IN THE SUPREME COURT OF FLORIDA
Tallahassee, Florida

CASE NO. 63,583

HARVEY L. BROWN, et al.,

Petitioners,

v.

CADILLAC MOTOR CAR DIVISION,
et al.,

Respondents.

_____/

BRIEF OF AMICUS CURIAE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC.

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TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	iv
STATEMENT OF INTEREST OF AMICUS CURIAE	1
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. THE PLAINTIFFS' INTERPRETATION OF DICTUM IN SELFE V. SMITH IS ILLOGICAL AND INCONSISTENT WITH THE HOLDING OF THE CASE AS WELL AS THE CONTROLLING SUPREME COURT PRECEDENT	3
(a) They distort a fragment of the District Court's language by taking it out of context	3
(b) Nothing in the reasoning of Selfe v. Smith justifies such an unrealistic conclusion	5
(c) The "alternative recovery" theory the plaintiffs base on the Selfe dictum is only a different name for distress at the injury to a third person	6
(d) The plaintiffs waived the contention that the jury could find in their favor on the basis of alleged psychological injury	8
II. THE RULING BY THE COURT OF APPEAL SHOULD BE AFFIRMED EVEN IF THE SUPREME COURT WERE TO ELIMINATE THE IMPACT REQUIREMENT IN CHAMPION v. GRAY	11
(a) Unlike Mrs. Champion, Mr. Brown did not suffer a physical injury attributable to severe mental distress	11

Page

(b) The minority view in Gilliam would only permit mental distress to be a basis for a judgment if the plaintiff proves the existence of a clear cut physical injury and also satisfies additional requirements 12

(c) The overwhelming weight of authority supports the physical injury rule 15

III. THE PROPOSAL THAT FLORIDA LAW BE CHANGED TO PERMIT RECOVERY FOR MENTAL DISTRESS, NOT ACCOMPANIED BY PHYSICAL INJURY OR IMPACT, PRESENTS DIFFICULT QUESTIONS OF PUBLIC POLICY 17

(a) The basic problems are highly practical 17

(b) The dangers would be particularly severe in a product liability case 18

(c) These claims would tend to heighten the emotional quality of product litigation, distorting the trial process 20

(d) A gradual approach would reduce the dangers 22

IV. THE ALTERNATIVES TO THE IMPACT RULE WHICH THE PLAINTIFFS PROPOSE COULD NOT SERVE AS ADEQUATE SAFEGUARDS 23

(a) The "bystander-participant" distinction is unfair and unworkable 24

(b) The diagnosable injury formula would be an abdication to the paid witness 27

(c) The guidelines the plaintiffs propose cannot apply to this case because the Wrongful Death Act preempts the field 32

Page

(d) The "instrument of death" theory is mere jury rhetoric 34

V. THE FACTS OF THIS CASE SHOW THAT THE DANGER OF SPECULATIVE AWARDS FOR "PSYCHIATRIC" DISTRESS IS REAL AND IMMEDIATE 36

CONCLUSION 40

CERTIFICATE OF SERVICE 41

TABLE OF CITATIONS

CASES:	Page
Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983)	27
Bould v. Touchette, 349 So.2d 1781 (Fla. 1977)	9, 18, 36
Carter v. Lake Wales Hospital Association, 213 So.2d 898 (Fla. 2d DCA 1968)	25
Champion v. Gray, 420 So.2d 348 (Fla. 5th DCA 1982)	11, 25, 37, 40
Charlie Stuart Oldsmobile, Inc. v. Smith, 171 Ind.App. 315, 357 N.E.2d 247 (1976), vacated in part, 175 Ind.App. 1, 369 N.E.2d 947 (1977)	15
City of Coral Gables v. Puiggros, 376 So.2d 281 (Fla. 3d DCA 1978)	24
Clemm v. Atchinson, T & S. R.R. Co., 126 Kan. 181, 268 P. 103 (1928)	15
CNA Ins. v. Minton, 334 So.2d 257 (Fla. 1976)	10
Daley v. LaCroix, 384 Mich. 4, 179 N.W.2d 390 (1970)	15
Dillon v. Legg, 68 Cal.2d 728, 441 P.2d 912 (1968)	24, 32
Dober v. Worrell, 401 So.2d 1322 (Fla. 1981)	10
Dorsey v. Honda Motor Co., Ltd., 655 F.2d 650 (5th Cir. 1981), modified, 670 F.2d 21 (5th Cir.), cert. denied, 103 S.Ct. 177 (1982)	22
Friedman v. Mutual Broadcasting System, Inc., 380 So.2d 131 (Fla. 3d DCA), cert. denied, 388 So.2d 1112 (Fla. 1980)	22
Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974)	1, 5, 9, 12, 15, 37
Gilper v. Kiamesha Concord, Inc., 302 A.2d 740 (D.C. Ct.App. 1973)	15
Hafield v. Max Rouse & Sons N.W., 100 Idaho 840, 606 P.2d 944 (1980)	15

Page

Hall v. O'Neil Turpentine Co., 56 Fla. 324, 47 So. 609 (1908) 29

Hartley v. Florida E. C. R. Co., 339 So.2d 630 (Fla. 1976) 10

Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) 10

Houdaille v. Edwards, 374 So.2d 490 (Fla. 1979) 25

Huddell v. Levin, 537 F.2d 726 (1976) 39

In re Beverly, 342 So.2d 481 (Fla. 1977) 10, 24

Keck v. Jackson, 122 Ariz. 114, 593 P.2d 668 (1979) 15

Kennedy v. McKesson Company, 58 N.Y.2d 500 (1983) 34

Lassiter v. International Union of Op. Engrs., 349 So.2d 622 (Fla. 1977) 36

Loftin v. Wilson, 67 So.2d 185 (Fla. 1953) 36

M.B.M. Co. v. Counce, 268 Ark. 269, 596 S.W.2d 681 (1980) 15

McClain v. Faraone, 369 A.2d 1090 (Del. Super. 1977) 15

Motor Club of America Ins. Co. v. Landa, 388 So.2d 10 (Fla. 4th DCA 1980) 10

National Car Rental Systems, Inc. v. Bostic, 423 So.2d 915 (Fla. 3d DCA 1983) 26

Payton v. Abbott Laboratories, 368 Mass. 540, 437 N.E.2d 171 (1982) 20

Robb v. Pennsylvania R. Co., 58 Del. 454, 210 A.2d 709 (1965) 15

Revitz v. Bava, 355 So.2d 1170 (Fla. 1978) 24

Selfe v. Smith, 397 So.2d 348 (Fla. 1st DCA), rev. denied, 407 So.2d 1105 (Fla. 1981) 1, 3, 4, 9, 10

