IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,583

DCA CASE NO. 82-306

HARVEY BROWN, et al.,

Petitioners,

vs.

CADILLAC MOTOR CAR DIVISION, et al.,

Respondents.

PETITIONERS' BRIEF ON MERITS AND JURISDICTION

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INTRODUCTION

Plaintiffs/Petitioners Harvey and Gayl Brown will hereinafter be referred to as Petitioners. Cadillac Division, General Motors Corporation, will hereinafter be referred to as Respondents. The symbol "App." will be used to refer to the Appendix and the symbol "R" to the Record on Appeal. The letter "T" will be used to refer to the transcript of trial.

This case is presented to this Honorable Court having been certified by the Appellate Court, Third District Court of Appeal, as one of great public importance. (App. Ex. I). Jurisdiction is thereby properly entertained pursuant to Article V, Sec. 3(b),(4) of the Florida Constitution.

This case presents issues with regard to what has become known in Florida as the "impact rule". Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974).

The first issue to determine in this case is whether there has been an impact within the parameters of the impact rule which would allow the Petitioners to recover or whether the claim is barred by the impact doctrine. The second issue is whether the impact rule should still be given credence at all or whether like many other tort doctrines, such as comparative negligence or doctrine of strict liability in tort, a change is in order. It has been suggested by some

of the esteemed judges of the appellate tribunals of the State of Florida to abolish this archaic doctrine which once may have aided justice but now serves to distort the concept.[1] The case also presents an issue as to whether a new trial on damages is warranted or whether the decision of the District Court of Appeal, Third District, in this case is in direct conflict with Wackenhut Corporation v. Canty, 359 So.2d 430 (Fla. 1978), and should be reversed.

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1 (A) Champion v. Roy Lee Gray, et al., 420 So.2d 348 (Fla. 5th DCA 1982).

(B) National Car Rental Systems, Inc. and Travelers Indemnity Co. v. Marvin Bostic, 423 So.2d 915 (Fla. 34d DCA 1982). (Concurring opinion at P. 918).

See Gilliam v. Stewart, supra, dissenting opinion and opinion rendered at the Appellate Court, Fourth District Court of Appeal, 271 So.2d 466 (Fla. 4th DCA 1972).

STATEMENT OF CASE AND FACTS

This case involved an accident wherein Petitioner Harvey Brown, while behind the wheel of his Cadillac experienced unwanted and unexpected acceleration of the vehicle due to a defective accelerator flap which defect was later remedied by Respondent through a recall campaign causing the vehicle to strike and kill his mother, Florence Brown. (T 154/155; App. Ex. I). The evidence indicated that Petitioner Brown was a participant in the event (App. Ex. I) who himself received a bump on the head in the collision. (T 370).

Petitioner's case at the trial level on liability consisted of proof by two experts, one a mechanical engineer and the other an accident reconstruction expert, who testified as to the defect and how the defect caused the accident and from lay witnesses who described the events. Respondents' defenses at the trial level were two-fold: that Harvey Brown stepped on the accelerator pedal and that was the cause of the accident, alternatively that the accident could not have occurred in the manner described by Petitioner's experts.

Prior to trial, the issue of whether the impact rule barred this cause was presented to the trial judge at a special hearing (App. Ex. II). Thereat both sides agreed that the law regarding the application of the impact doctrine

was correctly and currently set forth in Selfe v. Smith, 397 So.2d 348 (Fla. 1st DCA 1981) and that such would be controlling.

The rule set forth in Selfe, supra, is:

> But satisfying the "impact rule" - which is defined as verifying otherwise problematic injuries, or as drawing a needed if somewhat arbitrary line between compensible injuries and those that society requires be borne unrecompensed - until now has gained plaintiff damages for only that mental distress which is due to plaintiff's own injury, or to the traumatic events considered in relation to the plaintiff alone. At P. 350. Emphasis added.

The Petitioners relying on the alternative test for compliance with the impact rule, emphasized above, were granted leave by the trial court to present their case to the jury (App. Ex. II).

At the trial proceeding, Petitioners presented what they preceived as evidence of an impact by showing that the vehicle Harvey Brown was operating collided with Florence Brown (App. Ex. I) and further, through testimony that in the collision Harvey Brown had struck his head (T 370). The Petitioners also confined the testimony of the psychiatrist who treated Harvey Brown to the "four corners" of the requirement for recovery as set out above in Selfe, supra:

Q I would like you to testify in this case about the traumatic event in relation to Harvey Brown and try your best to separate the fact that there was another person, his mother, involved on the receiving end of this event, if you can do that for us, there is a legal reason for it.

A Yes.
(T 368/369, emphasis added).

The testimony of record reflected the tragic loss that Petitioner Brown had suffered. Dr. Stillman, the treating psychiatrist, testified that as a result of this accident, Petitioner Brown had suffered a permanent psychiatric impairment of 35 per cent, which condition could worsen with time and that Petitioner Brown was in need of a number of years of psychiatric aid. (T 384-388).

