element of damages even if the breach is malicious.[17]

Today the majority of American jurisdictions do not follow the

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bathroom ceiling fell, missing her); Carter v. Lake Wales Hosp. Ass'n, 213 So. 2d 898 (Fla. 2d Dist. Ct. App. 1968) (parents suffered mental pain and anguish because hospital allowed baby to be taken from maternity ward by wrong parents); Levine v. Knowles, 197 So. 2d 329 (Fla. 3d Dist. Ct. App. 1967) (plaintiff's dog died during routine treatment by veterinarian; dog was subsequently cremated contrary to owner's directions); Korbin v. Berlin, 177 So. 2d 551 (Fla. 3d Dist. Ct. App. 1965) (six-year-old child exposed to derogatory statements concerning her mother's sex habits); *cf.* Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950); Henry Morrison Flagler Museum v. Lee, 268 So. 2d 434 (Fla. 4th Dist. Ct. App. 1972).

15. In Crane v. Loftin, 70 So. 2d 574 (Fla. 1954), the plaintiff sought to recover for personal injuries allegedly resulting from fright. There had been no physical impact; plaintiff leaped from her car when she saw that it was about to be struck by a locomotive. The court found no malice in the operation of the train and affirmed the lower court's dismissal of the action.

16. *See* Crane v. Loftin, 70 So. 2d 574, 575 (Fla. 1954); Kirksey v. Jernigan, 45 So. 2d 188, 189 (Fla. 1950); Henry Morrison Flagler Museum v. Lee, 268 So. 2d 434, 436 (Fla. 4th Dist. Ct. App. 1972); Kimple v. Riedel, 133 So. 2d 437, 439 (Fla. 2d Dist. Ct. App. 1961).

17. The often quoted language of Kirksey v. Jernigan, 45 So. 2d 188, 189 (Fla. 1950), is not free from ambiguity on the question of recovery for mental anguish arising from a breach of contract:

> This court is committed to the rule, and we re-affirm it herein, that there can be no recovery for mental pain and anguish unconnected with physical injury in an action arising out of the negligent breach of a contract whereby simple negligence is involved.
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> But we do not feel constrained to extend this rule to cases founded purely in tort, where the wrongful act is such as to reasonably imply malice, or where, from the entire want of care of attention to duty, or great indifference to the persons, property, or rights of others, such malice will be imputed as would justify the assessment of exemplary or punitive damages. The right to recover, in such cases, is especially appropriate to tortious interference with rights . . . where mental anguish . . . is not only the natural and probable consequence of the . . . wrong committed, but indeed is frequently the only injurious consequence to follow from it. [Citations omitted.]

The extract does not make it clear whether a malicious breach of contract might create a right founded in contract for which the aggrieved party could obtain compensation for mental anguish. The rule is generally accepted, however, that recovery for mental anguish is barred even in cases of malicious breach of contract. *See* Henry Morrison Flagler Museum v. Lee, 268 So. 2d 434, 436-37 (Fla. 4th Dist. Ct. App. 1972). The party aggrieved by a contract breach may nevertheless obtain punitive damages if he can establish actions attending the breach that constitute an independent, willful tort. *See id.* at 437; Carter v. Lake Wales Hosp. Ass'n, 213 So. 2d 898 (Fla. 2d Dist. Ct. App. 1968). *See also* Singleton v. Foreman, 435 F.2d 962, 971 (5th Cir. 1970); Carpel v. Saget Studios, Inc., 326 F. Supp. 1331 (E.D. Pa. 1971); RESTATEMENT OF CONTRACTS §§ 341-42 (1932).

impact rule.[18] They reject the artificiality of the contemporaneous impact requirement and analyze actions for negligently inflicted mental distress upon general tort principles. Only ten jurisdictions join Florida as bastions of the impact rule.[19]

In addition to the clear weight of authority rejecting the impact rule in other jurisdictions, two Florida district courts of appeal have recently evinced contempt for its application.

In *Way v. Tampa Coca Cola Bottling Co.*,[20] the plaintiff became nauseated upon discovering what appeared to be a dead, hairless rat in the bottled soft drink from which he was drinking. The Second District Court of Appeal reversed a directed verdict for the defendant bottler. Proceeding on the premise that the trial court had found a lack of impact determinative,[21] the appellate court rejected application of the impact rule in cases where adulterated *food* or *drink* results in emotional trauma that, in turn, produces physical trauma. Within the limited scope of its decision the court adopted a simple and traditional proximate cause analysis.

