O/a 5-5-83

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In The Supreme Court of Florida

Walter D. Champion, Petitioner

v.

Roy Lee Gray, Jr., et.al., Respondent

Case No.
62,830

Supplemental Brief of Amicus
Curiae on Question of Direct
or Derivative Cause of Action

6/13/85

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Summary of Argument

The negligent infliction of emotional distress cause of action has been evolving for at least a century. From the earliest impact rule cases to the modern cases acknowledging a duty, the courts have uniformly employ standard negligence duty analysis, thereby implying a direct cause of action.

Moreover, the cases have uniformly deemed the issue to be one of individual duty, employing forseeability analysis as a principal consideration. None of the cases has examined the issue in terms of damage to a relationship, which is the key doctrine underlying derivative tort rights such as those acknowledged in loss of consortium and wrongful death claims. Moreover, if this Court were to hold the present action to be derivative, it would make the Court's apparent overruling of Gilliam v. Stewart, 271 So.2d 408 (Fla. 1973) unnecessary and at best an obiter dictum and would unnecessarily confuse and proliferate the various causes of action in this state.

Finally, treating the cause of action as direct is more just under the fundamental common law premise of individual accountability. An innocent person's action against a negligent person should not be diminished on the ground that some other person was also negligent.

Finally, treating the cause of action as direct places it in the mainstream of the law of negligence. Thereafter, existing doctrines of contribution, indemnification, and immunity would apply exactly as they would apply had injuries resulted from physical rather than the psychic impact. Thus, confusion and complication of the law will be avoided.

ARGUMENT

This supplemental brief is submitted voluntarily in reply to a telephone call received on June 5, 1985 from the office of the Clerk of The Florida Supreme Court notifying me of the privilege of doing so. Because there is no initial brief as such to answer, Amicus Curiae will address the issue of whether the cause of action acknowledged by this Court in its Champion v.Gray opinion in case No. 62,830 issued on March 7, 1985 is a direct or derivative cause of action. The organization will correspond to that employed by Respondents in the Joint Motion for Rehearing filed on March 19, 1985.

A. THE NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CAUSE OF ACTION IS A DIRECT AND NOT DERIVATIVE CAUSE OF ACTION.

The question of whether the cause of action is direct or derivative is apparently novel. Courts and commentators have uniformly treated the issue as one of duty with all its ramifications. These include particularly the point so firmly cemented in the law by the celebrated opinion of Justice Cardozo in Palsgraf v. Long Island R.R., 248 N.Y. 339, 164, N.E, 564 (1929); namely, for a negligence cause of action to exist, a duty must be owed directly to the particular plaintiff and not to someone else. As demonstrated below, history, doctrine and justice all support the conclusion that the negligent infliction of emotional distress cause of action is in the mainstream of the duty issue and must, therefore, be deemed to be a direct cause of action.

History. Although a few older American cases acknowledged a duty in emotional injury cases,[1] the two seminal cases were

Victoria Railways Commissioners v. Coultas, 13 App. Cas. 222 (P.C. 1888) from the Privy Council and Mitchell v. Rochester Railway Co., 151 N.Y. 107, 45 N.E. 354 (1896) from the New York Court of Appeals, both of which held that there is no-duty as to negligent infliction of emotional injury in the abscence of physical impact. The opinions in these and all subsequent important cases down to Dillon v. Legg, 68 Cal.2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968), Mt. Isa Mines Ltd. v. Pusey, 125 C.L.R. 383 (Austl. 1970) and McLaughlin v. O'Brian, [1982] 2 All E. R. 298, have employed analyses that assumed the Palsgraf point; namely, that the question is one of duty and the duty must be one owing directly to the plaintiff.

Had the negligent infliction of emotional distress cause of action been deemed to be derivative in character, the mode and considerations of the analyses would have been entirely different. Because this issue was never a question in these many cases, the various courts' uniform implicit view that the cause of action is direct in character must be inferred from the overall analytical approaches employed by the courts. Amicus

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1. See, Little "Erosion of No-Duty Negligence Rules in England, the United States, and Common Law Commonwealth Nations," 20 Houston L. Rev. 953, 984-987, 1009-1016 (1983). This article traces the evaluation of many no-duty rules including, particularly, the emotional injury no-duty rule abrogated by this Court in this case.

