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MALICIOUS, INTENTIONAL AND NEGLIGENT MENTAL DISTRESS IN FLORIDA

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I. INTRODUCTION

Causes of action for mental distress fall into three broad categories in Florida: malicious infliction of mental distress, intentional infliction of mental distress, and negligent infliction of mental distress.

One could draw order out of the patchwork of mental distress cases in Florida by viewing them as a series of recurring fact patterns. Unwholesome food is always compensated;\(^1\) destruction of a pet is always compensated, sometimes even when done merely negligently,\(^2\) but certainly when done maliciously;\(^3\) mental distress involving the mistreatment of dead bodies is always compensated if malice is involved,\(^4\) but not when mere negligence is involved;\(^5\) and before the area was preempted by federal law,\(^6\) mental distress connected with telegraphic transmissions was usually compensated as long as the language of the transmission warned of the possibility of harm.\(^7\) Termination of an "at will" employee is never compensated;\(^8\) mental distress in domestic relations is never compensated;\(^9\)
sated; mental distress is not compensated in actions involving an insurer's dealings with its insured (or third parties) under contracts of insurance unless active concealment, misrepresentation, or actual bad faith is involved; and mental distress actions against participants in commitment proceedings will not be compensated as long as the participants do not act with malice or intent to inflict mental distress.

By viewing cases as recurring fact patterns, some predictability is provided for future cases. What is lacking, however, is proportionality of result from one fact pattern to another, and a method of delimiting the cause of action for the negligent infliction of mental distress that avoids inconsistent and capricious results.

The purpose of this article is to describe the development of the cause of action for mental distress in Florida, to describe various requirements for the cause of action, and to show how judges change the requirements from one case to another, thus confining the cause of action in ways that do not comport with the articulated benchmarks of the action. The appropriate basis for limiting the cause of action for negligent infliction of mental distress is a proximate cause test, because it allows for necessary judicial and jury discretion, and provides at least as much certainty as present

DCA 1978), aff'd, 384 So. 2d 1253 (Fla. 1980); Butler v. Lomelo, 355 So. 2d 1208 (Fla. 4th DCA 1977); Dowling v. Blue Cross, 338 So. 2d 88 (Fla. 1st DCA 1976); Henry Morrison Flagler Museum v. Lee, 268 So. 2d 434 (Fla. 4th DCA 1972).

9. Cordoba v. Cordoba, 393 So. 2d 589 (Fla. 4th DCA 1981); Mims v. Mims, 305 So. 2d 787, 790 (Fla. 4th DCA 1974) ("he lied when he said he loved me").


11. Habelow v. Travelers Ins. Co., 389 So. 2d 218 (Fla. 5th DCA 1980); World Ins. Co. v. Wright, 308 So. 2d 612 (Fla. 1st DCA 1975); cf. Lopez, 406 So. 2d 1155. However, an insurer will not be heard to argue that a count for mental distress and punitive damages must be struck from a court for breach of contract because evidence of net worth might prejudice the jury on the determination of the breach of contract. This "spill-over" theory has been rejected. See United States Auto. Ass'n v. Byrd, 370 So. 2d 1247 (Fla. 4th DCA 1979).

See also Metropolitan Life Ins. Co. v. McCarson, 8 Fla. L.W. 994 (Fla. 4th DCA Apr. 6, 1983) in which the court awarded wrongful death damages and attorney's fees based upon the insurer's intentional infliction of mental distress, but declined to award mental distress damages because the legislature did not provide for such damages in the Wrongful Death Act, FLA. STAT. § 768.21 (Supp. 1982). The court's authority for awarding attorney's fees is unclear; perhaps the award is based upon the contract of insurance. However, it is clear that damages under the Wrongful Death Act are insufficient to deter the intentional misconduct that occurred in this case, and intentional misconduct generally.

12. Bencomo v. Morgan, 210 So. 236 (Fla. 3d DCA 1968); Cawthon v. Coffer, 264 So. 2d 873 (Fla. 2d DCA 1972).
limitations provide.

II. MALICIOUS INFILCTION OF MENTAL DISTRESS

The genesis of malicious infliction of mental distress is Kirksey v. Jernigan, in which the Florida Supreme Court held that its reluctance to allow a cause of action for negligent infliction of mental distress would not limit the availability of recovery in cases where the defendant's conduct implied malice. The court said malice would be implied whenever the defendant acted with "great indifference" to the rights of plaintiff or to plaintiff's property. The Kirksey court implied malice in the defendant's refusal to relinquish the body of the plaintiff's dead child until twice the normal embalming fee had been paid by the mother, an "impecunious colored woman."

Subsequent cases in which the court implied malice in the defendant's conduct included the act of throwing a garbage can at a dog by a "garbage gatherer," with the result that the dog, Heidi, was hit and died from the blow; the act of "destroying" a dog by a veterinarian, in order to cover-up veterinary malpractice; a medical doctor's act of performing an autopsy over the strenuous objections of the children of the deceased in order to better defend against a feared medical malpractice suit; and the demand of a policeman to return, under pain of arrest, a legally repossessed automobile to the debtor, his friend. In addition, a court held there could be recovery of mental distress damages for the extermination by the county of "Big Foot," a seven-toed cat, before the required three-day waiting period, if the jury found malice, that is, "great indifference" to the property rights of the plaintiff.

Courts have declined to imply malice, however, where a medical examiner refused to relinquish the body of the plaintiff's son, killed in an automobile accident, but mistakenly identified by the

13. 45 So. 2d 188. The possibility of such a case was suggested in International Ocean, 14 So. 148.
14. Kirksey, 45 So. 2d at 189.
15. La Porte, 163 So. 2d 267.
16. Levine, 197 So. 2d 329. See also the act of leaving a dog on a heating pad too long by a veterinarian, Knowles, 360 So. 2d 37, discussed infra.
17. Jackson, 228 So. 2d 916.
18. City of Deland v. Florida Transp. and Leasing Corp., 293 So. 2d 800 (Fla. 1st DCA 1974). This was an intentional cause of action, but the court disposed of it as malice. Cf. Claycomb v. Eichles, 399 So. 2d 1050 (Fla. 2d DCA 1981).
police as someone else; where a hospital "misplaced and never again located" the body of plaintiff's premature infant; where a hospital sent home plaintiff's newborn with the wrong parents; where medical doctors, in good faith, participated in commitment proceedings; where plaintiff's deceased husband was embalmed by an undertaker not of her choosing; and where an insurance company hired an unqualified medical doctor to examine an insurance applicant.

Courts have also refused to imply malice in cases of termination of employment, even in one case where at least "great indifference" if not intent should have been found, because the defendant's agent occupied a position of authority over the plaintiff, which imposes a higher duty upon the defendant. The defendant's agent encouraged the plaintiff to lie, then fired her for doing so.

Then there have been cases where courts implied malice too easily, and permitted recovery for "great indifference" that looked a lot like ordinary negligence and was clearly not intentional misconduct, as when defendant veterinarian left a post-operative animal on a heating pad for a day and a half, and the animal died from

20. Przybyszewski v. Metropolitan Dade County, 363 So. 2d 388 (Fla. 3d DCA 1978).
23. Bencomo, 210 So. 2d 236; Cawthon, 264 So. 2d 873.
24. Kimple, 133 So. 2d 437. Plaintiff's husband died of a heart attack in his doctor's office while plaintiff was out of the city, and the coroner requested that the defendant funeral home owner pick up the body. Defendant went to considerable trouble to find the deceased's wife in a nearby city, sent a car for her, and arranged for a minister and an acquaintance of the plaintiff to travel in the car to greet and comfort her. When requested to transfer the body of the deceased to the funeral home of the plaintiff's choice, defendant indicated that the embalming process had already begun, but after it was completed he did so, and was later paid the customary embalming fee by the other funeral director.
25. Peeler v. Independent Life & Accident Ins. Co., 206 So. 2d 34 (Fla. 3d DCA 1968). The liability of the unqualified doctor was not at issue.
26. Catania, 381 So. 2d 265; Gellert v. Eastern Airlines, Inc., 370 So. 2d 802 (Fla. 3d DCA 1979) (removal of important privileges of an employee under contract short of termination); DeMarco, 360 So. 2d 134; Butler, 355 So. 2d 1208; Dowling, 338 So. 2d 88; Henry Morrison Flagler Museum, 268 So. 2d 434.
27. Food Fair, Inc. v. Anderson, 382 So. 2d 150 (Fla. 5th DCA 1980).
28. See City of Deland, 293 So. 2d 800; Johnson v. Sampson, 208 N.W. 814 (Minn. 1926); Janvier v. Sweeney, 2 K.B. 316 (1919); W. Prosser, HANDBOOK OF THE LAW OF TORTS § 12, at 56-57 (4th ed. 1971). "The extreme and outrageous nature of the [actionable] conduct may arise not so much from what is done as from abuse by the defendant of some relation or position which gives him actual or apparent power to damage the plaintiff's interests. The result is something very like extortion." Id.
the resulting burn.\textsuperscript{30}

Two significant limitations have been imposed upon the implied malice or "great indifference" test of \textit{Kirksey}. First, the \textit{Kirksey} test only allows mental distress damages when some other intentional or malicious tort has been committed. This limitation originated in \textit{Slocum v. Food Fair Stores},\textsuperscript{31} in which the court gave a restrictive misreading to the rule of \textit{Kirksey}.\textsuperscript{32} Because the \textit{Kirksey} test is sound, and has not been overruled, the \textit{Slocum} limitation is perhaps an aberration.