Later, however, in *Johnson v. Herlong Aviation, Inc.*,[22] the same court appeared to abandon completely the impact rule by sustaining a cause of action for mental pain and anguish that allegedly resulted from the vibrations of a rented aircraft in which the plaintiff had ridden.

Finally, in *Stewart,* the most recent Florida decision abandoning the impact rule, the Fourth District Court of Appeal discarded the rule insofar as it would preclude recovery when physical injury results from emotional trauma. The *Stewart* opinion attempted to dispose of the three arguments traditionally marshalled in support of the impact rule. These arguments form a rather tortured logical chain: because it is extremely difficult (if not impossible) to prove causation between mental distress and physical injuries, there will be many fraudulent claims, and they will inundate the courts.

Arguably, the premise that there is nearly insurmountable difficulty

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18. *See* Commentary, *Torts: The Impact Rule—Nuisance or Necessity?*, 25 U. FLA. L. REV. 368, 375 (1973).

19. *Id.*

20. 260 So. 2d 288 (Fla. 2d Dist. Ct. App. 1972).

21. The court stated:

> [T]he appellant was attempting to get the contents of the bottle out by sucking upon it and discovered the foreign substance. He immediately became nauseated and went outside and vomited. We might be correct in holding that this was sufficient contact to get around the impact doctrine. . . . We choose rather to take the position that the trial court based its directed verdict on the lack of impact.

Id. at 289.

22. 271 So. 2d 226 (Fla. 2d Dist. Ct. App. 1972).

in establishing a causal link between mental distress and an allegedly resulting physical injury was supported by the state of medical knowledge at the time of the rule's genesis. It finds little, if any, foundation, however, in the current state of medical science.[23] *Stewart* took notice of the fact that "medical science has come a long way since the turn of the century."[24] Then, adopting the view recently espoused by the Pennsylvania Supreme Court in *Niederman v. Brodsky*,[25] the Florida court concluded that this argument could no longer support the impact rule, reflecting, as it does, a condescending and inaccurate view of modern medicine.[26]

Probably the clearest illustrations of the fallaciousness of the impact rule are found in the "slightest impact" decisions. The apparent ability of the courts to perceive a causal link between shock and fright and an apparently resulting physical injury in the presence of some trivial impact, usually unrelated to either the mental or the emotional trauma, suggests, of course, that causation is provable without impact.[27] The requirement of some impact, no matter how trivial, is material only to the supposedly Herculean task of proving causation without impact. Yet in *Stewart* the trial court included in its summary judgment the

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23. *See* Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117, 121 (Me. 1970); Daley v. LaCroix, 179 N.W.2d 390, 395-97 (Mich. 1970); Niederman v. Brodsky, 261 A.2d 84, 86-87 (Pa. 1970): Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); Smith, *supra* note 7; Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260 (1921); Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237 (1971). *See also* H. HART & A. HONORE, CAUSATION IN THE LAW (1959).

24. 271 So. 2d at 472.

25. 261 A.2d 84 (Pa. 1970). In *Niederman*, Pennsylvania abandoned the impact rule. Addressing the argument that medical proof of a causal link between fright and physical injury would be prohibitively difficult, the court acknowledged that medicine had taken some strides in the eighty-two years since *Victorian Railways:*

> While we agree that this might have been an appropriate conclusion because of the lack of sophistication in the medical field when the impact doctrine was first announced in 1888, it would presently be inappropriate for us to ignore all of the phenomenal advances medical science has achieved in the last eighty years. . . .
>
> New equipment and research, improved education and diagnostic techniques, and an increased professional understanding of disease in general require us now to give greater credit to medical evidence.

Id. at 86 (footnote omitted); *see* Robb v. Pennsylvania R.R., 210 A.2d 709, 712 (Del. 1965); Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117, 121 (Me. 1970); Falzone v. Busch, 214 A.2d 12, 14-15 (N.J. 1965); Battalla v. State, 176 N.E.2d 729, 731-32, 219 N.Y.S.2d 34, 38 (1961).

26. 271 So. 2d at 472-73.