Curiae will not needless freight this opinion with long quotations to make this point, but asserts that the two paragraph quotation from Dillon in Justice MacDonald's majority opinion in this case fully supports it.

In this regard, Amicus Curiae explicitly disagrees with Respondents' assertion in the Joint Motion for Rehearing (p.2) that Dillon v. Legg, and Porter v. Jaffe, 84 N.J. 88, 417 A.2d 521 (1980) acknowledge derivative rather than direct causes of action. The analysis in each opinion clearly proceeds on the basis of an individual, direct cause of action. (See Doctrinal discussion, infra.). Although it cannot be denied that the short penultimate paragraph of the Porter opinion held that the damages of the emotional injury plaintiff must be reduced on account of the negligence of the bodily injured plaintiff (417 A.2d at 528), Amicus Curiae asserts both that this holding is an pro tanto artificial limitation of an otherwise orthodox analysis and is also unsound. It departs drastically from the Porter opinion's own preceding doctrinal justification for acknowledging the cause of action and fails to recognize that other measures exist for avoiding the consequences that the Porter court deems to be unjust. Consequently, this Court should ignore this ill considered portion of the Porter opinion.

In sum, the historical evolution of the negligent infliction of emotional injury cause of action for damages, beginning with the impact rule cases like Coultas and Mitchell and continuing down to the modern cases, has proceeded on the basis of individual duty and a direct cause of action.

Doctrine. As this Court's majority opinion in this case points out, emotional injury cases come in at least two distinct types: those stemming from fear for one's own safety and those arising out of the shock of seeing harm rendered someone else. Coultas and Mitchell were of the first variety (fear of personal harm) as was Gilliam v. Stewart,271 So.2d 466 (Fla. 1973), the leading Florida impact rule case this the Court has presumably abrogated in this case. By contrast, Mt. Isa Mines and the present case are of the second variety, namely, emotional harm arising out of the aftermath of bodily harm done someone else.

As a matter of negligence doctrine, the various opinions have treated these different modalities as if they were one. The basic issue remains a question of duty and the primary consideration of the modern cases has been forseeability of risk of harm. None of the cases have considered the issue in terms of the basic question underlying a derivative cause of action. This point is corroborated by an examination of cases dealing with loss of consortium, which is the prototypical derivative cause of action in the field of common law negligence.

The heart of a consortium action is injury to a protectable consortium relationship shared by the consortium plaintiff and the victim of bodily injury. The doctrinal issue must address that relationship. None of the emotional injury cases has treated the basic duty issue primarily in terms of such a relationship. If they had, the nature of the analysis would have been notably different as is clearly evidenced by this Court's leading loss of consortium cases of Gates v. Foley, 247 So.2d 40 (Fla. 1971) (loss of consortium for wife acknowledged) and Zorzos

v. Rosen, 467 So.2d 305 (Fla. 1985) (loss of consortium for child denied). See also Variety Children's Hospital v. Perkins, 445 So.2d 1010 (Fla. 1983) concluding that actions under the wrongful death statutes are derivative.

By contrast, all the emotional distress cases have treated the issue as one of individual duty without distinction between the various modalities of causation.

In summary, existing doctrine treats all modalities of emotional harm negligently inflicted as an issue of individual duty, implying a direct cause of action. Not only would it be contrary to uniform practice for this Court to deem the cause of action to be derivative but it would also unduly confuse the law of Florida. Indeed, Gilliam v. Stewart, the precendent that this Court has receded from in this case, cannot be treated as a derivative action case. Hence, if the current action is to be treated as a derivative action, then the apparent overruling of Gilliam v. Stewart must be considered to be mere obiter dictum, thus requiring there to be additional uncertainty and litigation about the validity of that case.

In sum, doctrinal considerations strongly impel the conclusion that the cause of action in the present case is direct and not derivative.

Justice. For centuries a central underlying premise of the common law is one of individuality. As a general matter, rights are individually possessed and duties are individually owed.

Implicit within this is the general concept that the most

just result is the one that sees rights and duties evaluated primarily on a one-on-one basis. Thus, ordinarily, the fact that the negligence of A puts B into risk of danger from the negligence of C does not diminish the liability of C to B, nor does it diminish the amount of damages that B may claim from C. For example, if a mother (A) negligently permits a small child (B) to play unattendedly, the mother's negligence will not diminish the child's cause of action against a third person (C) who negligently injures him. This is classical common law jurispru- dence resting firmly on the tenet of individual accountability.