The second limitation is peculiar to cases in which an insurance company is the defendant. In those cases, "great indifference" will not suffice to provide recovery for mental distress. Instead, "active concealment and misrepresentation" or "actual bad faith" is required.\textsuperscript{33} In the cases in which this requirement is imposed, the limitation is sometimes expressed as a contract limitation upon the tort suit.\textsuperscript{34} This limitation, imposed by the Florida Supreme Court, was ignored by a Fourth District Court of Appeal case in which no such limitation was mentioned in the court's decision to send a case to the jury.\textsuperscript{35}

In addition to these limitations, a few courts have established punitive damages as a threshold test of malice,\textsuperscript{36} and have held that gross negligence is not the legal equivalent of malice and will not support the award of punitive damages,\textsuperscript{37} a roundabout way of

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\item \textsuperscript{30} \textit{Knowles}, 360 So. 2d 37.
\item \textsuperscript{31} 100 So. 2d 396 (Fla. 1958).
\item \textsuperscript{32} It is not clear whether \textit{Kirksey} even met the requirement. There were other counts in the \textit{Kirksey} case; they dealt with interference with dead bodies.
\item \textsuperscript{33} \textit{Butchikas}, 343 So. 2d 816; \textit{Stetz}, 368 So. 2d 912; \textit{Saltmarsh}, 344 So. 2d at 863; \textit{World Ins.}, 308 So. 2d 612; MacDonald v. Penn Mut. Life Ins. Co., 276 So. 2d 232 (Fla. 2d DCA 1973). When the court says, "deliberate, overt and dishonest dealing," it obviously means more than unlawfully and deliberately refusing to pay what is owed. See \textit{Metropolitan Life}, 8 Fla. L.W. at 995 for "evidence of 'bad blood' " amounting to intentional misconduct. The appellate court awarded damages under Florida's Wrongful Death Act, \textit{Fla. Stat. § 768.21} (Supp. 1982). Because the Act does not provide mental distress damages, the appellate court reversed the trial court's mental distress award. It is clear that damages under the Act are insufficient to deter intentional misconduct. This deserves legislative attention.
\item \textsuperscript{34} \textit{Butchikas}, 343 So. 2d at 817 n.2.
\item \textsuperscript{35} \textit{Lopez}, 406 So. 2d 1155. In the court's terms, the case involved negligence of the insurer in failing to secure the consent of the insured to a life insurance policy purchased by the insured's murderous wife. But "great indifference" is suggested by the insurer's failure to honor the insured's order to cancel the policy, and failure to note and respond appropriately to the fact that the premiums on the policy totalled one half of the insured's annual income.
\item \textsuperscript{36} \textit{Saltmarsh}, 344 So. 2d at 863; \textit{Carter}, 213 So. 2d 898; \textit{Kimple}, 133 So. 2d at 439. This, of course, merely begs the question.
\item \textsuperscript{37} \textit{Carter}, 213 So. 2d at 900. "[G]ross negligence . . . is that kind or degree of negli-
saying that gross negligence is not the legal equivalent of malice.

The implied malice or "great indifference" test for imposing liability for the infliction of mental distress in Florida is an important one. Most of the cases decided under this test involved intentional conduct, but had the cases been analyzed as intentional mental distress actions, recovery would have been doubtful because of additional restrictions on the intentional mental distress action discussed below. In fact, at least one case that was filed as an intentional action was decided based upon the "great indifference" analysis, with no attempt whatsoever to examine the requirements of an intentional cause of action: outrageous conduct and severe distress. As a result, a policeman's demand that the plaintiff immediately surrender a legally repossessed car, in order to recover the car for a friend of the policeman who had complained to him about the repossession, was held to imply malice sufficient to support recovery, without a finding that the distress which resulted was severe. No doubt the conduct involved was outrageous, but the dispensation from the severe distress requirement was generous.

Thus, while Florida courts hold a very firm doctrinal line in both intentional and negligent mental distress actions, they tolerate this hybrid malice action, which allows easier access to recovery than either intentional or negligent infliction of mental distress, and is especially useful when mistreatment of dead bodies or animals is sufficient to support a judgment for exemplary or punitive damages. ... "Id. (quoting Carraway v. Revell, 116 So. 2d 16, 22 (Fla. 1959)). Thus, the court stated, even gross negligence will not support recovery under the rule of Kirksey.

38. See City of Deland, 293 So. 2d 800.
39. Id.
40. In Slocum, 100 So. 2d 396, Mrs. Slocum was not allowed to recover despite a heart attack, because the court held that the insult she suffered was not sufficiently outrageous.
41. Federal Ins. Co. v. Applestein, 377 So. 2d 229 (Fla. 3d DCA 1979), demonstrates the importance of recognizing this hybrid, and the subtle distinctions among negligent, malicious and intentional actions. Plaintiff Mackin sued Applestein; Applestein was insured by Federal. The insurer's policy excluded acts committed with intent, yet the substantive law of mental distress restricts compensation for simple negligence. The plaintiff apparently attempted to steer his way between these limitations by alleging malice in order to come within the rule of Kirksey, alleging something more than negligence, but something less than intent. The court found that the plaintiff had alleged too much intent for the insurance policy at issue to apply. Everyone (the defendant Applestein, the Applestein Trust, and the plaintiff Mackin) but the insurance company wanted the coverage of the insurance policy to apply. Belatedly recognizing the subtlety of the middle ground, the plaintiff amended his complaint to claim that Applestein acted "only with imputed or implied malice," and thus survived a motion to dismiss. Mackin v. Applestein, 404 So. 2d 789 (Fla. 3d DCA 1981).
involved. In fact, this respect shown by the courts for affronts suffered by survivors through callousness toward dead bodies and animals is somewhat ironic when contrasted to the judicial treatment of the living.

III. INTENTIONAL INFLICTION OF MENTAL DISTRESS

Slocum v. Food Fair Stores is the first and only Florida Supreme Court case to consider the action for the intentional infliction of mental distress. But Florida had been allowing the action for quite some time under the rubric of implied malice. The Slocum opinion set out the requirements for the cause of action for intentional mental distress: severe distress and outrageous conduct.

Outrageous conduct has been defined by decisions of the district courts of appeal. It includes saying to a child: “Do you know that a man is sleeping in your mother’s room?” falsely telling the purchaser of a car who used a forged signature that a warrant had been issued for her arrest, and that the police would pick her up if she did not return the car immediately; holding patrons of a

42. La Porte, 163 So. 2d 267; Paul, 388 So. 2d 40; Scheuer, 385 So. 2d 1076; Knowles, 60 So. 2d 37; Jackson, 228 So. 2d 916; Levine, 197 So. 2d 329.

43. See Carter, 213 So. 2d 898. See also Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974); Champion v. Gray, 420 So. 2d 348 (Fla. 5th DCA 1982); Selfe v. Smith, 397 So. 2d 348 (Fla. 1st DCA 1981); Woodman v. Dever, 387 So. 2d 1061 (Fla. 1st DCA 1979); Fazo v. Upjohn Co., 310 So. 2d 30 (Fla. 2d DCA 1975); (all discussed in negligence section, infra).

44. In Wells, 39 So. 838, recovery was had for the intentional refusal by an employee of Western Union to pay over funds to the plaintiff until a typographical error in his name was corrected. As a result, the plaintiff and his wife and children went without food or a sleeping compartment on the train for the remainder of their journey. This case is unusual because the facts implied negligence, but the court inferred an intentional action. “This action was not based upon the failure of the telegraph company in promptness, but upon its willful refusal to pay over money to the plaintiff under . . . circumstances . . . made known fully [to defendant’s agent].” Id. at 840-41. But it is not clear that either outrageous conduct or even malice existed, just plain vanilla stupidity.

45. The court has recently been invited to consider the intentional mental distress action again in Gmuer, 8 Fla. L.W. 649, by way of a certified question whether one may recover for intentional mental distress not incident to “any separate tort or other actionable wrong.” Id. The case, however, did not reach the Florida Supreme Court because neither the plaintiff nor defendant petitioned to have it heard by the Florida Supreme Court after the Second District Court of Appeal had certified it.

46. Mrs. Slocum would have recovered for implied malice but for the fact that the court grafted a new requirement onto the earlier implied malice requirement — the need for an independent tort. The court cited Kirksey for this requirement, but no such requirement was announced in that case. It is not clear whether Kirksey even met the requirement. There were two other counts in the Kirksey case; they dealt with interference with dead bodies.