27. The *Niederman* court observed:

> It appears completely inconsistent to argue that the medical profession is absolutely unable to establish a causal connection . . . where there is no impact at all, but that the slightest impact (e.g., a bruised elbow and sprained ankle . . .) suddenly bestows . . . the knowledge and facility to diagnose the causal connection

finding that Mrs. Stewart "suffered a myocardial infarction as a reaction to the fright caused by the noise of the collision of Defendant's vehicle with the house."[28] Similarly, in *Way,* the jury was apparently convinced, by a preponderance of the evidence, that causation had been established. But the trial court entered, in effect, a judgment *non obstante veredicto* by relying upon the impact rule.[29] If it is thus possible to demonstrate causation without impact, invocation of the rule to deny recovery seems to denigrate both the substantial attainments of

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between emotional states and physical injuries.

261 A.2d at 87 (footnotes omitted); *see* Robb v. Pennsylvania R.R., 210 A.2d 709, 712 (Del. 1965); Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117, 121 (Me. 1970); Falzone v. Busch, 214 A.2d 12, 15 (N.J. 1965); Battalla v. State, 176 N.E.2d 729, 731, 219 N.Y.S.2d 34, 37 (1961).

For examples of the application of the slightest impact device, see Arkansas Motor Coaches, Inc. v. Whitlock, 136 S.W.2d 184 (Ark. 1940) (touching of arm termed a "constructive injury"); Christy Bros. Circus v. Turnage, 144 S.E. 680 (Ga. Ct. App. 1928) (horse defecated in plaintiff's lap); Interstate Life & Acc. Co. v. Brewer, 193 S.E. 458 (Ga. Ct. App. 1937) (coins tossed on plaintiff); Porter v. Delaware, L. & W.R.R., 63 A. 860 (N.J. 1906) (dust in eyes); Jones v. Brooklyn Heights R.R., 48 N.Y.S. 914 (Sup. Ct. 1897) (small lightbulb fell on head); Morton v. Stack, 170 N.E. 869 (Ohio 1930) (smoke inhalation); Hess v. Philadelphia Transp. Co., 56 A.2d 89 (Pa. 1948) (automobile touched by electric line); *cf.* Potere v. City of Philadelphia, 112 A.2d 100 (Pa. 1955).

While Florida could not be fairly characterized as having adopted a "slightest impact" approach, the supreme court's most recent "impact rule" decision does seem to indicate a willingness to lessen the rigors of the impact rule when the circumstances in favor of permitting recovery are compelling. In Clark v. Choctawhatchee Elec. Co-Operative, Inc., 107 So. 2d 609 (Fla. 1958), the plaintiff was ironing clothes in her gasoline service station building. The building was adjacent to a power line carrying 7,200 volts of electricity, which the defendant's employees were attempting to repair. The power line fell, struck the gasoline pumps, and set fire to a nearby woods. When the line fell plaintiff "felt a shock[,] [h]er tongue thickened, her legs began to ache, then buckled, and she fell to the ground." *Id.* at 610. Plaintiff sued for her injuries, which included emotional distress, a prolonged burning sensation in her limbs, and a curtailment of her actions thereafter. She suffered no burns or other clearly observable physical injuries. The trial court reduced a jury award of $10,000 to $1.00, finding a lack of physical impact. The trial court apparently found the plaintiff's inability to testify that she knew that she had suffered an electrical shock (never having experienced one before) as decisive. That is, even the trial court indicated that it would have recognized an electrical shock, once established, as "impact."

Thus the supreme court, noting that it was not receding from the impact rule, found that "impact" clearly occurred when the plaintiff was shocked and simply discounted the trial court's apparent emphasis upon the absence of burns or bruises and the plaintiff's inexperience with electrical shocks.

The decision is not one involving only "slightest impact"; the impact (the shock) was hardly slight. It does, however, evidence a willingness to broaden the scope of "impact" to embrace events other than the collision of physical masses.

28. 271 So. 2d at 469.

29. Before the case went to the jury the defendant moved for a directed verdict, but the trial judge reserved his ruling. After the jury returned a judgment of $1,000 for the plaintiff, the court ruled for the defendant as a matter of law. 260 So. 2d at 288-89; *see* FLA. R. CIV. P. 1.480.

medical science and the ability of juries to evaluate evidence and reach intelligent conclusions.