The District Court of Appeal, Third District, acknowledged that Petitioner Brown had killed his mother while operating the vehicle in question. However, as reflected in said opinion (App. Ex. I) no impact was found by the Appellate Court. The Appellate Court also expressed the opinion that if liability were to be found, a new trial would be mandated on the issue of damages as Petitioner Brown suffered no compensatory damages and the damages were speculative.

The testimony of Dr. Stillman, of record at trial, indicated that Petitioner Brown suffers from post-traumatic

stress disorder (T 367) which the doctor described in depth (T 367-388). Petitioner Brown's medical expenses to date of trial were $600.00 (T 382) and his future expenses for medical expenses, estimated to be three to four years, were easily calculatible. The charge per session, according to the testimony of the doctor, was $75.00. The doctor indicated that Mr. Brown would need two sessions per week, one individual and one group, in order to achieve the desired result (T 381-385). The trial transcript, in addition to Dr. Stillman's testimony, as to what the accident did to Harvey Brown mentally, also contained testimony from Petitioner Gayl Brown as to the psychological devastation wrought to Harvey Brown as a result of the event in question.

POINTS ON APPEAL

I.

THERE WAS AN IMPACT IN THE CASE, SUB JUDICE, AS CONTEMPLATED BY THE "IMPACT RULE" MANDATING REVERSAL OF THE APPELLATE DECISION OF THE THIRD DISTRICT COURT OF APPEAL AND REINSTATEMENT OF THE TRIAL COURT.

II.

THERE IS NO LONGER ANY VALIDITY IN APPLYING THE "IMPACT RULE" TO THE CASE AT BAR.

III.

THE DAMAGES SUSTAINED HEREIN WERE NOT SPECULATIVE AND THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL REVERSING THE DECISION OF THE TRIAL COURT IS IN DIRECT CONFLICT WITH THE DECISION OF THIS HONORABLE COURT IN WACKENHUT CORPORATION v. CANTY, 359 So.2d. 430 (Fla. 1978).

ARGUMENT

I.

THERE WAS AN IMPACT IN THE CASE, SUB JUDICE, AS CONTEMPLATED BY THE "IMPACT RULE" MANDATING REVERSAL OF THE APPELLATE DECISION OF THE THIRD DISTRICT COURT OF APPEAL AND REINSTATEMENT OF THE TRIAL COURT.

There has been over the years confusion as to what the requirements actually are to state a claim under the "impact rule". An historical review of the case law indicates two crucial features which when analyzed should allow Petitioner to recover. First, this Honorable Court and the District Courts of Appeal, following the requirements of this Honorable Body, have consistently pointed out that to meet the "impact rule threshold" there must be either physical injury or impact. Secondly, the cases holding against recovery as barred by the impact doctrine have always dealt with a bystander and/or with events where the party seeking recovery was not directly involved as a participant in the event. In this case, Petitioner Brown, as the driver of the vehicle, was not only a participant but the instrument by which his mother, Florence Brown, perished.

In Kirksey v. Jernigan, 45 So.2d 188 (Fla. 1950).

this Honorable Court had before it for consideration whether or not a surviving spouse or next of kin could sue a funeral home for mental pain and anguish as a result of the actions of the funeral home with regard to the body of the plaintiff's dead child. This Court enunciated that it was committed to the rule, at that time, that there could be no recovery for mental pain and anguish unconnected with physical injury in an action arising out of the negligent breach of a contract whereby simple negligence was involved. At P. 189. Nevertheless, recovery was allowed in that case, this Court finding that the actions of the funeral home were such as to warrant punitive damages.

Thereafter, when the "impact doctrine" was next before this Honorable Court in Crane v. Loftin, 70 So.2d 574 (Fla. 1954) a noted change is gleaned from the opinion. For the first time an alternative basis is mentioned as a ground for allowing a plaintiff to recover:

> It has been recognized in this jurisdiction that where the facts giving rise to an action in tort for personal injuries are such as to reasonably imply malice, or where from the entire want of care or attention to duty, or great indifference to the persons, property or rights of others, such malice will be imputed as would justify the assessment of exemplary or punitive damages, recovery for mental pain and anguish unconnected with direct

physical impact or trauma may be authorized. At P. 575 (Emphasis added)

Therein, the plaintiff was not involved in the actual impact, at P. 575, and no recovery was allowed.

The impact rule next came before this Honorable Court for consideration in Clark v. Choctawhatchee Electric Co-operative, Inc., 107 So.2d 609 (Fla. 1958). Therein, the opinion indicates that the defendant electric company operated a high power line close to the plaintiff's business establishment. On the day of the accident the line fell, striking gas pumps at plaintiff's business establishments and, according to plaintiff causing her to be shocked with a result that her tongue thickened, her legs began to ache and she fell to the ground. Following a verdict for the plaintiff, the trial judge determined that the recovery could not stand because there was "no direct physical impact or trauma". At P. 610. In reversing, this Honorable Court noted that an electric shock, or trauma, or impact may be administered and not leave an outward sign. Thus, once again, the alternative theory of recovery under the impact rule was stated as the law of this state.