47. Korbin v. Berlin, 177 So. 2d 551, 552 (Fla. 3d DCA 1965).

48. Abraham Used Car Co. v. Silva, 208 So. 2d 500 (Fla. 3d DCA 1968).
marine supply company at gunpoint in an altercation over the right to possess a yacht;\(^49\) telling the mother of a debtor, in an attempt to discover the debtor's whereabouts, that the debtor's two minor children were seriously injured and in the hospital when in fact neither was true;\(^50\) telling an insured, "We don't have to explain the insurance coverage to you... All I'm interested in is getting you off your butt and back to work";\(^51\) telling an insured, "You know damn well you had that disease when you took the policy," which was untrue;\(^52\) actual bad faith on the part of an insurer, including attempts to "buy up" the insurance policy;\(^53\) an insurer's advising the owner of a pet store not to tell a customer who had been bitten by a skunk that the skunk was sold and subsequently lost, instead of being tested for rabies, thereby exposing the consumer to a risk of rabies injections;\(^54\) a union's hanging in effigy a likeness of plaintiff "scab" and displaying the effigy outside the plaintiff's workplace and home;\(^55\) embalming a person whose religious beliefs forbid embalming, if the embalmer knew of the deceased's religious beliefs, or proceeded in violation of regulations governing the industry;\(^56\) and outrageous conduct may include an attorney's resort to self-help in the taking of jewelry by guile as security for a debt and refusal to return it upon request of the owner, if such acts amount to a breach of the peace;\(^57\) and a newspaper's publication of a photograph of a woman draped only in a towel, while she was being removed, in a state of shock, from the

\(^{49}\) Geary v. Starr, 418 So. 2d 1135 (Fla. 4th DCA 1982).
\(^{50}\) Ford Motor Credit Co. v. Sheehan, 373 So. 2d 956 (Fla. 1st DCA 1979).
\(^{51}\) Habelow, 389 So. 2d at 219.
\(^{52}\) Miller v. Mutual of Omaha Ins. Co., 335 So. 2d 33, 34 (Fla. 1st DCA 1970). The agent of the company, under false pretenses, wrongfully took the original policy from the plaintiff and never returned it.
\(^{53}\) World Ins., 308 So. 2d 612; see also the discussion of Metropolitan Life, supra note 33.
\(^{54}\) Kirkpatrick v. Zitz, 401 So. 2d 850 (Fla. 1st DCA 1981).
\(^{55}\) Stevens v. Horne, 325 So. 2d 459, 460 (Fla. 4th DCA 1975).
\(^{56}\) Scheuer, 385 So. 2d 1076.
\(^{57}\) Medel v. Republic Nat'l Bank, 365 So. 2d 782 (Fla. 3d DCA 1978). Medel sued for intentional infliction of mental distress and conversion against an attorney, Striar, and the attorney's principal, a bank. The bank had a judgment against Medel for $11,530.17. At a deposition of Medel taken in connection with another case, Striar asked to see Medel's watch, ring and bracelet. When Striar had these items in his possession he announced that he was keeping the items, and turning them over to the bank to satisfy the bank's judgment against Medel. Medel objected; the police were called and responded; Striar urged the police to call their legal advisor to confirm that a judgment creditor could resort to self-help if he did not commit a breach of the peace; they did so; Striar exited with the police. In a subsequent legal action Striar was ordered by the court to return the jewelry to Medel, and Medel then filed the instant suit. \textit{Id.} at 783-84.
scene of her husband’s suicide.\textsuperscript{58}

Outrageous conduct does not include collecting bills by repeated phone calls and unpleasant scenes at the threshold of the debtor’s home;\textsuperscript{59} mailing a debtor a complaint for collection that had never been filed;\textsuperscript{60} insurer A disclosing to insurer B a statement of its insured that was detrimental in insured’s lawsuit against insurer B;\textsuperscript{61} nor saying to a consumer in a grocery store: “you stink to me.”\textsuperscript{62} Nor was outrageous conduct established where defendant took a picture of the silhouette of plaintiff’s dead daughter at the request of the police and fire marshall;\textsuperscript{63} where a medical doctor, in good faith, participated in a commitment proceeding;\textsuperscript{64} where a cemetery moved an entire vault without disturbing the body therein;\textsuperscript{65} where defendant shouted racial epithets in a dispute over a parking space;\textsuperscript{66} where an airline grounded a pilot who believed the airline’s planes were defective, but medical witnesses found the action of the airline justified;\textsuperscript{67} nor where an author wrote a story about the plaintiff’s deceased husband describing him as a ghost, at least where the deceased’s former co-workers believed that he was indeed a ghost, and the author factually related the events which led to these beliefs.\textsuperscript{68}

And Florida courts have consistently held that there is no outrageous conduct involved when an employer terminates an “at will” employee, no matter how high-handedly the firing is accomplished.\textsuperscript{69} One Florida court held that outrageous conduct does not

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\item \textsuperscript{58} Cape Publications, Inc. v. Bridges, 387 So. 2d 436 (Fla. 5th DCA 1980).
\item \textsuperscript{59} Stockett v. Beneficial Fin. Co., 269 So. 2d 735 (Fla. 3d DCA 1972); Sacco v. Eagle Fin. Corp., 234 So. 2d 406 (Fla. 3d DCA 1970). These acts can give rise to other causes of action: trespass, defamation and statutory actions for violations of the Consumer Collection Practices Act, FLA. STAT. §§ 559.55-78 (1981).
\item \textsuperscript{60} Steiner & Munach v. Williams, 334 So. 2d 39 (Fla. 3d DCA 1976).
\item \textsuperscript{61} Fireman’s Fund Ins. Co. v. Riley, 294 So. 2d 59 (Fla. 3d DCA 1974).
\item \textsuperscript{62} Slocum, 100 So. 2d at 397.
\item \textsuperscript{63} Florida Publishing Co. v. Fletcher, 340 So. 2d 914 (Fla. 1976), cert. denied, 431 U.S. 930 (1977).
\item \textsuperscript{64} Bencomo, 210 So. 2d 236.
\item \textsuperscript{65} Trueba, 374 So. 2d 47.
\item \textsuperscript{66} Lay v. Roux Laboratories, Inc., 379 So. 2d 451 (Fla. 1st DCA 1980) (although an action for assault may lie); see also Lay v. Kremer 411 So. 2d 1347 (Fla. 1st DCA 1982).
\item \textsuperscript{67} Gellert, 370 So. 2d 802.
\item \textsuperscript{68} Loft v. Fuller, 408 So. 2d 619 (Fla. 4th DCA 1981).
\item \textsuperscript{69} See Gmuer, 8 Fla. L.W. 649; Dowling, 338 So. 2d 88; see also DeMarco, 360 So. 2d 134; Butler, 355 So. 2d 1208; Henry Morrison Flagler Museum, 268 So. 2d 434. In Gmuer, the Second District Court of Appeal approved a trial court’s determination that Florida does not recognize the tort of intentional infliction of mental distress. This determination is amazing in view of the numerous Florida cases decided upon the basis of intentional infliction of mental distress, discussed in this section.
\end{itemize}
include a grocery chain security advisor telling an employee, who was undergoing a lie detector test, that she must admit to having stolen from the chain for the test to be effective. She made the admission in reliance upon his direction, and was subsequently discharged for her admission. Anderson is wrongly decided. Hornbook law tells us that persons in a position of authority, such as security advisors for an entire chain of stores, are held to a higher standard of conduct in intentional mental distress cases than those who do not enjoy a position of power and authority.

The severe distress requirement has been found to be satisfied where a woman was hospitalized as a result of her distress, restrained during the hospitalization, and suffered permanent diminished use of one hand as a result of the restraint; where the plaintiff had to undergo a series of rabies shots as a result of defendant insurer's advice to its pet-store-owner insured to sell the skunk that bit the plaintiff; and where the plaintiff spent seven hours in a state of extreme anxiety about the life of his two minor children because the defendant lied about the children's involvement in an accident.

On the other hand, the severe distress of a heart attack is not sufficient if the conduct which brought it on is not deemed legally outrageous; nor is the distress accompanying the loss of a lawsuit sufficient if the acts complained of did not show an intent to inflict mental distress.

In intentional mental distress cases, Florida courts have ignored the usual rules limiting transferred intent. Transferred intent refers to two things: transferring the requisite intent from person A to person B, and transferring the requisite intent from tort A to tort B. Neither type of transferred intent is usually available in mental distress cases. Nonetheless, in Florida, intent has been...
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transferred from the tort of conversion to the tort of mental distress rather uniformly in cases involving the destruction of pets, even where it is not clear that intentional misconduct occurred.\(^7\) Ironically, transfer of intent has not been allowed where dead human bodies are destroyed, lost, or moved, although case law recognizes a property right in dead bodies.\(^7\)

Transfer of intent between persons has not been allowed in Florida, the most famous case being one where defendant failed to provide adequate security on his business premises and as a result, a minor daughter witnessed the sexual assault of her mother. No recovery was permitted for the daughter’s well-documented mental distress.\(^8\) But this case and several others involving auto and drug accidents do not present the issue squarely, for they involved negligence on the part of the defendant rather than intentional misconduct.\(^8\) One case, however, did involve intentional misconduct, and yet no recovery was permitted. The case involved the statement to plaintiff’s husband: “We don’t have to explain the insurance coverage to you. . . . All I’m interested in is getting you off your butt and back to work.”\(^8\) The statement added to her husband’s woes, and thus to her own. Her suit for her mental distress was dismissed for failure to state a cause of action.\(^8\)

showing the intent needed to support liability for conversion of a dead pet, though not a dead relative. On the other hand, if tortious intent is shown with respect to a particular victim, another victim’s mental distress injuries cannot “borrow” the malice or other intent established by the first victim. See also W. Prosser, J. Wade and V. Schwartz, Cases and Materials on Torts (7th ed. 1982).