	Page
Stern v. Miller, 348 So.2d 303 (Fla. 1977)	33
Stetz v. American Casualty Co., 368 So.2d 912 (Fla. 3d DCA), cert. denied, 378 So.2d 349 (Fla. 1979)	22
Stewart v. Gilliam, 371 So.2d 466, quashed, 291 So.2d 593 (Fla. 1974)	13
Thomas v. Fowler, 414 So.2d 215 (Fla. 4th DCA 1982)	10
Woodman v. Dever, 367 So.2d 1061 (Fla. 1st DCA 1979)	5
OTHER AUTHORITIES:	
Fla. Const. Art. V §(b)(4)	24
§90.202, Florida Statutes (1981)	29
23 Fla.Jur. 2d, "Evidence and Witnesses" §48	29
Anstead, Selective Publication: An Alternative to the PCA?, 34 U. Fla. L. Rev. 189 (1982)	19
Owens, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 Chi. L. Rev. 1	21
Pearson, Liability to Bystanders for Negligently Inflicted Emotional Harm - A Comment on the Nature of Arbitrary Rules, 34 U. Fla. L. Rev. 477 (1982)	17, 19, 24, 34
Prosser, Law of Torts, §334 (4th ed. 1971)	16
Restatement of Torts 2d, §313	16
England & Williams, Florida Appellate Reform: One Year Later, 9 Fla. State U. L. Rev. 221 (1981)	18

STATEMENT OF INTEREST OF AMICUS CURIAE

This case is one of great significance to the Product Liability Advisory Council of the Motor Vehicle Manufacturers Association of the United States, Inc. (hereinafter MVMA). If the Court were to adopt any of the varied and inconsistent positions touched on in the petitioners' brief, any defendant could be subject to liability to a new class of claimants and that liability would have no workable or predictable boundary.

STATEMENT OF FACTS

Amicus curiae adopts the statement of facts in the brief submitted on behalf of the defendant General Motors Corporation.

SUMMARY OF ARGUMENT

The plaintiffs' position[1/] (Point I, p.b. 3, 14, 16, 26) in the lower courts was that isolated dicta in Selfe v. Smith, 397 So.2d 348 (Fla. 1st DCA), rev. denied, 407 So.2d 1105 (Fla. 1981) meant they could satisfy the impact rule by telling the jury to ignore the circumstances of the accident and to consider only the "trauma" as it "effected Mr. Brown". That contention cannot be reconciled with Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974) or, for that matter, with the holding in

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1/ Petitioners Harvey Brown, et al. will be referred to as "plaintiffs". Their brief is cited as "p.b." followed by the page number.

Selfe. Moreover, they waived the argument later in the trial when they insisted on a jury instruction which only would permit recovery for physical injury and mental distress related to that injury.

In Point III, the plaintiffs demand that the Court abolish the impact rule and, in the process, that it also reject the majority position which requires an objective physical injury as a comparable safeguard. Instead, they would have the Court adopt one or more of the inconsistent approaches in their brief. None offers a feasible alternative to existing law. The "participant" and "instrument of death" theories have no support in precedent; they would not provide trial judges with workable boundaries; and the distinctions they draw would be arbitrary and unfair.

A review of the facts shows that the plaintiffs' attack on the Court of Appeal's ruling on the damage issue (p.b. 30) is unjustified. Further, those facts demonstrate the illusory nature of a rule which would permit an award whenever a psychologist or psychiatrist is willing to say a particular "mental injury" is "medically recognized". The practical effect would be that plaintiffs' attorneys would obtain the services of partisan experts who could fit any claim within the vague and shifting bounds of psychiatric terminology.

ARGUMENT

I. THE PLAINTIFFS' INTERPRETATION OF DICTUM IN SELFE v. SMITH IS ILLOGICAL AND INCONSISTENT WITH THE HOLDING OF THE CASE AS WELL AS THE CONTROLLING SUPREME COURT PRECEDENT

(a) They distort a fragment of the District Court's language by taking it out of context

The plaintiffs' position[2/] before the trial court and the District Court of Appeal was an attempt to capitalize on dictum in Selfe v. Smith. Yet the holding in that case requires a ruling for the defense.

Selfe involved a claim by a mother for mental distress she suffered when she saw her daughter's face cut in an automobile accident. She herself was injured in the same collision. The Court of Appeal held that she could not recover for her distress at the injury to her child, although an award was proper for her own physical injuries and emotional distress they caused her.

2/ Note their statement (p.b. 3-4) that the parties agreed to the law as stated in Selfe v. Smith. At various points, they also suggested that the Psychiatrist's reference to a "bump" satisfied the "impact" requirement. We will not address that point other than to point out that the testimony does not establish when or how the bump occurred or, more important, that it was the cause of the mental distress.

The plaintiffs' argument to the trial judge (t. 5-7; 9) focused on a passing statement that the permissible recovery is for "the traumatic event considered in relation to plaintiff alone." Selfe, p. 350. They used that dictum as the spring-board for an assertion that the jury in this case only considered the "psychological effects" on Mr. Brown of the "trauma" involved in seeing his mother injured and that these were distinct from his distress at the injury to his mother. Yet there is no evidence that jurors could or would separate the "effects" from the "distress". Indeed, the "testimony" the plaintiffs cite for that point (p.b. 4) is nothing but their own lawyers' instruction to the psychiatrist to "try his best" to limit his testimony in that way "if he could". (t. 369). It is clear that this was a conscious attempt to build a record for this appeal. The lawyer, in fact, explained his instruction by telling the witness "there is a legal reason for it". (t. 369).

In reality, neither the psychiatrist nor the jurors could have made such a self-defeating distinction even if they had tried. If the jurors had ignored the death of Mrs. Brown and her son's distress, they would have had to ignore the basic facts of the accident and the "trauma" as well.

(b) Nothing in the reasoning of Selfe v. Smith justifies such an unrealistic conclusion

The clause in question appeared in a sentence which was followed immediately by the holding of the case, i.e. that Mrs. Selfe could not recover for her anguish at the child's injury. In context, the dictum was only a reference to the claimant's right to recover for her own physical injuries which were attributable to the traumatic event and, also, for the emotional or psychological consequences of those physical injuries. Presumably, the District Court added it to emphasize the nature of the compensable injury and to distinguish it from distress at an injury to a third person -- which is not compensable.

Each of the four cases which Judge Smith cited in Selfe to support the dicta in question is consistent with that reading but inconsistent with the plaintiffs' theory. In particular, note Woodman v. Dever, 367 So.2d 1061 (Fla. 1st DCA 1979). There a mother and her daughter were staying in a motel. An intruder entered and raped the mother. The complaint sought damages for the emotional distress the daughter suffered as a result of witnessing the attack. In another count, the mother sought medical expenses incurred in the treatment of the psychological injury to the daughter. Citing Gilliam, the Court affirmed the dismissal of both counts. Thus Woodman is a holding that there could be no recovery for a psychological

injury caused by witnessing an injury to a close family member. The First District would not have cited such a case had it intended the Selfe opinion to authorize precisely that recovery.