In Carter v. Lake Wales Hospital, 213 So.2d 898 (Fla. 2nd DCA 1968), a baby was given by mistake to the wrong parents for a period of some hours by the defendant hospital

and the appellate tribunal refused relief citing the impact doctrine as a bar. What is important in understanding this case is that the plaintiff were not participants but were bystanders.

In Herlong Aviation, Inc. v. Johnson, 291 So.2d 603 (Fla. 1974), this Court had before it the question of the applicability of the impact rule once again. From the opinion it is clear that what is required to meet the threshold is, among alternatives an impact to the persons seeking relief:

> We are therefore compelled to quash the decision of the District Court insofar as it permits a plaintiff to recover for mental pain and anguish in the absense of impact. At P. 604 (Emphasis Added).

Gilliam v. Stewart, 291 So.2d 593 (Fla. 1954) is perhaps the most cited case with regard to applying the impact rule as a bar to proposed cases seeking relief for mental pain and anguish. In expressing the opinion of this Honorable Court, Judge Drew indicated that where a physical impact occurs, recovery may be had for mental injuries, a situation Petitioner submits exists in the case at bar:

There may be circumstances under which one may recover for emotional or mental injuries, as when there has been a physical impact - - -. At P. 595.

Counsel respectfully submits that no requirement

exists which defines or sets a minimal standard as to the impact. Such seems to be what the Third District Court of Appeal without saying so determined because an analysis of what law exists supports Petitioner's view that what occurred in the case at bar is an impact.

In Hollie v. Radcliffe, 200 So.2d 616 (Fla. 1st DCA 1967) the Appellate Court was presented with the issue of whether a claim was barred by the "impact doctrine". Factually, in Hollie, supra, a railway clerk was on leave from his employment because of his deteriorating health condition caused by Parkinson's disease. He was subsequently involved in an automobile accident wherein his condition was aggravated, and the Appellate Court stated the point on appeal as follows:

> Is a plaintiff who is susceptible to emotional disturbance entitled to recover for his emotional reaction to an accident when the evidence reflects that he suffered no physical injury and that his emotional distress was not caused by any impact or trauma sustained in the accident. At P. 618 (Emphasis added).

In answering the question, the Appellate Court indicated that the "impact rule" was satisfied by the collision of plaintiff and defendant's vehicles and that recovery could be had for mental injuries even though there was no physical injury. At P. 618.

It appears that in Hollie, supra, the Appellate Court recognized that the plaintiff was a participant in the accident as opposed to a bystander, thus recovery was allowed. In the case at bar, Petitioner Brown was also involved in the collision and like Hollie, suffered mental damages. Petitioner Brown was not a bystander, but the instrument, the captain of the ship, which struck and killed his mother.

In Way v. Coca-Cola Bottling Co, 260 So.2d 288 (Fla. 2nd DCA 1972), the Appellate Court had cause to comment on the "impact rule":

> In the instant case the appellant was attempting to get the contents of the bottle out by sucking upon it and discovered the foreign substance. He immediately became nauseated and went outside and vomited. We might be correct in holding that this was sufficient contact to get around the impact doctrine, many cases, too numerous to enumerate, have held that it is only necessary to show slight impact and that most any contact will suffice. At P. 289.

If the Petitioner had been driving his vehicle past a farm where elephants were being trained or cows were being pastured, and the farm was not properly maintained such that an animal wandered out in the road and Petitioner struck same, would that not be an impact? Petitioner submits that such would create an impact as would the striking of a bird

flying across the road and so, too, would there be an impact where a vehicle strikes a person. See Collara v. Mendella, 85 N.W. 2d 345 (Wis. 1957).

An analysis of National Car Rental Systems, Inc. and Travelers Indemnity v. Bostic, 423 So.2d 915 (Fla. 3rd DCA 1982), adds additional credence to Petitioner's position that where one is a participant in an accident, the impact rule is satisifed. Therein, the plaintiffs' vehicle was involved in a head-on crash with defendant's vehicle. The Appellate Court noted that the plaintiff's physical injuries healed leaving a minimal disability of about five per cent "however, he suffered and still suffers, a severe emotional problem steming from his inability to do anything to help save his mother, who was a passenger in the car".

In the case at bar, Petitioner's psychiatric problem is analogous, i.e., it stems from his being the instrument which caused the death of his mother as the operator of the defective vehicle.

In National Car Rental Systems, Inc., supra, the plaintiff sought compensation for his psychological injuries to which the defense objected on the ground that said evidence was inadmissible such being compensation for "being present when his mother was killed". At P. 916/917; citing Selfe v.

Smith, supra, and Gilliam v. Stewart, supra.

In ruling in favor of the plaintiff therein, the language of the Appellate Court is crucial:

> The evidence showed that Bostic's emotional problem was caused by his inability to render aid and comfort to his mother because of injuries and impact suffered by Bostick which had rendered him physically unable to come to her aid. Therefore we find no error in permitting into evidence testimony of Bostic's mental pain and suffering caused by his being present when his mother was killed. At P. 917.