This doctrine of “transferred intent” is something of a freak. It was derived originally from the criminal law, and goes back to the time when tort damages were awarded as a side issue in criminal prosecutions. It is familiar enough in the criminal law, and has been applied in several tort cases where the defendant has shot at A, or thrown a rock at him, and has quite unintentionally hit B instead . . . [I]t applies whenever both the tort intended and that which results fall within the scope of the old action of trespass—that is, where both involve direct and immediate application of force to the person or to tangible property. There are five torts that fall within the trespass writ: Battery, assault, false imprisonment, trespass to land, and trespass to chattels. When the defendant intends any one of the five, and accidentally accomplishes any one of the five, he is liable.

\(^7\) La Porte, 163 So. 2d 267; Paul, 388 So. 2d 40; Knowles, 360 So. 2d 37 (apparently negligence); Levine, 197 So. 2d 329.

\(^8\) Trueba, 374 So. 2d 47; Brooks, 325 So. 2d 479 (negligence). However, plaintiff has recovered where malice was shown. See Kirksey, 45 So. 2d 188; Jackson, 228 So. 2d 916.

\(^9\) Woodman, 367 So. 2d 1061.

\(^10\) Champion, 420 So. 2d 348; Selfe, 397 So. 2d 348; Pazo, 310 So. 2d 30.

\(^11\) Habelow, 389 So. 2d at 219.

\(^12\) Id. at 220.
IV. Negligent Infliction of Mental Distress

The most difficult Florida tort to classify systematically in terms of its prima facie elements is the negligent infliction of mental distress. The usually articulated requirement for this cause of action is impact. But impact means physical contact in some cases and non-contactually caused physical injury in others. Still other cases require that mental and physical injury occur in a required temporal sequence—first the physical, and then the mental. Sometimes the courts seem to require physical injury when the facts include physically harmless contact, yet contact when the facts include serious physical injury that is not directly consequential to a physical contact. Some cases turn upon the element of foreseeable harm, a proximate cause requirement, which is a familiar standard in torts, and a standard which avoids the rigidity of the impact requirement. Proximate cause also provides flexibility under one standard, an advantage over the present device of an announced impact standard with its changing definition of impact—sometimes contact, sometimes physical injury and sometimes a required temporal sequence of damages. Thus, the proximate cause standard is more candid, a feature which enhances respect for the law. The Florida Supreme Court has a current opportunity to review the area and bring order to it, and to adopt a proximate cause test.84

A. Physical Injury

The physical injury test is often stated as a threshold test in Florida, upon which other requirements will be layered. For example, the earliest negligent infliction of mental distress case in Florida85 required at least physical injury, and then that the physical injury occur in a required sequence.86 The defendant's failure to deliver the telegram "Wife dying. Come at once . . .," from a hospital to the husband of one of the hospital's patients, prevented the husband from attending his wife at her death,87 and as a result, he suffered great anguish.88 The court held that only "mental suffering incident to, connected with, and flowing directly from the physical injury" could be compensated, and denied recovery.89

84. Champion, 420 So. 2d 348.
85. International Ocean, 14 So. 148.
86. See discussion of the temporal sequence requirement infra.
87. International Ocean, 14 So. at 148.
88. Id. at 149.
89. Id. at 151.
Similarly, the court denied recovery for mental anguish "unconnected with physical injury" to a man who suffered anguish because of the negligent embalming of his wife;\(^9\) to a woman who was distressed because the body of her husband was embalmed by an undertaker not of her choosing;\(^9\) to the parents of a newborn infant negligently sent home with the wrong parents by hospital personnel;\(^9\) and to a distraught mother whose premature infant's body was negligently "misplaced and never again located" in defendant's hospital.\(^9\)

The absence of physical injury was also cited among the reasons for denial of recovery where defendant insurer cancelled an insurance policy and denied personal injury protection (PIP) benefits under the cancelled policy without overt and dishonest dealing;\(^9\) where plaintiff objected to defendant insurer's attempt to settle a claim but could not show overt and dishonest dealing;\(^9\) where city firemen were furloughed from their jobs pursuant to reasonable procedures;\(^9\) and where a bank teller was handed a hold-up note by a robber during the course of her employment.\(^9\)

Conversely, the presence of physical injury was cited among the reasons for recovery where the plaintiff was negligently electrified by an electric company;\(^9\) where the defendant negligently included a rat in a cola, which acted as an emetic;\(^9\) and where the defendant negligently included worms in a can of "fancy" spinach, which acted as both an emetic and a laxative.\(^9\)

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90. Dunahoo, 200 So. at 542.
91. Kimple, 133 So. 2d 437. This case was pleaded as a malice case, but the court found neither malice nor physical injury. While the plaintiff was out of town, her husband died of a heart attack in his doctor's office, and the defendant was summoned to remove the body. The defendant went to considerable effort to locate the plaintiff in a neighboring city, and sent a car for her, along with her minister and a friend to console her. When the plaintiff asked the defendant to deliver the body to another funeral home, he delayed until the following morning because the embalming process was already in progress. For his efforts, he charged only the usual embalming fee. Id. at 438-39.
92. Carter, 213 So. 2d 898. The court denied a cause of action to the infant's mother because "[n]either the child nor its mother . . . sustained any physical injury." Id. at 899.
93. Brooks, 325 So. 2d 479. The court found "[t]here was no evidence of . . . physical injury" to the mother. Id.
94. Saltmarsh, 344 So. 2d 862. This case is particularly interesting because it implies that physical injury is synonymous with battery. Id. at 863.
95. Stetz, 368 So. 2d 912.
96. Butler, 355 So. 2d 1208.
97. Davis v. Sun First Nat'l Bank, 408 So. 2d 608 (Fla. 5th DCA 1981).
99. Way, 260 So. 2d 288. This case presents a variant of the physical injury test—the physical reaction test. Id. at 289.
100. Macurda, 93 So. 2d 860.
The difficult cases to understand, and the ones that are probably wrongly decided, are those in which the courts have denied recovery where physical injury exists, while claiming to apply a physical injury test, and those where very serious physical injury existed, but the courts ignored the physical injury test and announced some other test instead.

This willingness to compensate mental distress which accompanies vomiting and diarrhea, and to ignore mental distress which accompanies crippling and death, is an undesirable inconsistency in the law of negligent mental distress.

B. Temporal Sequence

For years before Florida courts announced the impact test for the negligent infliction of mental distress, they struggled with a direct injury test that evolved into a requirement that physical injury must precede mental injury in order for recovery for mental distress to be permitted. In *International Ocean Telegraph v. Saunders*, the first negligent mental distress case in the state, the Florida Supreme Court, in a two to one decision, held that there was no cause of action for the failure to promptly deliver a telegram. The court announced that mental injury could be compensated “when coupled with or accompanied by substantive injury to the person . . . in such cases the mental suffering growing

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101. See Claycomb, 399 So. 2d at 1051 (where the plaintiffs put on expert testimony of physical injury).

102. See Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974) (where the plaintiff suffered a heart attack, was admitted to an intensive care unit, and eventually died). The tremendous confusion surrounding an asserted physical injury test is plainly illustrated in the statement of the district court of appeal in Stewart v. Gilliam: “When she [Mrs. Stewart] was examined at the hospital there were no outward signs of physical injury.” Stewart v. Gilliam, 271 So. 2d 466, 467 (Fla. 4th DCA 1972), quashed 291 So. 2d 593 (Fla. 1974). Obviously, when Mrs. Stewart was examined in the hospital, she was suffering enormous physical injury. She was admitted to the intensive care unit with myocardial infarction, and later suffered a cerebral hemorrhage. But when the court says “physical injury,” it sometimes means physical contact, not physical injury. In other words, there were no outward signs of physical contact. And the fact that Mrs. Stewart’s brain was bleeding and her heart tissue dying was too complicated a physical injury for the court to comprehend, apparently because these were not visible to the naked eye.

See also Champion, 420 So. 2d 348 (where the plaintiff suffered a cardiac arrest and died on the spot); Moores v. Lucas, 405 So. 2d 1022, 1024 (Fla. 5th DCA 1981) (where the plaintiff suffered Larsen’s Syndrome, literally a crippling disease).

103. The impact test had been expressly rejected in Victorian Railways Comm’rs v. Coultas, 13 App. Cas. 405 (P.C. 1888), and did not appear in Florida until 1954 in Crane v. Loftin, 70 So. 2d 574 (Fla. 1954).

104. 14 So. 148.

105. Id. at 148 (“Wife dying. Come at once. . . .”).
out of and produced by the physical injury is so interwoven with the latter that it is impossible to consider the one without contemplating the other. 106 The rule, while appearing to be a simple physical injury requirement, is actually a temporal sequence of damages requirement. First there must be physical injury and then mental injury—it will not do if the mental injury occurs before the physical. The required temporal sequence of damages is also suggested in another passage of the opinion, where the court says that only mental suffering “incident to, connected with, and flowing directly from the physical injury” can be considered. 107 Thus physical injury is merely a threshold requirement. Once physical injury exists, the question then becomes whether the physical injury preceded and “produced” the mental injury. 108

The temporal sequence requirement, born in International Ocean and reaching its apogee in Gilliam, 109 received regular attention in the interim cases.