Subsumed in this argument about proof of causality is the notion that the impact rule is needed to establish the foreseeability of mental distress.[30] Without impact, it is argued, one could not reasonably anticipate that his actions would produce mental distress, much less resulting physical trauma, and thus no liability may be found for either injury. *Stewart* recognizes that a finding of foreseeability must precede liability, but correctly perceives that foreseeability is critical in making the initial determination of negligence. In making that determination the question is whether the defendant should have foreseen that some injury might result from his actions. If that question is answered in the affirmative, then liability extends to "all the consequences that reasonably and naturally flow . . . from his wrongful act whether or not these consequences were *actually* contemplated or foreseen."[31] Consequently, a requirement of contemporaneous impact adds nothing analytically useful to the threshold determination of foreseeability. Liability must be resolved using one standard for all claims of negligence regardless of the actual injury incurred.

Responding to the second charge—that fraudulent or exaggerated claims would be compensated if there were no impact requirement—the court simply noted that one can accept that proposition only by conceding that the judicial system is incapable of recognizing fraudulent claims: "[A]ny protection against such . . . claims is contained within the system itself—in the integrity of our judicial process, the knowl[edge] of expert witnesses, the concern of juries and the safeguards of our evidentiary standards."[32]

More importantly, the impact rule enhances neither the court's nor the jury's ability to recognize fraudulent claims. This point, too, is epitomized by the "slightest impact" decisions. In those cases the courts and the juries have effectively distinguished valid and invalid claims, but they have implemented their judgments on the validity of the claims by manipulation of the ill-defined concept of "impact."[33] The

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30. *See* 271 So. 2d at 474; Dillon v. Legg, 441 P.2d 912, 920-22, 69 Cal. Rptr. 72, 79-82 (1968). Foreseeability is the chief element of the tort concept of "duty." Thus, many decisions finding no duty absent impact are largely concerned with foreseeability. *See* Green, *"Fright" Cases,* 27 ILL. L. REV. 761, 763-67 (1933).

31. 271 So. 2d at 474. The opinion recognizes that there is a split of authority as to whether the defendant's foreseeability must extend to *all* specific injuries, but notes that the general rule in Florida supports its position on this issue. *See* King v. Cooney-Eckstein Co., 63 So. 659 (Fla. 1913).

32. 271 So. 2d at 475, *quoting from* Niederman v. Brodsky, 261 A.2d 84, 87 (Pa. 1970).

33. *See* note 27 *supra.*

danger of fraudulent claims and the difficulty of distinguishing them from meritorious claims is no different for these cases than for those in which no impact occurs. The reasoning that prophesies the encouragement of fraudulent claims embodies the notion that abandonment of the impact rule would precipitate recoveries for physical injuries that could not satisfactorily be linked to the tortious act. The argument, however, is a part of the broader and periodically deflated notion that medicine has remained in such a sufficiently unsophisticated state as to be incapable of establishing causation between a tortious act and the injury for which recovery is sought.

The *Stewart* court summarily dismissed the third argument—that the fraudulent claims, supposedly invited by abolition of the impact rule, would engulf the courts. The short and compelling answer to the flood-of-frivolous-claims spectre is that experience refutes it.[34] Jurisdictions that have repudiated the rule have experienced no resultant increase in litigation, and they have not labored under a greater caseload than have the few states that continue to follow the rule.[35]

If the Florida Supreme Court elects to retain the impact rule when it hands down its decisions in *Stewart* and *Herlong Aviation,* little more need be said. But assuming, *arguendo,* that the court will discard the impact rule, the important question will become what limitations, if any, it will impose upon recovery for mental distress. Abolition of the impact rule is not necessarily the equivalent of permitting recovery for mental distress in all cases. One alternative would simply redirect analysis from one focusing upon the presence of physical *impact* to one focusing upon the presence of physical *results* of the tortious act. The impact rule could thus be abandoned while continuing to deny recovery for mental distress in the absence of a resulting physical injury. This alternative has been clearly presented to the court by *Stewart* and *Herlong Aviation* since the two decisions seem to conflict on this point. *Stewart* carefully limited its rejection of the rule to situations involving resulting physical injuries. *Herlong Aviation,* on the other hand, allowed recovery for mental distress without resulting physical injury. Yet this apparent difference in rationales may be illusory—the consequence of carefully fashioning each decision to be exactly as broad as the facts of the case. *Stewart* nowhere clearly indicates that a different

34. 271 So. 2d at 475.