Petitioner respectfully submits that without saying so what the opinion stands for is the proposition that if one is a participant in an accident recovery for mental pain and anguish will be allowed, notwithstanding the fact that the recovery is for seeing a loved one perish.

In Selfe v. Smith, 397 So.2d 348 (Fla. 1st DCA 1981), different language, perhaps more artfully stated, is found with regard to the allowance for recovery wherein questions concerning the impact rule are raised:

> But satisfying the "impact rule" which is defined as verifying otherwise problematic injuries was drawing a needed if somewhat arbitrary line between compensible injuries and those that society required be borne uncompensated until now has gained plaintiff damages for only that mental distress which is due to the plaintiff's own injury or to the traumatic event considered in relation to the plaintiff alone. At P. 350 (Emphasis added).

Petitioner respectfully submits that alternatively or in combination, the collision between Mr. Brown's vehicle operated by him which struck his mother and/or his striking of his head during the collision (T 370) both satisfy an impact requirement. The recurrent theme, found throughout the aforenoted decisions, best phrased by the Selfe court seems to be that if one is a participant, recovery will be allowed. The language found in Selfe, "the traumatic event considered in relation to the plaintiff alone" to this writer is a clear indication that the real arbitrary line dividing cases allowing recovery from cases where recovery will not be allowed is to be found in answering the question, was the person a participant or a bystander.

In the case, sub judice, the Petitioner was a participant who was involved in a situation presenting two distinct impacts, for which recovery should be allowed..

Wherefore, counsel respectfully request this Honorable Court reverse the decision of the Third District Court of Appeal and reinstate the decision of the trial forum.

II.

THERE IS NO LONGER ANY VALIDITY IN APPLYING THE IMPACT RULE TO THE CASE AT BAR.

Assuming arguendo, this Honorable Court does not accept the position of Petitioner that an impact has occurred, the Petitioner respectfully submits that it is time to abolish the archaic doctrine known as the "impact rule" in the State of Florida.

In Stewart v. Gilliam, 271 So.2d 466 (Fla. 4th DCA 1972), the Court of Appeal, Fourth District, held that the "impact rule" would no longer serve as a bar to claims for emotional distress absent physical impact. In Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974), this Honorable Court reversed that decision noting that only the Supreme Court has the power to change its precedents. At P. 594/595.

Since 1974 the appellate courts of this state have had occasion to comment, as invited by this Honorable Court in Gilliam, supra, at P. 594, on the impact rule. One court, in Selfe v. Smith, supra, alternatively clarified or interpreted the decisionin Gilliam, supra, to allow for recovery apparently without any physical impact, granting the right of a plaintiff to recover for mental distress which the plaintiff endures as a result of "the traumatic

event considered in relation to the plaintiff alone. At P. 350.

The Court of Appeal, Third District, in National Car Rental Systems, Inc. and Travelers Indemnity Co. v. Bostic, supra, allowed recovery for emotional distress (psychological injury) for watching one's mother die when there was a minor injury to the plaintiff.

The Court of Appeal, Fifth District, in Champion v. Gray, 420 So.2d 348 (Fla. 5th DCA 1982) upheld the impact rule, acknowledging that a change in the rule could only come from this Honorable body but certifying the question to this Honorable Court for review. Therein, the facts recited by the Appellate Court indicate that recovery was sought by a mother who having come to the scene of an accident whereat her child was killed, overcome with shock and grief, collapsed and died.

Subsequently, in the case at bar, wherein through a defective accelerator pedal flap, Petitioner Brown drove his vehicle into his mother, killing her, the Court of Appeals, Third District, adhering to the impact rule, reversed the decision of the trial court in favor of Petitioner Brown and as in Champion, supra, certified the case to this esteemed body.

This Honorable Court has previously changed tort concepts when the reason for change was just and common sense

dictated a change was in order. See, for example, West v. Caterpillar Tractor, 336 So.2d 80 (Fla. 1976); Hoffman v. Jones, 280 So.2d 431 (Fla. 1973); Ard v. Ard, 414 So.2d. 1066(Fla. 1982); Joseph v. Quest, 414 So.2d 1063 (Fla. 1982).

As noted by Mr. Justice Adkins in Gates v. Foley, 247 So.2d 40 (Fla. 1971):

> The law is not static. It must keep pace with changes in our society, for the doctrine of stare decisis is not an iron mold which can never be changed. At P. 43

Such thought process was amplified by the Court of Appeals in Steinhauer v. Steinhauer, 252 So.2d 828 (Fla. 4th DCA 1971) wherein the Appellate Court stated:

> * * * If it is argued * * * that stare decisis compels us to perpetuate a rule out of tune with the life around us, at various with modern day needs and concepts of justice and fair dealing - a ready answer is at hand. The rule of stare decisis was intended not to effect a petrifying rigidity, but to assure the justice that flows from certainty and stability. If, instead adherence to precedent offers not justice but unfairness not certainty but doubt and confusion, it loses it right to survive and no principle constrains us to follow it. At P. 832.