For example, in a case involving the negligent inclusion of worms in a can of “fancy” spinach, the defendant argued that the temporal sequence requirement had not been met, that is, that the mental reaction to the worms, and not the worms themselves, produced physical injury. 110 The court found worms in spinach to be “nauseous intruders” and “generally frowned upon” 111 and approved the jury’s verdict of $3,000, despite the defendant’s argument that it was only worth $100 per meal to eat worms. 112 The court found that the jury had ample evidence from which to conclude that the worms, not the mind, produced the plaintiff’s injury. 113

And in Slocum v. Food Fair Stores, 114 a case where defendant’s epithet was followed by plaintiff’s heart attack, the defendant argued that “the only direct injury” in the case was “mental or emo-

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106. Id. at 149 (emphasis added).
107. Id. at 151.
108. Id. at 149.
109. 291 So. 2d 593, discussed infra.
110. Macurda, 93 So. 2d 860. Presumably “fancy” referred to the grade of spinach, not the presence of worms.
111. Id. at 860–61. Mrs. Macurda noticed a worm and segments of worms in her half-eaten serving of Food Fair “fancy” spinach. Unfortunately, her husband had either started before her or ate faster than she did because he had already consumed “practically his entire helping” before his wife’s discovery.
112. Id. at 862.
113. Id. The “physical injury” in this case included vomiting, stomach pains and diarrhea. Id. at 861.
114. 100 So. 2d 396.
tional with physical symptoms merely derivative therefrom.”118 The court responded that “[n]o great difficulty is involved” because the case presented an intentional tort, not a negligent one, and would therefore be decided on other grounds.116

In Clark v. Choctawhatchee Electric Co-Operative, Inc.,117 where the plaintiff was negligently electrified by an electric company, the trial judge paid more attention to the temporal sequence of damages than to the physical disability that occurred. He “deduced that the sensations and symptoms experienced [by the plaintiff] immediately after the incident arose from fright and not from impact or trauma . . . [although he] thought the testimony ‘amply’ supported the conclusion that she sustained a serious emotional disturbance resulting in physical disability.”118 In Arcia,119 where the plaintiff, a seven-year-old child, was frightened when part of the bathroom ceiling collapsed and almost hit her while she was bathing, the defendant argued, among other things, that injuries, if any, were caused solely by fright,120 that is, that mental reaction preceded physical injury.

In the interim between International Ocean and Gilliam, Florida courts sometimes said they were adhering to the temporal sequence requirement when the facts belied them. For example, in the Hoitt case121 where the plaintiff, frightened by a gas explosion, was injured when she collided with another restaurant employee, fright preceded physical injury, yet the plaintiff was allowed to get by a summary judgment for the defendant and proceed to trial.122 The court claimed that the case did not represent an effort to recover where the only direct injury was mental, with physical symptoms merely derivative therefrom.123 This, of course, simply is not true. The case represents precisely an effort to recover for physical symptoms merely derivative from mental fright. And the case is properly decided, because efforts to escape from negligently created peril are foreseeable and reasonably to be expected.124 This is

115. Id. at 397.
116. Id.
117. 107 So. 2d 609.
118. Id. at 611. The appellate court disagreed with the trial court’s factual conclusions regarding impact, and thus reversed. Id. at 612.
120. Id. at 865.
122. Id. at 59-61.
123. Id.
124. Id. at 60 (citing 38 AM. JUR. NEGLIGENCE § 77 at 736).
true whether the peril is a falling ceiling, a loud explosion, or a loud collision.

The Gilliam case is the most disturbing example of the temporal sequence requirement in action. The facts of the case involved a negligent collision between two automobiles which caused the automobiles to collide with the Stewart's home and a tree in their front yard. The Stewarts were inside their home at the time of the collision. Shortly after the collision, and as a result of the excitement of the collision, Mrs. Stewart experienced chest pains and was admitted to the intensive care unit of a hospital. The supreme court said that the trial court's entry of summary judgment was consistent with the rule that there can be no recovery for "mental pain and suffering unaccompanied by any physical injuries in the absence of . . . malice." Obviously, in this case, physical injury accompanied the mental pain and suffering. When the court said "unaccompanied by physical injuries," the court meant that damages must occur in the required temporal sequence: first physical damage, then mental distress. If mental distress precedes the physical damage, there will be no recovery, even if the physical damage is very serious — heart attack, stroke and eventual death.

One can view the temporal sequence requirement as a roundabout impact requirement; the Florida Supreme Court in its most problematic case, Gilliam, relied heavily on both. The temporal sequence requirement and the impact requirement are equally technical restrictions upon the negligent mental distress cause of action. Like the impact requirement, the temporal sequence requirement demands more than physical injury for recovery to be permitted. And like the impact requirement, it does not insure that injuries are authentic.

C. Contact

The impact requirement, the controlling factor in so many re-

125. 291 So. 2d 593. The Gilliam case is also discussed in the contact section, infra.
126. Stewart, 271 So. 2d at 467.
127. Id.
128. Gilliam, 291 So. 2d at 594.
129. Unfortunately, the supreme court was so busy chastising the district court for "openly overruling previous decisions of this [Supreme] Court," that its members did not examine the rationale for a temporal sequence of damage requirement, nor did the court articulate reasons for such an unusual damage requirement. Id. at 594.
130. See Stewart, 271 So. 2d at 468 nn.1 & 2 (discussion of the extent of the plaintiff's physical injuries).
cent cases, appeared for the first time in Florida in *Crane v. Loftin*. At its first appearance, the court acted as though impact had been in the Florida cases all along—although in fact, Florida courts had been applying temporal sequence, proximate cause, and physical injury requirements for over sixty years. The defendant railroad ran into plaintiff's car (from which she had already alighted in haste) at a downtown crossing. She sought recovery for "personal injuries alleged to have resulted from fright." The court affirmed the dismissal of plaintiff's complaint because she failed to prove malice. But, in dictum, the court mentioned impact and the long-lived impact requirement thus spread to Florida.

In the intervening years, the court has also denied recovery and cited the impact requirement where defendant's negligently vibrating airplane placed the plaintiffs in fear of their lives; where defendant hospital sent plaintiff's infant home with the wrong par-

131. See Champion, 420 So. 2d 348 (currently before the Florida Supreme Court for review).
132. 70 So. 2d 574 (Fla. 1954).
133. See discussion of the proximate cause requirement, *infra*.
134. Florida is one of the last jurisdictions to observe the impact limitation. See Champion, 420 So. 2d 348 n.1 (relating that at least thirty-five jurisdictions have abandoned the impact requirement).
135. *Crane*, 70 So. 2d at 575. From the language of *International Ocean*, 14 So. 148, this would be the wrong temporal sequence of damages. See the discussion of temporal sequence, *supra*.
136. *Crane*, 70 So. 2d at 575. Plaintiff tried to bring the facts of the case within the scope of *Kirksey* by alleging that defendant's excessive speed in a populated city was evidence of "great indifference" sufficient to impute malice. *Id*.
137. We have the view that under the controlling law [of malicious mental distress] as to the right of a plaintiff to recover damages for personal injuries resulting from fright and mental anguish unaccompanied by direct physical impact or trauma, the plaintiff has failed to allege a case for recovery based upon willful and wanton negligence of the defendant. *Id* at 576.

The court may have been using impact as a synonym for both trauma and physical injury. See *Stedman's Medical Dictionary* 1476 (5th lawyers' ed. 1982) which defines trauma as an injury caused by harsh contact with an object. Or the court may have been discounting the plaintiff's alleged physical injury because it did not occur in the temporal sequence required by *International Ocean*, 14 So. 148.
138. Ironically, most jurisdictions have subsequently abandoned the impact requirement. Florida remains in a small minority. See *Champion*, 420 So. 2d 348 n.1.
139. *Herlong Aviation, Inc. v. Johnson*, 291 So. 2d 603 (Fla. 1974). Plaintiffs alleged that the defendant was negligent in the manufacture of the plane. The Second District Court of Appeal had held for the plaintiffs, observing that "the time has come when the impact doctrine serves no useful purpose." *Johnson v. Herlong Aviation, Inc.*, 271 So. 2d 226, 227 (Fla. 2d DCA 1972).
ents; where defendant's ceiling collapsed and nearly hit a child; where defendant's car hit plaintiff's home, and the excitement of the collision caused a heart attack, stroke, and eventual death; where defendant's drug produced birth defects in plaintiff's infant; where defendant hospital lost the body of plaintiff's premature infant; where defendant insurer wrongfully denied benefits to plaintiff, its insured; where defendant's negligently constructed coffin, bearing the body of plaintiff's mother, collapsed before her eyes; where defendant bill-collecting doctors sent a claim which had never been filed to the plaintiff, their former patient; where, as a result of defendant's failure to provide adequate security, plaintiff, a young child, witnessed her mother's sexual assault; where, as a result of defendant bank's failure to provide adequate security, plaintiff, its employee-teller, was

140. Carter, 213 So. 2d 898. The child was returned to the hospital unharmed after several hours; the plaintiff mother sustained no physical injury. Id. at 899.

141. Arcia, 264 So. 2d 865. The court also implied approval of the temporal sequence test of injury announced in International Ocean when it said that the injuries, if any, were caused solely by fright, that is, if there was any physical injury, it followed rather than preceded the mental injury. Id.