(c) The "alternative recovery" theory the plaintiffs base on the Selfe dictum is only a different name for distress at the injury to a third person

The Supreme Court, of course, would not be bound by Selfe even if the plaintiffs had interpreted the case correctly. We think it important to demonstrate, however, that the "rule" the plaintiffs would draw from the dictum is just as much a sham as their other, intermingled argument to the effect that the impact rule does not require a genuine impact (p.b. 8, 17). In every case, jurors could be told, pro forma, to consider mental anguish in isolation from its cause -- including, for that matter, one which duplicated the facts of Selfe. But to make that the basis for an award would nullify the limitations which Gilliam placed on such claims. Moreover, that approach would reduce the heart of the trial to a transparent fiction.

Jurors could not consider the effects of mental anguish in a vacuum, without regard to the anguish itself and the events which caused it.

For instance, in this case, the pretense would be that the jury only considered the testimony about the death of Mr. Brown's mother in a highly abstract and stylized manner i.e. as

if Mrs. Brown were not involved at all and nothing were at stake but the emotional reactions of the plaintiff. The question, of course, is what provoked those emotions. The answer is equally obvious: the death of his mother in the accident. If one eliminates the accident to Mrs. Brown from the testimony, the whole event becomes incomprehensible.[3/]

It is equally unrealistic for the plaintiffs to claim (p.b. 4) that Dr. Stillman limited himself to describing the event "as it effected Mr. Brown". True, the plaintiffs' lawyer recited that formula but the doctor proceeded to ignore it and to talk (t. 369-71) about the accident to Mrs. Brown and Mr. Brown's distress at her death. More generally, it is hypocritical to say that any such perfunctory "limit" would make jurors consider only the "trauma" and not the circumstances of the accident.

The circumstances of this case were highly emotional. The transcript of the plaintiffs' testimony and the jury speeches by their counsel show that they sought to capitalize on that emotion at every stage of the trial. Indeed, they continue to do so in their appellate brief.

3/ Neither Mr. Brown nor anyone else suggested that he suffered the alleged psychological injury because his foot slipped on the accelerator or, for that matter, because the mat may have jammed the accelerator, causing the vehicle to move forward a few feet.

The best evidence of the artificiality of the supposed separation of "trauma" from "effect" lies in the plaintiffs' own insistence that Mr. Brown be viewed as an "instrument of death". That talk flatly contradicts the pretense that anyone could or would consider the "trauma" in isolation. To follow the plaintiffs' argument, the jury had to consider Mr. Brown's actions; the extent to which he was an "instrument"; the effects of the "instrument" on a third person; the relationship between the two; and, finally, the anguish which the results of those actions produced in the plaintiff himself.

It would be an unworthy subterfuge for the law to pretend that jurors would ignore testimony and arguments of counsel which dwell on the circumstances of the accident in this way. The "traumatic" event was what happened to Mrs. Brown. To consider it "in relationship" to the plaintiff, Harvey Brown, is to consider his emotional response to an injury to another person.

(d) The plaintiffs waived the contention that the jury could find in their favor on the basis of alleged psychological injury

The question is moot.

If the plaintiffs could be said, arguendo, to have raised the contention in tne trial court that psychological damages alone should be a sufficient basis for recovery, they promptly waived it. Specifically, they argued, early the trial, that

Selfe v. Smith made the psychological "trauma" a sufficient basis for recovery. (t. 5-7, 9) But when the time came for jury instructions, the plaintiff did not submit any request which could have led the jurors to find in their favor on the basis of the supposed psychological injury. On the contrary, they submitted only the standard instruction based on Gilliam. (t. 666) This told the jurors that any award must be on the basis of physical injury and mental distress attributable to that physical injury (t. 666, 745; App. A to this brief).[4/]

In effect, the plaintiffs successfully switched back to their "bump on the head" argument. That was a shrewd tactical decision. The jury had heard extensive testimony about the "psychological" claim and that dramatic theory could be expected to influence them.[5/] On the other hand, the theory would be highly controversial on appeal; the safer course was to jettison it at the end of the trial. The plaintiffs, however, could not have it both ways.

For authority that a litigant cannot assert an argument on appeal which he has waived or abandoned during the course of the trial, see Bould v. Touchette, 349 So.2d 1181, 1186 (Fla. 1977) (party could not argue, on appeal, a theory of damage

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4/ Further, the defendants objected to that instruction and pointed out that there was no evidence in the record to support it. (t. 666).

5/ General Motors preserved this point by moving to strike Dr. Stillman's testimony (t. 391).

different from that on which he tried the case). Also see, Dober v. Worrell, 401 So.2d 1322, 1323-24 (Fla. 1981) (and cases cited at 1324); In re Beverly, 342 So.2d 481, 489 (Fla. 1977); Hartley v. Florida E.C. R. Co., 339 So.2d 630, 631 (Fla 1976); CNA Ins. v. Minton, 334 So.2d 257-58 (Fla. 1976); Hoffman v. Jones, 280 So.2d 431, 439-40 (Fla. 1973); Thomas v. Fowler, 414 So.2d 215 (Fla. 4th DCA 1982); Motor Club of America Ins. Co. v. Landa, 388 So.2d 10 (Fla. 4th DCA 1980).

In summary, the position the plaintiffs' relied upon below is meaningless. Common sense says that plaintiffs cannot be right in asserting that Selfe is the basis for two independent rules, which govern the same circumstances but produce directly contrary results. The reality is that the car moved forward for some reason, and struck Mr. Brown's mother. Understandably, he felt grief and sorrow (t.180). But the Supreme Court has said that this is not a basis for recovery, and the jury was not instructed to make the findings which would have been indispensable to that theory.

II. THE RULING BY THE COURT OF APPEAL SHOULD BE AFFIRMED EVEN IF THE SUPREME COURT WERE TO ELIMINATE THE IMPACT REQUIREMENT IN CHAMPION v. GRAY

(a) Unlike Mrs. Champion, Mr. Brown did not suffer a physical injury attributable to severe mental distress

Mrs. Champion suffered the ultimate physical injury, death. Mr. Brown experienced grief and anguish but neither the accident nor the mental distress inflicted any physical injury upon him. The plaintiffs ignore that fundamental difference between the two cases. The Court should not.

An affirmative answer to the certified question would require that the Court abandon the impact rule and, also, that there be no comparable safeguard such as a requirement of an objective physical injury resulting from the mental distress. That would go beyond anything necessary to the plaintiffs' position in Champion v. Gray.[6/]

6/ The MVMA believes that the impact rule represents a reasonable balance of the competing interests and that no one has demonstrated that a change in the rule would accomplish enough to justify the burdens and risks involved. The Court, however, has heard the arguments, pro and con, in Champion v. Gray. Rather than go over the same ground, this brief will assume that the Court has decided to change its doctrine in some way. We will show that even the relatively permissive "physical injury" test would not permit the award to stand in this case; and that the more extreme proposals suggested by the plaintiffs would be unworkable and unfair.

(b) The minority view in Gilliam would only permit mental distress to be a basis for a judgment if the plaintiff proves the existence of a clear cut physical injury and also satisfies additional requirements

The enormity of the change in Florida law which the plaintiffs demand becomes even more apparent when one considers that the evidence presented on behalf of Mr. Brown would not have satisfied those judges who unsuccessfully argued for the elimination of the impact requirement in Gilliam.