35. *Id. See* Niederman v. Brodsky, 261 A.2d 84, 89 (Pa. 1970), where it is pointed out that "[t]he volume of litigation has been heaviest in states following the . . . impact rule." The court also refers to the observation of the Minnesota Supreme Court in Okrina v. Midwestern Corp., 165 N.W.2d 259, 263 (Minn. 1969), that "there is no indication [that the abandonment of the impact rule] has either spawned a flood of litigation or bred a rash of fraudulent claims since its adoption in 1892."

result would be reached were that court presented with the circumstances involved in *Herlong Aviation*.[36]

The rationale supporting a resulting physical injury requirement is the familiar one that mental distress that is neither produced by nor results in physical injury is too easily counterfeited and perhaps even too trivial to compensate.[37] The arguments underlying this "resulting physical injury" rule are partly duplicative of those advanced to support the impact rule. Causation, however, would appear to be a less important consideration in deciding whether to compensate mental distress without resulting physical harm than it has been in deciding whether to compensate the physical effects of mental distress. In the latter instance emphasis has been traditionally placed upon the difficulty of establishing a causal connection between the mental distress and the physical injury supposedly resulting from it. In the former, however, emphasis would most likely be upon the existence and the severity of the alleged mental distress. In most simple form the argument would have two parts: resulting physical harm serves to "guarantee" the existence of the alleged emotional distress, and mental distress that is not severe enough to produce physical harm is *de minimis*—too trivial to be compensated by the courts.

Certainly the arguments for and against the fear of fraudulent claims are applicable here. But preservation of this argument after discarding the impact rule could prove rather tedious since both requirements rest, at least in part, upon the same ground. Subsequent decisions would also face the frequently difficult task of distinguishing physical manifestations of injuries from those that are mental.[38] An

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36. Although the *Stewart* court was careful to limit its decision to whether a cause of action exists for the recovery of damages stemming from the "*physical consequences* of a mental or an emotional disturbance caused by a negligent act in [the] absence of physical impact," 271 So. 2d at 467, nowhere in its opinion did the court speculate on the question presented in *Herlong Aviation*. The district courts have been cautious in limiting their holdings in this area to the facts before them while perhaps holding dormant a more sweeping viewpoint. Consider, for example, that the same district court of appeal (the second district) that rendered the carefully limited but path-breaking decision in *Way* also decided *Herlong Aviation*, which apparently totally abandoned the impact rule and the bar to recovery for mental distress, eight months later.

37. In Falzone v. Busch, 214 A.2d 12, 17 (N.J. 1965), the court framed its holding thusly:

> We hold, therefore, that where negligence causes fright from a reasonable fear of immediate personal injury, which fright is adequately demonstrated to have resulted in substantial bodily injury or sickness, the injured person may recover if such bodily injury or sickness would be regarded as proper elements of damage had they occurred as a consequence of direct physical injury rather than fright. Of course, where fright does not cause *substantial* bodily injury or sickness, it is to be regarded as too lacking in seriousness and too speculative to warrant the imposition of liability.

approach demanding a resulting physical injury might evoke a "slightest resulting injury" counterpart to the "slightest impact" test. Courts might again feel obliged to divine appropriate distinctions between mental disorders and physical "injuries" in order to avoid dismissals of otherwise clearly meritorious claims.

A second limitation, applied by a number of the courts that have repudiated the impact rule,[39] requires, as a precondition to liability, that the plaintiff have been within the "zone of danger" created by the negligent act.[40] That is, the plaintiff must have been in a sufficiently proximate relation to the tortious act for the tort-feasor to have foreseen possible injury to him. Absent foreseeability there is no duty upon which to base a finding of negligence. The flexibility of the zone-of-danger limitation renders it more desirable than the impact rule because, under the former analysis, each case is examined on its facts to determine the parameters of the zone. As previously noted, foreseeability should be uniform for all injuries, mental or physical, suffered in the same fact situation since foreseeability relates only to the initial determination of negligence. Because the zone-of-danger requirement performs this function, no tenable rationale linked to fore-

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38. *See generally* Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1258-62 (1971).