142. Gilliam, 291 So. 2d 593. See Stewart, 271 So. 2d 466 for facts of case. Mrs. Stewart never had the opportunity to put the case before a jury because Mrs. Stewart was candid enough to admit that she felt no physical impact and that neither she nor her house shook as a result of the collision. Id. at 467-68.

143. Pazo, 310 So. 2d 30.

144. Brooks, 325 So. 2d 479. The court based its holding on the lack of "any physical impact or physical injury." Id.

145. Saltmarsh, 344 So. 2d 862. This case is interesting because the trial judge equated the impact requirement with a battery requirement.

[T]he trial judge found as a matter of law that a cause of action does not exist under Florida law for a claim for punitive damages, emotional distress and/or mental pain and anguish arising out of the manner in which a first party insurance contract is breached in the absence of a battery. Id. at 863.

It is not correct to call the requirement a battery requirement because the impact requirement applies in negligence cases only, and battery is an intentional act.

146. Estate of Harper, 366 So. 2d 126. This case was brought as an intentional mental distress cause of action, but the court affirmed the trial court's dismissal based upon negligence principles. Id. at 128. A unique rationale was urged by the court in this case. The court urged that courts take a realistic look at negligent mental distress cases, without artificial impediments like the contact requirement, in order to deter "resort to self help, perhaps even violence." Id.

147. Steiner, 334 So. 2d 39. The debtor, recovering from surgery, stopped eating and sleeping for a time, and died during the lawsuit. The court remanded for recovery under the Unfair Collections Practices Act, Fla. Stat. §§ 559.72(10), 77(1) (1975). Steiner, 334 So. 2d at 42.

148. Woodman, 367 So. 2d 1061. This resulted in emotional distress and medical expenses to one of the plaintiff's minor daughters. Id. at 1062.
handed a hold-up note;\textsuperscript{149} where defendant collided with plaintiff's auto, and her child was injured in it;\textsuperscript{150} where defendant's agent accepted money to promote plaintiff's product, and did not do so;\textsuperscript{151} where defendant doctor negligently misrepresented to plaintiff that her disease was not inheritable, and her child was born with the disease;\textsuperscript{152} where defendant policeman possessed plaintiff's car, which had been stolen, but not by the plaintiff, and plaintiff had to recover the car in a replevin action;\textsuperscript{153} and where

\textsuperscript{149} Davis, 408 So. 2d 608. Davis argued that the robber's act of handing her his hold-up note satisfied Florida's impact requirement, but the court disagreed with her, even though the defendant viewed impact as contact. The court decided that impact, in this case, meant physical injury, not mere contact.

If appellant alleged additional facts to show that her mental distress was not compensable under the [Workers' Compensation] Act, \textit{i.e.}, that she suffered no physical injury, then due to the 'physical impact' rule, appellant would have been precluded from recovering under a common-law theory of negligence. On the other hand, if appellant alleged a physical impact or injury so as to recover under a negligence theory, then her claim would be barred by the exclusiveness of liability of the Workers' Compensation Act as mental anguish resulting from a physical injury is compensable. As appellant is precluded from recovery under either set of facts, the deficiencies in the complaint could not have been cured by amendment. \textit{Id.} at 610 (emphasis added).

On review, the First District Court of Appeal concluded that there was no way for plaintiff to recover because, on the one hand, the Workers' Compensation law precluded recovery for mental injury, and on the other hand, the Workers' Compensation law provided the exclusive remedy for her injuries. Davis v. Sun Banks, 412 So. 2d 937 (Fla. 1st DCA 1982).

\textsuperscript{150} Selfe, 397 So. 2d 348.

\textsuperscript{151} Friedman v. Mutual Broadcasting Sys., Inc., 380 So. 2d 1313 (Fla. 3d DCA 1980). This case confuses the requirements of an intentional mental distress action with a malice action in that it adds punitive damages to the requirements of outrageous conduct and severe distress and cites \textit{Kirksey} as the source of this statement. \textit{Id.} at 1314. The outrageous conduct and severe distress requirements have their origin in \textit{Slocum} v. Food Fair Stores, 100 So. 2d 396 (Fla. 1958). The Florida cases dealing with punitive damages (\textit{Kirksey} and its progeny) have never been analyzed as intentional tort cases, but rather as a class of cases dealing with conduct more than negligent but less than intentional (namely conduct evidencing malice or great indifference to the person or property of another). When the cause of action for intentional infliction of mental distress was presented to the Florida Supreme Court in \textit{Slocum}, the court identified the cause as novel in Florida—a case of first impression. Recall that \textit{Slocum} was presented eight years after \textit{Kirksey}. Negligence cases developed to impose liability for wrongdoing short of malice, that is, short of "great indifference," in which impact was necessary. Impact took on different meanings: contact in some cases, physical injury in others.

\textsuperscript{152} Moores, 405 So. 2d 1022. The child was born with Larsen's Syndrome, a defect of the kneecap which causes crippling. \textit{Id.} at 1024. \textit{See Dorland's Illustrated Medical Dictionary} (24th ed. 1965). The appellate court allowed the cause to proceed for damages representing the portion of the cost of raising Justin in excess of the cost of raising a normal child. Moores, 405 So. 2d at 1027.

\textsuperscript{153} Claycomb, 399 So. 2d 1050. An interesting point in the case is the fact that the plaintiffs put on expert testimony that "they both suffered physical injury from the emotional distress of the incident." \textit{Id.} at 1051. Thus, this court concluded that physical injury did not satisfy the impact requirement, or else did not believe the expert testimony.
defendant airline intentionally grounded one of its pilots, who had publicly complained about the safety of its aircraft.\textsuperscript{154}

On the other hand, the court has permitted recovery under the impact rule where defendant negligently allowed a runaway surge of electricity to damage plaintiff's property, and there was evidence that the electricity was transmitted to the plaintiff;\textsuperscript{155} where defendant collided with plaintiff's automobile, and the accident exacerbated plaintiff's preexisting Parkinson's Disease;\textsuperscript{156} where defendant negligently included a rat in a cola, and plaintiff vomited and lost his taste for colas;\textsuperscript{157} where defendant negligently failed to cancel plaintiff's life insurance policy, despite notice that plaintiff's wife was plotting to kill him;\textsuperscript{158} and where defendant collided with plaintiff's automobile, and the plaintiff's injuries prevented him from aiding his mother, a passenger in his car, who died as a result of her injuries.\textsuperscript{159}

These cases are inconsistent because impact sufficient to support recovery sometimes means contact between the plaintiff (or something closely associated with the plaintiff) and the defendant (or the defendant's agent or product); yet sometimes this kind of contact does not support recovery.

For example, in \textit{Hollie},\textsuperscript{160} impact sufficient to support recovery

\textsuperscript{154} \textit{Gellert}, 370 So. 2d 802. This case is troublesome because the court expressly confuses the requirements of an intentional tort action, which are outrageous conduct and severe distress, with the requirement of a negligent tort action, which is usually expressed as impact or contact, despite the fact that the plaintiff chose an intentional cause of action, and did not file an alternative count in negligence. \textit{Id.} at 803. "The principal question presented by this appeal is whether . . . one may recover damages for intentional infliction of severe mental distress which is \textit{without} physical contact, and which is not incidental to or consequent upon any separate tort or other actionable wrong. The judgment appealed from was predicated on the trial court answering that question in the negative. We hold that in so ruling the trial court was correct, and affirm the judgment." \textit{Id.} (emphasis added). Physical contact is not a requirement in an intentional mental distress action. When the defendant intends mental distress, that is enough, provided the harm that results is severe and the defendant's conduct is highly offensive to reasonable people. \textit{See Korbin}, 177 So. 2d 551; \textit{Abraham Used Car Co.} 208 So. 2d 500. The proper holding of \textit{Gellert} is best stated in the concurring opinion, which correctly identified the requirements of a cause of action for intentional mental distress, and the holding of \textit{Slocum}: "[N]either the actions of the defendant, . . . nor the effect of those actions upon the mental well-being of the plaintiff, . . . were of the thoroughly horrendous character required to make out such a claim." \textit{Gellert}, 370 So. 2d at 808.

\textsuperscript{155} \textit{Clark}, 107 So. 2d 609.

\textsuperscript{156} \textit{Hollie} v. \textit{Radcliffe}, 200 So. 2d 616 (Fla. 1st DCA 1967).

\textsuperscript{157} \textit{Way}, 260 So. 2d 288.

\textsuperscript{158} \textit{Lopez}, 406 So. 2d 1155.

\textsuperscript{159} \textit{National Car Rental Sys., Inc.} v. \textit{Bostic}, 423 So. 2d 915 (Fla. 3d DCA 1982).

\textsuperscript{160} 200 So. 2d 616.
was found in the defendant’s violent contact with the plaintiff’s car, but the sole physical manifestation of injury was the exacerbation of the plaintiff’s Parkinson’s Disease. But in Gilliam, defendant’s violent contact with plaintiff’s home, which precipitated the plaintiff’s heart attack, stroke, and eventual death, went uncompensated.