The plaintiffs' brief ignores the difference between the "physical impact" of the accident and "physical injury" caused by the mental distress resulting from the accident. The District Court of Appeal opinion in Gilliam, however, carefully distinguished the two concepts and treated the physical injury requirement as an indispensable safeguard.

Judge Mager thought that the Florida law which requires an impact for such a claim should be changed. Nevertheless, he emphasized that the new form of liability should be limited to those clear-cut physical injuries which result from mental distress.

Conversely, the Court of Appeal flatly rejected suggestions, like the plaintiffs', that "mental injury" should be treated as the functional equivalent of a clear-cut physical injury. Judge Mager's statements to the contrary could not have been more direct:

> . . . [I]t is alleged that a defendant's negligent act, although involving no physical impact, has caused a mental or emotional disturbance resulting in bodily injury or illness. This factual circumstance is to be distinguished from a case where a plaintiff seeks to maintain a cause of action for an emotional disturbance without physical effect. In other words, we are not herein concerned with an action for recovery for mental or emotional disturbance unconnected with a resulting physical injury . . . Instead, we are concerned with a defendants' wrongful act without direct physical impact but which occasions a mental disturbance that operates internally to produce physical injuries of a definite, objective and ascertainable nature. (Stewart v. Gilliam, 271 So.2d 466 at 472, quashed, 291 So.2d 593 (Fla. 1974) (Emphasis in original).

The Judge proceeded to discuss certain cases in which the physical impact of the accident had been attenuated - such as an electrical shock which left no physical mark. But even there, he emphasized, the resulting injury must be objective and physical, not a matter of emotion or psychology.

The question certified[7/] to the Supreme Court in Gilliam assumed the need for a traditional, physical injury as a basis for recovery even under the proposed liberalization. Further, the dissenting opinion by Justice Adkins emphasized the same limitation which Judge Mager had set for the expanded

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7/ Where a person suffers a definite and objective physical injury, i.e. heart attack, as a result of emotional stress, i.e. fright, induced by a defendant's alleged negligent conduct may such person maintain an action against the defendant even though no physical impact from an external force was imposed upon the injured person? 291 So.2d at 594.

liability. Although he would have permitted damage awards in a new, limited category of cases, the Justice cautioned:

> 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 recovery for mental or emotional disturbance unconnected with a resulting physical injury. 291 So.2d at 596 (Emphasis in original).

Further, Justice Adkins added other safeguards. The recovery would be limited to those within the area of physical risk; and then only for those reactions which were a natural result of fright. Even more important, the dissent also specified that:

> The injuries should not only be proximately caused by the negligence of the defendant, but should also follow closely in point of time to the negligent conduct . . . Id. at 603.

Mr. Brown's claim would not satisfy any of these requirements. Assuming arguendo that he experienced some mental "change", it was not accompanied by any physical injury. Nor was it a consequence of fear for his own physical safety. And rather than closely following the negligent conduct, his alleged injury took years to develop - if it has developed. Dr. Stillman's testimony that he may stay the same or get "worse" (in some unexplained way) at some point in the future (t. 383), still more years after the event, only makes the whole process even more speculative.

In short, while the Court of Appeal and a minority in the Supreme Court argued for a change in the law in Gilliam v. Stewart, they did not intend that change to encompass a claim like Mr. Brown's.

(c) The overwhelming weight of authority supports the physical injury rule

Most American jurisdictions have adopted the approach suggested by Justice Adkins.[8/] That consensus, moreover, is based upon realism and practicality.

Dean Prosser has pointed to the need for enforceable boundaries, if a Mrs. Champion is to recover but potential defendants and the trial bench are not to be overwhelmed by other, less deserving claims:

8/ Among other authorities which specifically require a showing of physical harm as a precondition to recovery for emotional distress, see M.B.M. Co. v. Counce, 268 Ark. 269, 596 S.W.2d 681 (1980) (dicta); Keck v. Jackson, 122 Ariz. 114, 593 P.2d 668 (1979) (en banc); Robb v. Pennsylvania R. Co., 58 Del. 454, 210 A.2d 709 (1965). Accord, McClain v. Faraone, 369 A.2d 1090, 1095 (Del. Super. 1977); Gilper v. Kiamesha Concord, Inc., 302 A.2d 740 (D.C. Ct. App. 1973); Hafield v. Max Rouse & Sons N.W., 100 Idaho 840, 606 P.2d 944 (1980); Charlie Stuart Oldsmobile, Inc. v. Smith, 171 Ind.App. 315, 357 N.E.2d 247 (1976), vacated in part, 175 Ind.App. 1, 369 N.E.2d 947 (1977); Clemm v. Atchinson, T &S.F. R. Co., 126 Kan. 181, 268 P. 103 (1928); Daley v. LaCroix, 384 Mich. 4, 179 N.W.2d 390 (1970) ("definite and objective physical injury").

> It seems sufficiently obvious that the shock of a mother at danger or harm to her child may be both a real and serious injury . . . Yet it is equally obvious that if recovery is to be permitted, there must be some limitation. It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one man were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it . . . obviously the danger of fictitious claims and the necessity of some guarantee of genuineness, are even greater here than before. It is no doubt such considerations that have made the law extremely cautious.
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> W. Prosser, Law of Torts, 334 (4th ed. 1971).

Further, he identified the physical injury requirement as the type of safeguard which prudence requires:

> Some limitations might however, be suggested. It is clear that the injury threatened or inflicted upon the third person must be a serious one of a nature to cause severe mental disturbance to the plaintiff and that the shock must result in actual pnysical harm . . . Prosser, Law of Torts (4th ed.) 334-335.

The Restatement of Torts 2d §313 also insists upon that safeguard in a case involving the negligent infliction of emotional distress--although the draftsmen would impose additional prerequisites through the "zone of danger" rule.

III. THE PROPOSAL THAT FLORIDA LAW BE CHANGED TO PERMIT RECOVERY FOR MENTAL DISTRESS, NOT ACCOMPANIED BY PHYSICAL INJURY OR IMPACT, PRESENTS DIFFICULT QUESTIONS OF PUBLIC POLICY

(a) The basic problems are highly practical

An affirmative answer to the certified question would change Florida law, in a single decision, from the long established "impact rule" to one of extreme lenience. The outcome of this case shows that the concerns which have led the majority of courts to reject that wide open approach are realistic.

The problems include (1) the appeal of the claims to emotion and sympathy; (2) the impossibility of measuring them in monetary terms; and (3) the practical difficulties of distinguishing them from normal grief.[9/]

The most fundamental danger, however, lies in the sheer number of claims which such a rule would encourage.