Counsel is not as eloquent of pen as the author of the aforenoted comment, but if ever an expression of truth was more aptly put, counsel is unaware of same.

More than ten years ago the Appellate Court in Stewart v. Gilliam, supra, cited with approval from Falzone

v. Bush, 214 A.2d 12 (N.J. 1965):

> To hold that all honest claims should be barred merely because otherwise some dishonest ones would prevail is stretching the public policy concept very close to the breaking point, especially since it is quite as simple to feign emotional disturbance plus slight impact and get in "under the wire" of one of the exceptions as it is to feign emotional disturbance sans impact. The arbitrary denial of recovery in all cases not falling within the realm of one or another of the exceptions discourages the bringing of meritorious actions and at the same time allows the prosecution of fabricated claims, for surely those capable of perjuring evidence will not hesitate to manufacture one additional feature of the occurrence - a slight impact - to insure recovery. At P. 16.

In Niederman v. Brodsky, 261 A.2d 84 (Pa. 1970, the defendant's automobile skidded onto the sidewalk striking the plaintiff's son while they were walking. Almost immediately afterwards plaintiff claimed he suffered severe chest pains and was diagnosed as having sustained an acute heart problem. Plaintiff claimed that the defendant's negligently operated vehicle placed the plaintiff in personal danger of physical impact although the injuries arose in the absence of any physical impact. In holding that the plaintiff was entitled to proceed, the Supreme Court of Pennsylvania opined:

> Every court that has been confronted with a challenge to its impact rule has been threatened with the ominous spectre that an avalanche of unwarranted, trumped up, false and otherwise unmeritorious claims would suddenly cascade upon the courts of the jurisdiction. The virtually unanimous response has been that (1) danger of illusory claims in this area is not greater than in cases where impact occurs, that (2) our courts have proven that any protection against such fraudulent claims is contained within the system itself - in the integrity of our judicial process, the knowledge of expert witnesses, the concern of juries, and the safeguards of our evidentiary standards. At P. 87.

In Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969), this Honorable Court expressed its view in the strength, integrity and creditability of the jury system. As noted in Stewart v. Gilliam, supra, at P. 473:

> The question is not really one of "impact" but rather the causal connection between the negligent act and the ultimate injury - a circumstance which in the last analysis does not seem to pose problems any more difficult to solve in a non-impact case than in an impact case. Causation is not peculiar to cases without impact, it is an ingredient in all types of personal injury litigation. The fact that there may be difficulty in proving or disproving a claim should not prevent a plaintiff from being given the opportunity of trying to convince the trier of facts of the truth of the claim. The question is one that falls within the province of a jury in light of the circumstances in the particular case. At P. 473.

Counsel respectfully submits that a jury is quite capable, as is a judge, of deciding the merits of a "non impact" claim. See Shingleton v. Bussey, supra.

The decision in Champion v. Gray, supra, which has been certified to this Honorable Court ably discusses the law in noting that at this juncture the overwhelming majority of jurisdictions have abolished the impact rule:

> Our view is that Florida should now align itself with the overwhelming majority of jurisdictions which have abandoned the rule and condemn it as unjust and illogical. The rationale for the rule has certainly been seriously undermined in recent year. Ricky v. Chicago Transit Authority, 101 Ill. App. 3rd 439, 428 N.E. 2d 596, 598 (Ill. App. 1981); Techniques for diagnosing the causal connection between emotional significantly refined since the impact rule was first announced. Stewart v. Gilliam, 271 So.2d 466 (Fla. 4th DCA 1973) quashed 291 So.2d 593 (Fla. 1954). Due to the advances of medical science in the field of psychic injuries, it is foreseeable to the defendant that his negligence may cause another to suffer emotional distress and mere difficulty of proof or the possibility of fraud should not preclude the plaintiff from the opportunity to prove his injury. At P. 350.

In so indicating the Champion court noted that if recovery is allowed, there would be no greater risk of fraud than in those cases where relief is sought for intentional infliction of emotional distress.

In Champion, supra, the Appellate Court discussed

two classes of prospective claimants; the first being those who suffer physical injuries sans impact as a result of shock, fright or other emotional disturbances; the second class being those persons who do not sustain any physical impact in the accident but because of the circumstances where injury is to another, with whom they share a close personal bond, fear for their own physical well-being. An example of the latter catagory being the fact pattern in Champion, supra.

The fact pattern in the case at bar fits neither class but does contain for all the reasons given in Champion, supra, a sound basis as a cause for which compensation should be given. Here the plaintiff/petitioner was not a witness to the death of his mother, but the very, unwilling instrument of her death.