Similarly, in Clark, impact sufficient to support recovery was found in the contact between the defendant’s product, electricity, and the plaintiff. Yet, in Pazo, contact between defendant’s product, a birth-defect-producing drug, and the plaintiff, the mother of a child born with birth defects, went uncompensated. One might surmise that Mrs. Pazo did not recover because she sought mental distress damages for her distress at her child’s birth defects, rather than her own injuries. But in Bostic, the plaintiff was compensated for his distress at his mother’s injuries in an auto accident, about which he was helpless to do anything. This does not differ significantly from Mrs. Pazo’s helplessness in the face of her child’s injuries. Herlong provides another example of contact between defendant’s product, a vibrating airplane, and the

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161. At the trial the uncontradicted evidence showed that the defendant’s automobile ran a stop sign and collided with the driver’s side of the car driven by [the plaintiff], causing about $500 damages to the latter’s car . . . this evidence was sufficient to support a finding . . . that there was an impact that would satisfy the above “impact rule.” Hollie, 200 So. 2d at 618.

If the Hollie case holds that property damage will satisfy the impact requirement, it is inconsistent with Crane, 70 So. 2d 574, in which contact between defendant’s train and plaintiff’s car, from which plaintiff had escaped in fear of her life, did not satisfy the impact requirement, and Herlong, 291 So. 2d 603, in which defendant’s vibrating plane placed plaintiffs in fear of their lives. Both cases involved considerable property damage. If the Hollie case holds that touching an extension of the plaintiff is the legal equivalent of touching the plaintiff, it is inconsistent with Gilliam, 291 So. 2d 593, in which contact with plaintiff’s house did not satisfy the impact requirement, despite very serious physical injury—heart attack and eventual death.

162. The plaintiff was required to take an indefinite leave of absence because of his tremors, with the understanding that he could return if his tremors diminished sufficiently to allow him to discharge his clerical duties. Hollie, 200 So. 2d at 617. The court reaffirmed the thin skull rule—a defendant will be liable for aggravating a preexisting condition of the plaintiff. Id. at 618.

163. 291 So. 2d 593.

164. See Stewart, 271 So. 2d at 468 nn.1 & 2 (explanation of the extent of the plaintiff’s physical injuries). The doctor testified: “[W]hat happened that day was due to the accident, and it wasn’t her day to have a myocardial infarction.” Id. at 468.

165. 107 So. 2d 609.

166. 310 So. 2d 30.

167. 423 So. 2d 915.

168. 291 So. 2d 603.
plaintiffs that went uncompensated, despite plaintiffs' fear for their lives in a transoceanic flight.

Nor does impact sufficient to support recovery always mean violent injurious physical contact between the plaintiff and the defendant. For example, in *Way*, recovery was permitted where the contact was not so violent, not so injurious, and not between plaintiff and defendant directly but only between plaintiff and defendant’s product. *Way’s* mouth touched a rat negligently included in a cola, and he vomited. The *Way* court, in a burst of candor, admitted that courts have affirmed rules restricting recovery, “but on the factual situation” before them, the consumer would be protected “whatever the theory.” But in the *Pazo* case, where the contact between the plaintiff and the defendant’s product, a birth-defect-producing drug, was injurious, there was no recovery. This case implies that harmful drugs are not the legal equivalent of unwholesome food, but the contact is the same, for obviously Mrs. Pazo ingested (had contact with) the defendant’s birth-defect-producing drug. A drug passing through the body of the plaintiff, and causing significant changes within it, ought to satisfy the contact requirement. Even appellate judges get confused on this contact question. For example, the concurring judge in *Pazo* thought impact meant contact. But his colleagues concluded it meant something else.

169. 260 So. 2d 288.

170. *Id.* at 289-90. The *Way* court also presented yet another variation upon physical injury requirement—“physical reaction.” The “physical reaction” is something short of physical injury, but would apparently suffice, for the court says that although no action exists where a mental injury is “not produced by, connected with, or the result of physical suffering or injury . . . [a]n entirely different question would have been presented, had the plaintiff become nauseated and vomited as a result of the taste or toxic effect of the contaminated drink and had the mental condition been a result of or been connected with the physical reaction.” *Id.* at 289 (emphasis added) (quoting Cushing Coca-Cola Bottling Co. v. Francis, 245 P.2d 84 (Okl. 1952)).

171. 310 So. 2d 30.

172. See *Way*, 260 So. 2d 288; *Macurda*, 93 So. 2d 860. This result may be explained by the fact that drugs are more useful than colas. But this may not be the right result given the fact that the harm wrought by drugs is much more serious than vomiting and diarrhea caused by rats and worms in food and drink.

173. This contact is not very different from electricity, *Clark*, 107 So. 2d 609, or alcohol through the body, *Lopez*, 406 So. 2d 1155.

174. “I am of the opinion that the appellant (mother) may recover for mental pain and anguish sustained by her because of the ingestion of the drug . . . .” *Pazo*, 310 So. 2d at 31 (emphasis added).

175. They don’t tell us what. But they say, “[t]here was no ‘impact’ between the drug and either of the appellants,” ignoring the fact that one of the appellants had ingested the drug. *Id.* at 30.
And in Lopez,\(^{178}\) too, there was recovery where contact was violent, but not physically injurious, and not between plaintiff and defendant, not even between plaintiff and defendant's agent or product. The defendant insurer negligently failed to cancel Lopez's life insurance policy, despite notice that his wife was plotting to kill him. Her attempt to kill him by tying his hands and pouring alcohol down his throat, in preparation for drowning him, was interrupted by the police, without physical injury resulting, but with considerable mental distress. Yet, in the Herlong case,\(^{177}\) where there was contact between plaintiff and defendant's product, and the contact was violent, and no less injurious, there was no recovery.

Recovery was permitted in Hollie,\(^{178}\) where the violent contact occurred between defendant and plaintiff's car, though the resulting injury was not physical, but rather an increased level of anxiety, which made the plaintiff's preexisting disease worse. Yet no recovery was permitted in Gilliam,\(^{177}\) where the violent contact with plaintiff's house was physically injurious to the plaintiff, and very serious, despite the testimony of the plaintiff's doctor that she had no prior history of coronary disease, and that the accident caused her physical injuries.\(^{180}\)

And despite violent injurious physical contact between defendant and plaintiff's car in Selfe,\(^{181}\) there was no recovery for Mrs. Selfe's distress at her child's injuries.\(^{183}\) Yet in Bostic,\(^{183}\) which also involved a violent injurious physical contact between defendant and plaintiff's car, the court permitted recovery, where the plaintiff was so seriously hurt in an auto accident that he could not respond to his mother's call for help, and she died in the same accident. He suffered a "severe emotional problem stemming from his inability to do anything to help or save his mother."\(^{184}\) The only difference

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176. 406 So. 2d 1155.
177. 291 So. 2d 603.
178. 200 So. 2d 616.
179. 291 So. 2d 593.
180. The doctor testified: "[W]hat happened that day was due to the accident, and it wasn't her day to have a myocardial infarction." Stewart, 271 So. 2d at 468.
181. 397 So. 2d 348.
182. "[S]atisfying the 'impact rule' . . . until now has gained plaintiff damages for only that mental distress which is due to plaintiff's own injury, or to the traumatic event considered in relation to plaintiff alone." Id. at 350.
183. 423 So. 2d 915.
184. Id. at 916. The majority said that on these facts the impact requirement was satisfied. Id. at 917. The concurring judge agreed, but he thought "the reasons for the rule have been thoroughly repudiated and . . . the rule should be abolished and replaced . . . by some
between *Selfe* and *Bostic* was the fact that the Selfe infant did not ask for help—but he probably cried a lot, and his mother was probably as unable to soothe him as the plaintiff in *Bostic* was unable to help his dying mother. And of course the plaintiff in *Knowles Animal Hospital, Inc. v. Wills*, recovered for the mental distress he felt as a result of his dog’s heating-pad burn.

To further complicate the picture, there was recovery in *Clark*, where the violent contact was not between plaintiff and defendant, but between plaintiff and defendant’s product, electricity; yet no recovery in *Pazo*, where the contact between plaintiff and defendant’s product, a drug, was equally harmful; and no recovery in *Herlong*, where the contact between plaintiff and defendant’s product, a vibrating airplane, was equally violent.

The impact requirement is an expression of a strong judicial reluctance to impose liability for subjective injuries such as mental distress, when occasioned by mere negligence. But a more effective and less capricious way to insure that injuries are authentic would be to require expert medical testimony regarding injury, rather than imposing a mechanical and rigid requirement like impact. And to insure the necessary nexus between defendant’s carelessness and plaintiff’s injury, a proximate cause test, not an impact test, should be used.

*more enlightened rule.*" *Id.* at 918 (emphasis added).

185. 360 So. 2d 37.
186. 107 So. 2d 609.
187. 310 So. 2d 30.
188. 291 So. 2d 603.
189. This is in fact what Justice Adkins recommended in his dissent in *Gilliam*, 291 So. 2d at 596.

In my opinion, where a definite and objective physical injury is produced as a result of emotional distress proximately caused by defendant’s negligent conduct, a plaintiff should be allowed to maintain an action and recover damages for such physical consequences to himself regardless of the absence of any physical impact.

In applying this principle, I refer only to a situation in which a defendant’s wrongful act, absent any physical impact, causes a mental disturbance which operates internally to produce “definite and objective physical injuries of an ascertainable nature.” It does not apply to an action for mental or emotional disturbance unconnected with a resulting physical injury.