The plaintiffs themselves suggest that every accident victim has friends or relatives who suffer genuine emotional blows because of his or ner injuries (p.b. 25, quoting Dziokonski v. Babineau, 380 N.E.2d 1295 (Mass. 1978). The logical corollary is that virtually every accident case could

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9/ For a thoughtful discussion of these points by a disinterested scholar, see Pearson, Liability to Bystanders for Negligently Inflicted Emotional Harm, 34 U. Fla. L. Rev. 477 (1982) at pp. 506-09.

involve several additional claimants. The Court may think this an alarmist view. Yet consider the implications for the trial courts of even a conservative assumption that only one such claim would be added to half of the severe accident cases. Further, each of those new claims would involve time consuming psychological or psychiatric testimony.

(b) The dangers would be particularly severe in a product liability case

The new rule would apply to all defendants, not just General Motors. Any motorist who is in an accident could be subjected to potentially ruinous claims for "psychological disorders." Nevertheless, the effects of such a ruling would be particularly severe in product liability cases.

Over the past three decades, the judiciary has consciously expanded the liability of manufacturers and, at the same time, taken a far more lenient approach to damage claims. Judgments now often include hundreds of thousands of dollars attributable to inherently speculative matters such as future inflation. Bould v. Touchette, supra. Equally significant, while the number of cases has expanded, the time and resources available for appellate review of each has decreased.[10/] A ruling for the

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10/ Note the Supreme Court's active role in constitutional reforms restricting its jurisdiction. England and Williams, Florida Appellate Reform: One Year Later, 9 Fla. State U. L. Rev. 221, 224 (1981). The growth of the per curiam opinion and repeated statements by courts at every level that this is necessary because they no longer

Footnote Continued

plaintiffs in this case would carry that process still further. A whole new class of claimants would be encouraged to demand enormous judgments for emotions which are indistinguishable from sorrow and grief. If not to them, to those who would capitalize on their claims, the temptation would be to convert tragedy into a lottery.11/

Further, the money to pay those claims would have to come from higher insurance rates or higher prices for consumer goods. These, in turn, could mean lost jobs for those workers whose employers could not simply "pass the cost on."

There also is another aspect to the problem. If the law were changed to permit claims for "psychological" damages the probable result would be a far larger total of awards against the defendant for a single tort. Conceivably, however, jurors might reduce the awards to each claimant, to prevent the total from being disproportionately and ruinously large. But would

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Footnote Continued From Preceding Page

have the time to issue written analyses of every case cast additional doubt on the assumption that the courts will be able to handle a large number of new cases. See also Anstead, Selective Publication: An Alternative to the PCA? 34 U. Fla. L. Rev. 189 (1982) at 201-202. The plaintiffs' arguments on the damages issues in the case (p.b. 30, 32-34) exaggerate the extent to which the scope of review has diminished, but they do illustrate the trend and the general type of thinking to which we refer.

11/ Consider the analysis in Pearson, Liability to Bystanders for Negligently Inflicted Emotional Harm - A Comment on the Nature of Arbitrary Rules, 34 U. Fla. L. Rev. at p. 502-03.

that be fair to the plaintiff who actually suffers a tangible physical injury? Should his award be reduced in order to give money to another for "mental problems" which a Dr. Stillman says will materialize at some time in the future?

(c) These claims would tend to heighten the emotional quality of product litigation, distorting the trial process

The plaintiffs' assumption that these problems would be eliminated by the wisdom of jurors is self-serving and superficial.

In Payton v. Abbott Laboratories, 368 Mass. 540, 437 N.E.2d 171, 175 (1982), Justice Lynch of the Supreme Judicial Court of Massachusetts set forth the best case for that view:

> Those seeking to apply a more liberal rule argue that a jury is capable of distinguishing real from feigned injuries and that, therefore, the matter should be left to the jury. This response has appeal because in general it is for the jury-and not for an appellate court, to determine which injuries are real and which are contrived.

The Justice, however, rejected that approach because it failed to take into account the uniquely difficult nature of this problem:

> The task of determining whether a plaintiff has suffered purely emotional distress does not fall conveniently into the traditional categories separating the responsibilities of the judge from those of the jury. A plaintiff may be genuinely, though wrongly, convinced that a defendant's negligence has caused her to suffer

> emotional distress. If such a plaintiff's testimony is believed, and there is no requirement of objective corroboration of the emotional distress alleged, a defendant would be held liable unjustifiably. It is in recognition of the tricks that the human mind can play upon itself, as much as of the deception that people are capable of perpetrating upon one another, that we continue to rely upon traditional indicia of harm to provide objective evidence that a plaintiff actually has suffered emotional distress.

Other authorities have recognized that humane jurors already find it difficult to assess product liability claims objectively when they are confronted with a severely injured plaintiff. Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 Chi. L. Rev. 1 at 11. A demand for supposed emotional or psychological injuries to third persons necessarily adds still more emotion. The focus of those claims, after all, is not on the product - as it supposedly is in strict liability - or even on the defendant's conduct. The emphasis, instead, is on a detailed account of emotional reaction to a tragedy.

Indeed, there is a danger that these claims will be turned into thinly disguised punitive damage presentations in which the plaintiffs' counsel argues heatedly that the defendant should be scourged because the accident made his client feel such distress.[12/]

12/ A punitive damage claim, at least, requires that the plaintiff prove some unusual misconduct, sufficient to satisfy a formula such as that of "wanton and willful

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The distortion would be even more acute when the plaintiffs argue, as did counsel in this case, that the supposed psychological injury must have been more severe because the defendant did not "own up" to the claim that its negligence caused the accident (t. 698). The suggestion is ingenious but it reverses the burden of proof. If it were permitted, the defendant would have a legal duty to stipulate liability in a host of cases or run the risk of paying an added windfall to the other side for "psychological damage".

(d) A gradual approach would reduce the dangers

Individually, the factors we have discussed are not necessarily controlling. Their cumulative effect, however, would be great. Further, even those who dispute these points in detail must recognize that the elimination of the "impact

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negligence." Dorsey v. Honda Motor Co., Ltd., 655 F.2d 650, 652 (5th Cir. 1981), modified, 670 F.2d 21 (5th Cir.), cert. denied, 103 S.Ct. 177 (1982). The "psychological change" theory would nullify that requirement. Recovery would be based upon ordinary negligence or even the mere existence of a defect in the product in spite of extraordinary care. In contrast, under existing law, even an intentional tort does not justify mental anguish damages unless the misconduct also would support punitive damages. Stetz v. American Casualty Co., 368 So.2d 912 (Fla. 3d DCA), cert. denied, 378 So.2d 349 (Fla. 1979); also see Friedman v. Mutual Broadcasting System, Inc., 380 So.2d 131 (Fla. 3d DCA); cert. denied, 388 So.2d 1112 (Fla. 1980). Yet the emotion and name calling would be the same as in a punitive damage case (t. 729, 738).

rule" and its replacement with a new doctrine would be a serious matter - one which requires far more than mere rhetoric that "the courts must do justice". The question is whether the courts would be able to do justice if the trial bench and defendants were subjected to these new burdens.