As noted above, the evaluation of the negligent infliction of emotional distress cause of action has proceeded on the grounds of an individual duty. This is consistent with these basic common law premises of individual rights and individual accountability. The concern that troubled the Porter court, if the Porter approach were valid, would have caused earlier courts to conclude that the child in the hypothetical situation described above would have had his mother's negligence held against him. The result would have been to favor the guilty person (C, who was negligent) over the innocent person (B who was not). Moreover, in some cases, at least, the Porter court's complaint can be alleviated by contribution claims. In any event, however, under historic notions of justice it is better to hold a negligent person responsible for all the consequences of his wrong than to diminish the rights of an innocent person because of the negligence of someone else. Amicus Curiae asserts that this basic view of justice should apply as firmly today as

it has through history.

In conclusion, Amicus Curiae asserts that history, doctrine and justice all require the action in the present case to be treated as a direct and not derivative cause of action.

B. A NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS DEFENDANT MAY SEEK CONTRIBUTION FROM A NEGLIGENT PLAINTIFF WHO SUFFERED BODILY INJURY THAT CAUSED THE PSYCHIC INJURY IN THE PLAINTIFF WHO BRINGS THE EMOTIONAL INJURY CAUSE OF ACTION AGAINST THE DEFENDANT.

Establishing the negligent infliction of emotional injury cause of action as direct and not derivative brings it into the mainstream of the law of negligence. It would necessarily follow that the Florida contribution statute and law of indemnification would apply to these cases just as they apply to cases in which direct bodily injury was rendered to the initial plaintiff. This, of course, would include the application of any special rules that apply under the doctrines of intraspousal and intra-family immunity. See, e.g., Shor v. Paoli, 353 So.2d 825 (Fla. 1977) (intraspousal immunity superseded in contribution actions by Fla. Sta. §768.31), Joseph v. Quest, 414 So.2d 1063 (Fla. 1982) (a parent's intrafamily immunity waived in contribution actions to the limit of liability insurance); and, Ard v. Ard 414 So.2d 1066 (Fla. 1982) (a parent's intrafamily immunity waived to the limit of liability insurance.)

C. A PLAINTIFF WHO SUFFERS PSYCHICALLY-INDUCED PHYSICAL INJURIES MAY SUSTAIN A CAUSE OF ACTION AGAINST A NEGLIGENT PERSON WHOSE BODILY INJURIES WERE PERCEIVED BY THE PLAINTIFF AND THEREBY INDUCED THE PSYCHIC INJURY, SUBJECT TO THE RULES OF INTRASPOUSAL AND INTRAFAMILY IMMUNITY AS APPLICABLE.

Consistent with the discussion in Part B, establishing the negligent infliction of emotional distress cause of action as direct and not derivative necessarily impels the conclusion that the psychically injured plaintiff would have a cause of action against a negligent bodily injured person whose injuries induced the psychic injury to the plaintiff. It is true that under the constraints that this Court has placed on the psychically induced cause of action - namely, that the plaintiff be a "close family member" of the bodily injured person - that the actual value of the cause of action will depend upon the particularities of the Florida law of intraspousal and intrafamily immunity. See cases cited in Part B. This is, of course, also true in cases in which a family member plaintiff is seeking damages for direct bodily injury caused by the negligence of another family member. Thus, creating a special rule applicable only to emotional injury cases, as did the New Jersey court in Porter, would unnecessarily confuse and confound the law.

Conclusion

The foregoing analysis demonstrates that the negligent infliction of emotional distress cause of action, in all its modalities, is a direct and not derivative cause of action. This assertion is supported by history, doctrine and justice. Moreover, acknowledging the action to be direct in character

places it in the mainstream of the law of negligence. Accordingly, the Florida law of contribution, indemnity and immunity would apply to these actions on exactly the same terms as they would apply if the plaintiff's harm were direct bodily injury instead of psychically induced injury. For all these reasons, Amicus Curiae urges this Honorable Court to hold the cause of action to be direct and not derivative in character.

CERTIFICATE OF SERVICE

Hereby certify that a true copy of the foregoing motion and brief was served by mail this 13th day of June, 1985 upon the following:

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