*Id.* at 596 (original emphasis omitted).

See also *Champion*, 420 So. 2d 348. The *Champion* court urged an “objective medical determination” test. *Id.* at 353. “[T]he harm for which plaintiff seeks to recover must be susceptible to some form of objective medical determination and proved through qualified medical witnesses.” *Id.* The requirement of expert medical testimony regarding injury is also the approach taken in other jurisdictions. See *Swanson v. Swanson*, 257 N.E.2d 194 (Ill. App. Ct. 1970).
D. Proximate Cause

A consideration of proximate cause is the most desirable test to delimit the cause of action for negligent infliction of mental distress. This is so because proximate cause provides both necessary flexibility, and at least as much certainty as other tests currently used to delimit the cause of action.

The proximate cause test is not new. The Western Union Telegraph Co. v. Wells case employed a proximate cause test for mental distress: if mental distress damages are foreseeable, if they are the natural and probable consequences of the defendant's negligence, they will be recovered. The defendant erroneously transmitted a message to pay "G. Wake. Wells" as "G. Wake. Fells," and its agent refused to pay over the funds at issue until a correction was telegraphed, despite Wells having made it clear to the defendant that failure to pay over the money would force him to travel a long journey with his wife and small children without money for food.

At least a dozen Florida cases have been analyzed using a proximate cause test. Recovery for mental distress was permitted where the defendant failed to deliver a telegram instructing the plaintiff to secure a sleeping car, resulting in her traveling with her children at night in a day coach; where defendant erroneously telegraphed a message that the plaintiff's child had diphtheria, resulting in the administration of diphtheria antitoxin, which greatly exacerbated the child's illness, and caused the plaintiff two days of agony during which he was uncertain whether his child would live or die; where the defendant negligently electrified a consumer with a runaway power surge; where the defendant's negligently created gas explosion caused the plaintiff fright, flight, collision and injury; and where the defendant negligently included a rat in a cola. The court allowed a case to proceed to the jury where defendant negligently ignored plaintiff's request to cancel his life

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190. 39 So. 838.
191. Id. at 841.
192. Id. at 839.
193. Western Union Tel. Co. v. Taylor, 100 So. 163 (Fla. 1924).
194. Redding, 129 So. 743.
195. Clark, 107 So. 2d 609.
196. Hoitt, 182 So. 2d 58. The gas-powered plaintiff, a waitress, collided with a fellow restaurant worker, was knocked down, and injured. Id. at 59.
197. Way, 260 So. 2d 288.
insurance policy because plaintiff's wife was plotting to kill him.\textsuperscript{198} In addition, the intermediate court approved recovery where defendant's automobile negligently collided with plaintiff's home, causing plaintiff great excitement, and heart attack.\textsuperscript{199}

In these cases, the court allowed recovery because mental distress damages were foreseeable, that is, natural and probable, from the defendant's acts;\textsuperscript{200} because mental distress damages followed closely in time and space upon the defendant's negligence;\textsuperscript{201} and because mental distress followed in a direct and unbroken sequence of events from defendant's negligence.\textsuperscript{202} Recovery for mental distress was denied where defendant negligently failed to deliver the message: "Meet me . . . don't fail";\textsuperscript{203} and where defendant negligently embalmed the body of plaintiff's wife.\textsuperscript{204} Recovery was denied in these cases because damages were not foreseeable,\textsuperscript{205} thus too remote or speculative.\textsuperscript{206}

In addition to the above cases, several courts have expressed a preference for a proximate cause analysis, but have felt obliged to apply the impact requirement, and thus to deny recovery. For example, where defendant, a drunk driver, killed a child, causing her mother to die from shock at the scene of the accident, the court noted that such damage was foreseeable and should be compensated, but denied recovery because of the impact rule.\textsuperscript{207} Likewise, where the defendant's negligently constructed coffin collapsed while the deceased's family was present, causing them distress, the

\textsuperscript{198} Lopez, 406 So. 2d 1155.
\textsuperscript{199} Stewart, 271 So. 2d 466.
\textsuperscript{200} Clark, 107 So. 2d 609; Redding, 129 So. 743; Taylor, 100 So. 163; Wells, 39 So. 838.
\textsuperscript{201} "[T]he circumstances [of injury] had occurred so suddenly and the injury had followed so closely, the conclusion of relationship between them was inescapable." Clark, 107 So. 2d at 612; see also Hoitt, 182 So. 2d 58.
\textsuperscript{202} Stewart, 271 So. 2d 466. Recovery was reversed by the Florida Supreme Court, which woodenly applied an impact test, without regard to proximate cause considerations. Gilliam, 291 So. 2d 593.
\textsuperscript{203} Hildreth v. Western Union Tel. Co., 47 So. 820, 821 (Fla. 1908).
\textsuperscript{204} Dunahoo, 200 So. 541.
\textsuperscript{205} Hildreth, 47 So. 820.
\textsuperscript{206} Dunahoo, 200 So. 541.
\textsuperscript{207} Champion, 420 So. 2d 348. The proximate cause approach to mental distress was evident in the plaintiff's arguments. "Mr. Champion alleged that he lost his daughter, then his wife, as a direct and proximate result of the actions of the driver." Id. at 349. It was also evident in the court's language. "The problem with the zone of danger rule . . . is that it is an inadequate measure of the reasonable foreseeability of the possibility of physical injury resulting from a parent's anxiety arising from harm to his child." Id. at 351. "Thus, we believe traditional principles of negligence analysis may be applied in such cases and the imposition of undue liability may be avoided by using the broader test of reasonable foreseeability." Id. at 362.
court indicated such distress was reasonably foreseeable and should be compensated, but denied recovery because of the impact rule.208

One effect of employing a proximate cause test to delimit the negligent mental distress action would be to allow jurors to participate in the policy determination regarding limitations upon the cause of action. Undoubtedly, jurors would be at least as sympathetic to dead people as dead dogs, and this would probably be a good thing. Proximate cause is at least as certain a test as impact. And there are a great many cases extant to provide guidance for courts in this area. A proximate cause test requires that one consider the foreseeability of harm,209 the proximity in time and space between defendant's negligence and plaintiff's harm,210 whether plaintiff's harm follows defendant's negligence in a direct and unbroken sequence of events,211 and whether the plaintiff was foreseeable, or whether the plaintiff was present in a foreseeable zone of danger.212 These considerations have provided the parameters for tort liability in negligence cases for quite some time, and would

208. Estate of Harper, 366 So. 2d 126.

209. For a discussion of foreseeability, see Dunahoo, 200 So. 2d 541; Hildreth, 47 So. 820. In both of these cases the court concluded that harm was not foreseeable. See also Clark, 107 So. 2d 609; Redding, 129 So. 743; Taylor, 100 So. 163; Wells, 39 So. 838; Metropolitan Life, 8 Fla. L.W. 994; Champion, 420 So. 2d 348; Lopez, 406 So. 2d 1155; Estate of Harper, 366 So. 2d 126; Stewart, 271 So. 2d 466; Way, 260 So. 2d 288; Hoitt, 182 So. 2d 58. In these cases the court concluded that harm was foreseeable. In Champion there is also a suggestion of esoteric new tests to be used: contemporaneous observance, physical proximity to the accident, parental relationship to the injured, status of the injured as a minor, etc. Id. at 353-54. All of these could and should be considered under the traditional proximate cause analysis, rather than confusing the issue with separate enumerated criteria. The court suggests that "[i]t does not matter whether these factors are regarded as policy considerations imposing limitations on the scope of reasonable foreseeability . . . , or as factors bearing on the determination of reasonable foreseeability itself." Id. at 353 (quoting Dziokonski v. Babineau, 380 N.E.2d 1295, 1302 (Mass. 1978)). Unfortunately, it makes a great deal of difference. The latter would be a much simpler, more flexible determination.


211. See Gilliam, 291 So. 2d 593; Wells, 39 So. 838. For the classic discussion of directness in proximate cause, see In re Arbitration between Polemis and Furness, Withy & Co., Ltd., 3 K.B. 560 (C.A. 1921).

provide more flexibility and at least as much certainty in negligent mental distress cases as present mechanical and capricious devices such as impact.

V. Conclusion

There is a considerable body of case law in Florida in the areas of malicious, intentional, and negligent mental distress. There is a lack of proportionality of result between malice cases, where distress over loss of pets is compensated, and negligence cases, where distress over loss of human life is uncompensated. In the cause of action for negligent infliction of mental distress, the impact requirement, which usually means a contact requirement, has led to undesirable inconsistencies among the cases.

The Florida Supreme Court has a current opportunity to review and bring harmony to the area of negligent infliction of mental distress, the only area in which impact is relevant, and to restore proportionality of result between negligence and malice cases. The proximate cause requirement, which embraces a consideration of the foreseeability of harm, directness of harm, foreseeability of the plaintiff in a zone of danger, and the temporal and spacial relationship between negligence and harm, is a familiar delimitation in the law of torts. It provides more flexibility than the impact requirement, with at least as much consistency. It is a flexible yet predictable standard by which to judge the negligence cause of action. For these reasons, the impact requirement should be rejected and a traditional proximate cause limitation adopted.