Therefore the MVMA suggests that if the Court is dissatisfied with the impact rule, it should adopt the position taken by the majority of American jurisdictions - the requirement of an objective physical injury. That ruling, itself a significant change, would permit the Court to see what happens and how many additional claims actually develop, rather than choose between the predictions of either side to this controversy. In the future, when the Court has the benefit of empirical evidence and the experience of the lower courts with new liability and its attendent problems, it would be in a better position to decide whether a still more revolutionary change would be wise.

IV. THE ALTERNATIVES TO THE IMPACT RULE WHICH THE PLAINTIFFS PROPOSE COULD NOT SERVE AS ADEQUATE SAFEGUARDS

The question is not simply one of possible imperfections in existing legal doctrine but whether any of the alternatives which were raised below would be both fair and workable.[13/]

13/ The MVMA urges that the Court not consider other approaches which were not both raised below and discussed in the plaintiffs' brief. The Florida Constitution limits certified question jurisdiction to the instance where the

Footnote Continued

(a) The "bystander-participant" distinction is unfair and unworkable

The plaintiffs argue that Florida permits "participants" to recover but not bystanders (p.b. 8). Interestingly, that view would bar Mrs. Champion's claim.[14/]

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matter was passed upon by the Court of Appeal. Fla. Const. Art. V §3(b)(4); Revitz v. Baya, 355 So.2d 1170, 1171 (Fla. 1978). If a point was not raised below, it could not have been passed upon by the Court of Appeal. More generally, any approach to these problems involves complexities and difficult judgments. Therefore, the Court's traditional insistence that the matter have been debated and analyzed below is likely to produce a better record and a more thoughtful approach than would be possible if the Court were to accept the invitation to broad dicta implicit in the plaintiffs' generalities that the impact rule should be "abolished." See In re Beverly, 342 So.2d 481, 489 (Fla. 1977); City of Coral Gables v. Puiggros, 376 So.2d 281, 285 (Fla. 3d DCA 1978). For instance, there are serious arguments to be made about the "zone of danger" rule, both pro and con. See Pearson, Liability to Bystanders, supra. The Court could not adopt that rule in this case, however, unless it were willing to ignore the fact that it had not been proposed in the trial court and had not been analyzed by the lower court judges or even by the parties. The question is a difficult one and the Court would need background. No one can say what the zone of danger actually meant in this context. Further, Pearson assumes that the dominant characteristic of the zone of danger is the fear which the claimant felt for his own safety. There is no testimony in this case that Mr. Brown felt any fear; or that he had any reason to fear serious physical injury to himself.

14/ Similarly, one odd aspect of the plaintiffs' argument is that their theory conflicts with many other cases which they themselves cite. In those instances, courts have permitted recovery in cases involving "bystanders" (but bystanders who could show objective physical injury). See, for instance, Dillon v. Legg, 68 Cal.2d 728, 441 P.2d 912 (1968).

None of the cases they discuss actually says the "bystander-participant" distinction represents a sufficient test in and of itself. To the extent the authorities sometimes refer to "mere bystanders", the point is to eliminate those who have no connection with the event other than accidental physical presence. The "active" and "passive" distinction the plaintiffs attempt to draw has nothing to do with the question.[15/] The argument, instead, is wishful thinking. It represents the culmination of a process by which they ignore the critical role of an objective physical injury in cases which they cite (as well as in Champion v. Gray); then characterize everyone who recovers in those cases as a "participant" regardless of circumstances;[16/] and, finally, suggest that the Court had that distinction in mind although it never saw fit to say so publicly (p.b. 15).

15/ The Court found that the "active" and "passive" terminology useless in the context of implied indemnity claims, where it was at least familiar. Therefore it abolished that test. Houdaille v. Edwards, 374 So.2d 490 (Fla. 1979). There is no reason to resurrect unfamiliar terminology for use in a situation in which it is even less useful.

16/ Why, for instance, was the woman who gave birth in Carter v. Lake Wales Hospital Association, 213 So.2d 898 (Fla. 2d DCA 1968) (cited at p.b. 10) a "bystander" rather than a "participant" when the hospital sent her baby home with the wrong parents?

The plaintiffs' heavy reliance upon National Car Rental Systems, Inc. v. Bostic, 423 So.2d 915 (Fla. 3d DCA 1983) is an example of this process. In that case, the plaintiff suffered fractured ribs, a contused lung and back injuries in a head-on automobile accident. He claimed that he had a severe emotional problem because his physical injuries had left him unable to help his mother at the accident scene.

The Court of Appeal reversed the jury verdict in favor of the plaintiff. The reason was the impropriety of his counsel's argument - much like that of the plaintiff here - that the defendant somehow had wronged him by defending the case. The opinion also included dicta rejecting the motion to dismiss the mental distress claim. The Court's reasoning, however, had nothing to do with the "participant" theory. Nor did it include any criticism of the present state of the law. On the contrary, the panel saw the case as one in which the impact rule worked well and would have permitted a deserving plaintiff to recover:

> We have no quarrel with the . . . impact rule; but rather find that the instant case falls clearly within that rule. Id. at 917.

The reason was that the basic injury was objective and physical:

> The evidence showed that Bostic's emotional problem was caused by his inability to render aid and comfort to his mother because of the injuries and impact ... [which] rendered him physically unable to come to her aid... Id. at 917.

In short, the impact was real and it played a logical role in the causation of the mental distress.

In any event, we predict that the supposed test would last only until the first case in which the "bystander" was a mother who saw the accident happen or someone with an equally appealing claim. At that point, the courts would have to face, once more, the question of whether they could establish a workable boundary if they were to abandon the impact rule and ignore the overwhelming weight of authority in favor of the physical injury requirement.

(b) The "diagnosable injury" formula would be an abdication to the paid witness

The brief submitted on behalf of the organized plaintiffs' Bar cites a Missouri case, Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983), which urges that the test should be a psychological or psychiatric condition which a witness can diagnose and state to be "medically" significant. The point, however, is not properly at issue in this case.[17/]

17/ At one point, the trial judge in this case seems to have toyed with that idea (t. 31). But the plaintiffs later abandoned the contention, (see p. 9 of this brief as well as App. A), and waived any right to use it on appeal.

In any event, the Missouri approach would be no rule at all, but an abdication to the partisan expert. The proposal rests on the assumption that a psychological or psychiatric condition has clear cut boundaries and dimensions, so that it can be identified in the same way that a broken leg can be diagnosed. Further, it contemplates an ideal world in which neutral and detached physicians would inform the jury of such objective conditions. That scenario ignores both the nature of psychological and psychiatric testimony and the development, in recent years, of the expert for hire.

In reality, the only practical limitation would be the cost of an expert and his professional ethics.

The latter restraint, moreover, would be subject to a sort of Gresham's law. There may well be psychiatrists or psychologists too scrupulous to say a particular person has substantial "mental disorder" as a result of a single incident. The large amounts of money at stake, however, mean that a lawyer will feel duty bound to seek out other psychiatrists or psychologists (or perhaps even therapists) until he finds one who will testify that the client does have such a problem.