As indicated in the Champion opinion, an increasing number of courts are allowing recovery absent any physical impact where a parent or close relative has sustained severe emotional distress as a result of witnesses harm to a loved one. Barnhill v. Davis, 300 N.W. 2d 104 (Iowa 1981); Portee v. Jaffee, 417 A.2d 521 (N.J. 1980); Sinn v. Burd, 404 A.2d 673 (Pa. 1979); Corso v. Merrill, 406 A.2d 300 (N.H. 1979); Dziokonski v. Babineau, 380 N.E. 2d 1295 (Mass. 1978); D'Ambra v. United States, 338 A.2d 524 (R.I. 1975);

Leong v. Takasaki, 520 P.2d 758 (Ha. 1974); D'Amicol v. Alvarez Shipping Co., Inc., 326 A.2d 129 (Conn. Super. Ct. 1973); Toms v. McConnell, 207 N.W. 2d 140 (Mich. App. Ct. 1973); Landreth v. Reed, 570 S.W. 2d 486 (Tex. Cir. App. 6th Dist. 1978).

Considering the fact pattern of this case, the logic enunciated by a number of courts is applicable. In California, recovery was allowed for emotional distress when a mother witnessed the death of her daughter who was struck by a car in her presence. Dillon v. Legg, 441 P.2d 912 (Cal. 1968). Thereafter, in Archibald v. Braveman, 275 Cal. App. 2d 283 (79 Cal. Rptr. 723 (Cal 4th DCA 1969), recovery was allowed for a mother who arrived at the accident scene but who did not actually witness the accident. In the language of that court "Manifestly, the shock of seeing a child severely injured immediately after the tortious event may be just as profound as that experienced in witnessing the accident itself". Petitioner submits that common sense dictates that such is true and that it is equally applicable where one is made to suffer being a participant in the death of a parent. A review of Portee v. Jaffee, supra, wherein a mother was allowed to recover for emotional distress as a result of watching her seven year old son suffer and die when he became trapped in an

elevator; or Sinn v. Burd, supra, wherein a mother saw her daughter struck and killed by an automobile; or Leong v. Takasaki, supra, poignantly indicate Petitioner's position.

As noted in Dziokonski, supra, at P. 1302 "it is clear that it is reasonably foreseeable that, if one negligently operates a motor vehicle so as to injure a person, there will be one or more persons sufficiently attached emotionally to the injured person that he or they will be affected".

In the case, sub judice, the jury found General Motors was negligent, had breached an implied warranty and was strictly liable in tort. Is it justice that allows a tort feasor who has caused a son to sit behind the wheel of a car powerless to control events which end with the death of his mother to escape liability for their action? Such a loss is not speculative. As noted by the Court in Portee v. Jaffee:

> The task in the present case involves the refinement of principles of liability to remedy violations of reasonable care while avoiding speculative results on punitive liability. The solution is close scrutiny of the specific personal interest assertedly injured. By this approach, we can determine whether a defendant's freedom of action should be burdened by the imposition of liability. In the present case, the interest assertedly injured is more than a general interest in emotional tranquility. It is the profound and abiding sentiment of parental love. The knowledge that loved ones are safe

> and whole is the deepest wellspring of emotional welfare . . . No loss is greater than the loss of a loved one and no tragedy is more wrenching than the helpless apprehension of the death or serious injury of one whose very existence is a precious treasure. The law should find more than pity for one who is stricken by seeing that a loved one has been critically injured or killed. 417 A.2d at 526.

In the case at bar, Dr. Stillman, a board certified psychiatrist in describing the severe emotional trauma inflicted upon Harvey Brown as a direct result of the accident limited his testimony to only describing what the traumatic event had done to Petitioner Brown and eliminated any emotional trauma Petitioner Brown may have suffered from watching what was to become the death scenario of his mother, in accordance with one of the two tests set forth in Selfe v. Smith, supra, (T 368/369).

In Corso v. Merrill, 406 A.2d 304 (N.H. 1979), the court required for recovery that the emotional harm be a "painful mental experience with lasting effects", which is proved through medical testimony. In the case at bar this was absolutely done.

In Dziokowski, supra, a three prong test that comports with reasonableness was set forth as a basis for determining whether or not a cause of action may be maintained. without physical impact. The Champion decision cites the same

three prong test as a fair means of separating claims which should be compensated from those which are remote or speculative. Petitioner respectfully submits that the test is fair and just, removes speculation and allows for compensation in a meritorious situation:

> (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it.
>
> (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observation of the accident; as contrasted with hearing of the accident from others after its occurrence.
>
> (3) Whether plaintiff and victim were closely related, as contrasted with an absence from relationship or the presence of only a distant relationship.

In the case at bar, from a reading of the District Court of Appeal, Third District's opinion (App. Ex. I) as well as supported amptly in the transcript of trial, Petitioner Brown falls clearly within these guidelines.