39. *See, e.g.*, Robb v. Pennsylvania R.R., 210 A.2d 709 (Del. 1965); Niederman v. Brodsky, 261 A.2d 84 (Pa. 1970); Guilmette v. Alexander, 259 A.2d 12 (Vt. 1969). *See also* Note, 20 DEPAUL L. REV. 1029, 1040-43 (1971); 16 VILL. L. REV. 1011, 1013 n.12 (1971).

40. *See* Orlo v. Connecticut Co., 21 A.2d 402 (Conn. 1941); Mahnke v. Moore, 77 A.2d 923 (Md. 1951). The zone-of-danger concept has typically been applied in situations in which the plaintiff seeks to recover for mental distress or physical injury allegedly produced by the mental distress occasioned by being placed in fear of personal injury to himself. *See* Note, *One Step Beyond the Zone of Danger Limitation Upon Recovery for the Negligent Infliction of Mental Distress*, 43 TEMPLE L.Q. 59 (1969). The majority of decisions have refused to permit recovery for mental distress induced by witnessing harm done to a third person. *See, e.g.*, Strazza v. McKittrick, 156 A.2d 149 (Conn. 1959); Resavage v. Davies, 86 A.2d 879 (Md. 1952). California has led the way in permitting recovery in third party peril cases. *See* Dillon v. Legg, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). *See also* Whetham v. Bismarck Hosp., 197 N.W.2d 678 (N.D. 1972); Jelley v. Laflame, 238 A.2d 728 (N.H. 1968). The view expressed in RESTATEMENT (SECOND) OF TORTS § 313 (1965) would deny recovery for mental distress or resulting physical harm unless the plaintiff-observer was himself placed in physical danger of *impact*. *See* Whetham v. Bismarck Hosp., *supra*, at 683-84; Guilmette v. Alexander, 259 A.2d 12 (Vt. 1969). But this view is not universally held because it seems illogical to reintroduce an impact requirement in jurisdictions where the impact rule has been abandoned. Thus, some courts reject the fear-of-impact requirement but limit recovery to instances in which recovery is sought for mental distress accompanied by resulting harm. *See* Dillon v. Legg, *supra*; Toms v. McConnell, 207 N.W.2d 140 (Mich. Ct. App. 1973); *cf.* Aragon v. Speelman, 491 P.2d 173 (N.M. Ct. App. 1971); Schurk v. Christensen, 497 P.2d 937 (Wash. 1972). *See generally* Note, *Traumatic Mental Injury and the Bystander*, 24 U. So. Cal. L. REV. 439 (1972).

seeability could remain for distinguishing actions for mental distress from other types of negligence actions; indeed, the propagation of such a terminological distinction would create a substantive danger in application. But a rigid interpretation of the zone-of-danger test could also give birth to the equivalent of an "almost impact" requirement—a jurisdiction may choose to set a finite limit upon the parameters of the zone. Such an analytic scheme would create problems similar to those experienced under the impact rule.

The painfully obvious alternative, of course, would dispense with all such artificial limitations upon claims for mental distress. While "[i]t is universally agreed that there are compelling reasons for limiting the recovery . . . to claims of *serious* mental distress,"[41] the limitations described above are quite probably not the best means of deciding which claims should be compensated. The simple effect of this approach would be to bring causes of action for mental distress within the normal tort principles of duty, breach, proximate cause and damages. In doing so, courts would not only function within flexible guidelines in determining causality, but would also employ the objective standard of the reasonable man in deciding which claims warrant compensation. Each case would be evaluated on its facts and tested against the general standards of authenticity and severity of the injury without being forced to conform to the rigid mold of an artificial liability-limiting standard. This analysis, it should be remembered, would only serve to allow the plaintiff an *opportunity* to present his proof to the court and to the jury. Thereafter, sufficient protection against the fears that created and attended the impact rule and the rule denying compensation for pure mental distress would exist within the application of normal tort principles and within the expertise and abilities of physicians, lawyers, judges and juries.[42]

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41. Rodrigues v. State, 472 P.2d 509, 520 (Hawaii 1970).

42. On January 10, 1974, the supreme court reversed the decisions of the district courts of appeal in *Stewart* and *Herlong Aviation*. The majority concluded that these cases failed to raise any valid justification for rejecting long standing precedent in Florida and did not undertake any substantive analysis of the impact rule. In reaching its decision the court emphasized the failure of the district courts to recognize the binding effect of its prior decisions. The court did note that it continues to except intentionally inflicted torts from the strictures of the impact rule.