Medical terminology would not be a serious impediment to that process. Indeed, Dr. Stillman's testimony in this case and the concept of the "post-traumatic stress disorder" are both vivid illustrations of the way in which conduct which is "normal" in laymen's terms, even though undesirable, blends imperceptibly into mental illness or sickness.

The petitioners' brief says that the condition is "set forth in the Psychiatric Manual for Disorders", citing their Exhibit 4. In Appendix B to this brief, the Court will find copies of the pertinent pages of that manual, (some of which were supplied to the District Court of Appeal by the plantiffs). These include both the discussion of the post-trauma disorder and the Introduction which states the purpose of the manual and its limitations.[18/]

Those pages show that the condition in question is far from a well-defined "illness". On the contrary, the manual concedes there is not even a recognized definition of "disorder".

The specific material to which the plaintiffs refer consists of a list of symptoms which are mere possibilities and a statement that any unusually severe stress can be the cause. Dr. Stillman or any other paid expert could say that anything Mr. Brown did or felt, years after the accident, falls within that "definition." Indeed he could say the same about anything

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18/ This publication is available to the Court as part of the research appropriate to the public policy aspects of the legal controversy. Alternatively, the Court can take judicial notice of the contents of the document. Hall v. O'Neil Turpentine Co., 56 Fla. 324, 47 So. 609 (1908); 23 Fla.Jur. 2d, "Evidence and Witnesses" §48; §90.202, Florida Statutes (1981):

> (12) Facts that are not subject to dispute because they are capable of accurate and ready detemination by resort to sources whose accuracy cannot be questioned.

which happened to anyone who was involved, directly or indirectly, in a serious accident or any other situation with the potential for great stress.

That is why the authors of the manual caution that it only describes general symptoms and that the conditions they categorize - including post-traumatic stress disorder - are not clear cut illnesses. The Introduction, in fact, says that the definitions are not even sufficient to distinguish a normal person from one who has "no disorder".

Dr. Stillman's testimony, too, does not provide the jury with any basis for making such a distinction.[19/] We do not quarrel with the doctor's "medical judgment" - a futile effort on appeal. Our point, instead, is that he used medical terms which never were intended to mark the boundary between those who are "injured" and those who are well, much less to take the place of a rule.

More generally, the Missouri court's approach would mean that there is no legal test, separate and distinct from medical terminology. The "battle of experts" already is a problem but this is a much more drastic proposal. In the normal case, the

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19/ In outline, Dr. Stillman's testimony was that if a person suffers a severe loss, such as the death of a loved one, and then acts differently than he otherwise would have, the change shows that he suffers from a "post-traumatic stress disorder". On the other hand, if he does not act differently he is "hypomanic". The "repession" is bad, too, because eventually he may stay the same or "get worse." (t. 383).

jury at least has a legal standard to apply; and this gives them some basis for choosing between the conflicting views of the experts. Further, that independent legal standard is a tool which the appellate courts can use to ensure the integrity of the trial process. Under the Academy's proposal, however, there would be no such legal standard and be no basis for meaningful appellate review.

"Medical judgment" is not "legal judgment". In this case, for example, there is no logical connection between Dr. Stillman's use of the term "disorder" and the idea that the defendant should have to pay damages. While that loose descriptive terminology may serve a legitimate purpose for physicians, it cannot take the place of a clear-cut physical injury for the different purposes of the law. On the contrary, a psychiatrist's reasons for defining a condition as a "disorder" presumably are different from the considerations which should influence a judge's decision as to which experiences or accidents could justify an award of money damages. The judge, for example, is not concerned with the techniques of treatment or prognosis. Instead, he must consider the practicality of such an award in terms of its effect on the other parties, the burden on the judicial system and a variety of other factors about which the doctor - and the jury - know and care nothing.20/

20/ Further, a change in medical terminology could have a great effect on the rights of litigants and important

Footnote Continued

(c) The guidelines the plaintiffs propose cannot apply to this case because the Wrongful Death Act preempts the field

The plaintiffs recognize the necessity for objective tests which trial judges could apply. This, presumably, is the reasoning which led them to propose (p.b. 27) various "guidelines" drawn from Dillon v. Legg, supra.

They ignore the fact that the guidelines are intended to function in the context of a requirement of objective physical injury. Further, the proposals merely "buck" difficult questions back to the trial bench. In any event, to apply them to this case would embroil the Court in needless conflict with the legislative judgment, embodied in the Wrongful Death Act, that an adult non-dependent son may not recover for the death of a parent.

The Florida Wrongful Death Act, FSA §§768.16, et seq., permits minor children to recover for the death of a parent. In addition, any "blood relation" who is dependent upon the decedent can recover. (sec. 18) Mr. Brown does not qualify under either provision.21/

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issues of liability and damages. This could be so even though none of the medical authorities intended such a change or even gave it a thought.

21/ He is in his fifties and, far from being dependent upon his mother, is a prosperous businessmen (t. 391).

The plaintiffs no doubt would suggest that Mr. Brown's claim can rest upon common law principles. We suggest that this would be as unrealistic as their other arguments. When the legislature considered the proposal for a Wrongful Death Act, it had to balance the genuine losses and sorrows of survivors against the burdens which the creation of new causes of action would entail. The legislators made those choices, compromising the various interest. The specific statements in the statute - as to those who can recover and the items for which they can recover - mean that those who are not included in the list cannot bring claims for death. Cf. Stern v. Miller, 348 So.2d 303 (Fla. 1977). Still less, is it logical to suppose that the Legislature intended that they should recover for emotional consequences which are not designated in the statute.

More specifically, the statute deals with claims which are intangible and based upon emotional or psychological loss consequent to a wrongful death. Consider, for instance Section 21 which states that spouses and minor children can recover for loss of companionship and "mental pain and suffering." The inference is clear that the legislature did not intend that adults (other than husbands or wives) could recover for those losses.

That solution may not be perfect. Indeed, the Wrongful Death Act's boundaries are arbitrary to some extent. That necessarily is true of any approach to this problem,[22] including the plaintiffs' proposal. There is no self-evident "logical" limitation to the liability. Pearson, supra, in passim. It follows that if legal doctrine is to be changed, any new rule must be based upon broad social and political judgments. For that very reason, the Court should defer to the legislature. That branch of the government has made the social choices, at least in the limited field of wrongful death claims.

(d) The "instrument of death" theory is mere jury rhetoric

The plaintiffs cite no precedent for the contention (p.b. 14) that the "instrument of death" theory constitutes a workable boundary for the new liability. Nor do they mention Kennedy v. McKesson Company, 58 N.Y.2d 500 (1983), a case in which the New York Court of Appeals recently rejected just that suggestion:[23]

22/ Pearson, Liability to Bystanders, supra, at 485.

23/ In that case a dentist's patient died in the chair because of a malfunction in the anesthesia equipment which had been repaired by the defendant. The defendant sued for the damage to his reputation and for mental distress which left him unable to practice his profession. The Court held that there would be no recovery for his emotional injuries.