As noted by Judge Pearson in National Car Rental System, Inc., supra, in his concurring opinion regarding the impact rule:

> I think that the reasons for the rule have been thoroughly repudiated and that the rule should be abolished and replaced as it has been in other jurisdictions by some more enlightened rule. See e.g. Albert v. Simpson's Supermarket, Inc., 444 A.2d 433 (1981); Barnhill v. Davis, 300 N.W. 2d 104 (Iowa 1981); Portee v. Jaffee,

417 A. 2d 521 (1981); Kech v. Jackson, 593 P.2d 668 (1979); Sinn v. Burd, supra,; Corso v. Merrill, supra; Dziokonski v. Babineau, supra; Landreth v. Reed, 470 S.W. 2d 486 (Tex. Cir. App. 1978); Hunsley v. Giard, 553 P.2d 1096 (1976); D'Ambra v. United States, supra; Leong v. Takasaki, supra; Toms v. McConnell, supra; D'Amicol v. Alvarez Shipping Co.Inc, 326 A.2d 129 (1973); Whethan v. Bismark Hospital, 197 N.W. 2d 678 (N.D. 1974); Dillon v. Legg, supra; Resavage v. Davies, 86 A.2d 879 (952); Restatement (Second) of Torts, Sec. 313, at P. 918.

There is no valid reason for the imposition of the impact doctrine today in Florida. Medical science has progressed to the point where psychiatric injuries are discernible by various manifestations as determined by testing and evaluation. This coupled with the sophistication of juries and high standard of the juridicary removes any necessity for the impact rule.

As denoted in Stewart v. Gilliam, supra:

> The fundamental concept of justice under the law would reject any rule that measures the availability of a forum in the nebulous principle of a "floodtide of litigation" or "a virtual avalanche of cases". There is no more bedrock principle of law than that which declares that for every legal wrong there is a remedy and that every litigant is entitled to have cause submitted to the arbitrant of the law. Tidwell v. Witherspoon, 21 Fla. 359 (Fla. 1885). The principal that for every wrong there is a remedy is embodied in the Declaration of Rights of the Florida Constitution which provides that the Florida courts are to be open so that every person shall have a remedy by due course of law.

> (Section 21). It is far more consistent with justice to be concerned with the availability of a judicial forum for the adjudication of individual rights than to deny access of our courts because of speculation of increasing burden.

Justice, basic fairness and the purpose of allowance for compensation for tortiously inflicted injury mandate that the impact rule be abolished.

Wherefore, counsel respectfully requests this Honorable Court reverse the decision of the Third District and reinstate the verdict of the trial forum.

III.

THE DAMAGES SUSTAINED HEREIN WERE NOT SPECULATIVE AND THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL REVERSING THE DECISION OF THE TRIAL COURT IS IN DIRECT CONFLICT WITH THE DECISION OF THIS HONORABLE COURT IN WACKENHUT CORPORATION v. CANTY, 359 So.2d 430 (Fla. 1978).

The appellate decision in this case rendered by the Court of Appeals, Third District, indicates that the damages are speculative and therefore if the case is reversed by this Honorable Court a new trial on damages should occur. Without saying so what the Appellate Court really said is that they disagree with the amount of the verdict but finding no legal basis to reverse the decision of the lower court in the record nor any violation of any appellate rule regarding damages as to the size of the verdict, an alternative method for accomplishing the same task was applied. This is in direct contradiction to the mandate of this Honorable Court in Wackenhut Corporation v. Canty, 359 So.2d 430 (Fla. 1978).

The issue of damages in this case is "part and parcel" connected to the decision on liability because if the impact rule is abolished, there should be a clear statement as to how and what damages are recoverable. A review of the legal standards required for proof in a tort case, case law interpreting said concepts and analyzation of the applicable law as against the transcript of record in this case makes

it patently clear that the verdict and final judgment rendered herein was not speculative.

In Wackenhut Corporation, supra, this Honorable Court stated:

> A jury's determination of damages is reviewable by the trial judge on precisely the same principles as governs his superintendence of determination of liability. Mr. Justice Drew stated this clearly in Hodge v. Jacksonville Terminal Co., Fla., 234 So.2d 645, opinion filed April 22, 1970. The record must affirmatively show the improriety of the verdict or there must be an independent determination by the trial judge that the jury was influenced by consideration outside the record.
>
> In other words, the trial judge does not sit as a seventh juror with veto power. His setting aside a verdict must be supported by the record, as in Cloud v. Fallis, 1959, 110 So.2d 669 by findings reasonably amendable to judicial review. Not every verdict which raises a judicial eyebrow should shock the judicial conscience. (Emphasis added).
>
> In its movement toward consistency of principle, the law must permit a reasonable latitude from inconsistency of result in the performance of juries. The trial judge's review of the performance is likewise sustainable within a broad range provided that the record or findings of influence outside it support its determination. At P. 435 - see also Griffis v. Hill, 230 So.2d 143 (Fla. 1969); Standard Oil Co. v. Dunagan, 171 So.2d 622 (Fla. 3rd DCA 1965).

In this instance, the District Court of Appeal has, in fact, chosen to sit as "the seventh juror".