> "Nor is it an answer to suggest as do the dissenters here that plaintiff seeks recovery here not because he observed the patient die, but because he was, as the result of the defendant's negligence, the very instrument of her death." (Emphasis supplied).

The parallel to this case is direct.

Colorful as it is, the phrase has no clear meaning. This lawsuit, after all, is based on the premise that Mr. Brown did nothing wrong. If that is correct, the fact he could be characterized by his lawyer as an "instrument" has no rational significance to him or anyone else. Certainly that terminology has little to do with the policy issues which face a court which considers a drastic change in this body of law.

It may be that the plaintiffs' argument is based on lay speculation that the emotional stress on a person who plays an active role in an accident necessarily is greater than that of another person who observes the death or injury of a loved one. If so, they offer no medical or technical support for that premise.

It also is significant that this theory, too, would lead to strange results. For example Mrs. Champion or any other mother would be left without a remedy if she saw her child run over by a third person. On the other hand, if she drove negligently and the same child was injured in a collision, she would be a "participant" and the "instrument of death". It would seem to follow that she could seek money damages from the

manufacturer of her automobile on a "crashworthiness" theory. Indeed, the more negligently she had driven, the more tormenting the hypothetical feelings of guilt would be, and the greater the damages.

The Court also can be sure that the next plaintiff will demand that this criterion, too, be reduced to a fiction. The argument would be that the mother who let the child out of the house was the "unwitting instrument". Indeed, that could be said of virtually anyone except a deliberate tortfeasor.

In sum, the talk about Mr. Brown as a "instrument death" is effective jury rhetoric, nothing more. It cannot take the place of a legal standard.

V. THE FACTS OF THIS CASE SHOW THAT THE DANGER OF SPECULATIVE AWARDS FOR "PSYCHIATRIC" DISTRESS IS REAL AND IMMEDIATE

The plaintiffs seem to contend that the Court of Appeal was motivated by an undisclosed bias when it held that the record did not justify the multimillion dollar award (p.b. 30). A review of the facts is the best answer to that charge. The Supreme Court will find that the appellate judges acted well within the bounds of their authority in reviewing the denial of a request for a new trial. Bould v. Tonchette, supra at 1184-85; Lassitter v. International Union of Op. Engrs., 349 So.2d 622, 627 (Fla. 1977); Loftin v. Wilson, 67 So.2d 185, 190 (Fla. 1953).

That review also will provide the Court with an example of a case with facts far different from those of Champion v. Gray. Yet this is precisely the type of claim the Court must expect in the future if it ignores the need for a requirement of physical injury or some other objective standard.

One major reason courts have refused to recognize mental anguish as the basis for damages absent a physical injury (or where the anguish is at the injury to another), is that those claims are uniquely difficult to evaluate. The degree of mental anguish cannot be verified objectively and its consequences are easily exaggerated. (Cf. Justice Adkins' dissent in Gilliam, supra). Those who favor greater awards claim that the problem has been eliminated - but they offer no evidence to support that assurance. In the present case, for example, Mr. Brown undoubtedly felt severe grief over the accident and the death of his mother. To question that would be foolish. But it is a far different matter to ask whether there is any meaningful proof that he was not able to cope with the grief and to continue his life as a normal person.

To begin, there is no foundation in the record for future medical expenses as a component of the award. Dr. Stillman only said that the expense of the visits that he had with Mr. Brown, at the suggestion of his lawyer, came to $600 (t. 382). The plaintiff projects those expenses forward in time. Yet they ignore the testimony by the doctor himself that

Mr. Brown had refused to spend any more time with the psychiatrist (t. 380).

Similarly, there is nothing to support the idea that Mr. Brown's earning capacity will be less in the future, except for the doctor's passing and unexplained statement that he thought his business judgement "had" to be weakened by the experience. In fact, the plaintiff is a prosperous insurance agent, just as he was before the accident (t. 391).

There also is no testimony by Dr. Stillman as to what he meant by the possibility - not probability - that Mr. Brown might get worse" if he did not "stay the same" (t. 383). At most, the jury was told that Mr. Brown might appear normal because he can repress his feelings but that he might have some form of problem in the future. The jurors were not told, however, what the actual symptoms or consequences would be even if he did "get worse". This left them free to guess as to the nature and magnitude of the critical element of the cliam.

The Personal Inventory Test which Dr. Stillman relied upon (t. 373; p.b. 35) did not fill the gap. The test showed that Mr. Brown was normal in all respects except that his ability to compensate for distressing factors is so high that the doctor said it constituted a "pathological" state (t. 376). One might think this an extraordinary strength rather than a weakness. But, in any event, that unusual score does not create a jury issue as to the existence of a mental injury caused by the

accident. The doctor did not say whether the test showed Mr. Brown had that basic personality trait all his life or, instead, that he had been a completely normal individual until the accident had "changed" one facet of his personality. Accordingly, there is no basis for the comparison which would be essential to a finding that an "injury" was attributable to the accident.[24/] See, Huddell v. Levin, 537 F.2d 726, 737-38 (3d Cir. 1976).

The plaintiffs' attempt to prove damages in this case also is uniquely speculative because Mr. Brown himself did not testify that he suffered from any ailment, psychological or otherwise. Dr. Stillman gave an analysis based upon a few symptoms; Mr. Brown's wife and son testified as to their second-hand understanding of the doctor's analysis; but the plaintiff himself did not claim that his business judgment had failed him or say anything else to support the witness' claims (t. 201-217).

On the contrary, Dr. Stillman himself admitted that Mr. Brown refused to take Lithium as the doctor suggested (t. 380) and that he also had rejected any suggestion that he undergo more psychiatric treatment (t. 383). There is something bizarre about a case in which a man is permitted to

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24/ Certainly it is at least as reasonable to hypothesize that his childhood or other events of his life (including 60 combat missions during World War II) "reated this "undesirable" strength, if such it be.

recover one and three quarter million dollars when he himself does not testify that there is anything wrong with him.

CONCLUSION

A drastic expansion of tort liability by the elimination of the impact rule, or the physical injury rule, or both, would be unwise. The Court could only guess at the number of new claims that step would produce, their size and complexity, and the burden they would impose upon the trial bench and potential defendants.

The plaintiffs have not offered any workable substitute for the impact rule. Nor have they satisfied the requirements for the "physical injury" rule proposed in Champion v. Gray.

Therefore the MVMA urges that the answer to the question should be "no" and that the judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

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By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 5th day of July, 1983 to: Gary E. Garbis, P.A., 12550 Biscayne Boulevard, Suite 804, Miami, Florida 33181; Richard A. Sherman, Esq., Suite 204E Justice Building, 524 S. Andrews Avenue, Ft. Lauderdale, Florida 33301; and James A. Edwards, Esq., Rumberger, Kirk, Caldwell, Cabaniss & Burke, P. A., 11 East Pine Street, Orlando, Florida 32802; Larry Klein, Esq., 501 S. Flagler Drive, Ste. 501, West Palm Beach, Florida 33401.

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