In Sprock v. Nelson, 81 So.2d 478 (Fla. 1952), this

Honorable Court noted that in almost every jury verdict rendered where personal injury is being compensated there is some speculation but unless it appears that the jury's decision is arbitraty, the award should be affirmed. There is no evidence of record that the jury's decision was arbitrary. In fact, at the conclusion of the trial the defense chose not to have the jury polled to determine if the verdict rendered was, in fact, the verdict of each juror (T 761).[2]

Personal injury cannot be measured by any standard of pecuniary value. Tampa Electric Co. v. Bazemore, 96 So. 297 (Fla. 1923); Florida Power & Light Co. v. Hargrove, 35 So.2d 1 (Fla. 1948). This includes injury of both physical and mental faculties. Florida Power & Light Co., supra. The amount to be awarded is to be determined by the jury in view of the particular facts and circumstances in each case. Southwestern Life Ins. Co. v. Gersen, 187 So.2d 63 (Fla. 3rd DCA 1966); Talcott v. Hall, 224 So.2d 420 (Fla. 3rd DCA 1969); Klefeker v. Ellington, 304 So.2d 545 (Fla. 3rd DCA 1974).

It is the law of this state that separate tort elements

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2 The trial judge did not find the verdict excessive or that there was any basis for the granting of a new trial (R 263).

are to be considered and each one is itself the subject of consideration for compensation by the jury. These claims include the age of the person and his life expectancy; Miami Paper Co. v. Johnston, 58 So.2d 869 (Fla. 1952); Townsend v. Gibson, 67 So.2d 225 (Fla. 1953); Florida Power & Light Co. v. Brinson, 67 So.2d 407 (Fla. 1953); Moody v. Cross, 56 So.2d 525 (Fla. 1951); Loftin v. Wilson, 67 So.2d 185 (Fla. 1953); the extent and duration of the injury, Florida R & Nav. Co. v. Webster, 5 So. 714 (Fla. 1889); its effect on his health, Miami Paper Co. v. Johnston, 58 So.2d 869 (Fla. 1952); the diminished capacity for the enjoyment of life as a result of injury; Tampa Electric Co. v. Bazeman, 96 So. 297 (Fla. 1923); and the mental pain and anguish, Florida R & Nav. Co. v. Webster, supra; Warner v. Ware, 182 So. 605 (Fla. 1938); Miami Paper Co. v. Johnston, supra.

Regarding personal injury cases it has long been the rule in the State of Florida that the damages claimed must be capable of ascertainment with only a reasonable degree of certainty and need not be proven as absolute. Mansfield v. Brigham, 107 So. 336 (Fla. 1926); Carlton v. Vaux, 136 So. 344 (Fla. 1931); Baggett v. Davis, 169 So. 372 (Fla. 1936); McCall v. Sherbill, 68 So.2d 362 (Fla. 1953). Damages are not rendered uncertain or speculative merely because they cannot be calculated with absolute exactness. McCall v.

Sherbill, supra. In Twyman v. Roell, 166 So. 215 (Fla. 1936), this court indicated that mere difficulty in the assessment of damages is not a sufficient reason for denying recovery where a right to damges has been established. The uncertainty or speculation which defeats recovery has reference to the cause of damage rather than to the amount of it. Twyman v. Roell, supra; Saporito v. Bone, 195 So.2d 244 (Fla. 2nd DCA 1967). In other words, the rule against speculative damages applies only to such damages as are not the certain results of the wrong, and not to such as are the certain results but are uncertain in amount. Twyman v. Roell, supra.

Applying the well established legal requirements to the case at bar makes it patently clear that there has been no violation of the speculative damage rule. Dr. Stillman, a board certified psychiatrist and a diplomate in his field (T 364), Petitioner Brown's treating physician, testified that Mr. Brown was suffering from "Post Traumatic Stress Disorder", an illness found in the current (Third) edition of the ADSM, Diagnostic and Statistical Manual of Mental Disorders, which is the manual where known psychiatric disorders are described (T 367 (App. Ex. IV). He explained that this condition is brought on by an accute stressful situation (T 368). Dr. Stillman described carefully and in

detail how this condition effected Petitioner Brown; discussing his rage and depression (T 370); his agitation (T 371); describing how his business was effected (T 371); and how his social life was also effected (T 371).

Dr. Stillman as part of hisexamination of Petitioner Brown conducted a test known as the "Minnesota Multiphasic Personality Inventory " which test is a screening test analogous to an x-ray for confirming diagnosis (T 373). This test corroborated Dr. Stillman's clinical impressions (T 374).

Dr. Stillman testified at length and with explanation as to how Petitioner Brown was "out of control", depressed and angry and how this changed his lifestyle (T 379/380). Dr. Stillman then explained to the jury that Petitioner's condition had reached rage proportion in that "something happened that was beyond his control and that which happened caused a loss to him which was severe since he had an exceptional relationship with his mother". (T 381).

Dr. Stillman testified that Petitioner absolutely needed current and future psychiatric care. (T 382/383). He, according to the doctor, is in need of medication in the form of an anti-depressent and Lithuim and is in need of individual therapy and group therapy once a week each for between three to four years (T 383-385). Dr. Stillman was

then asked the following questions:

> Q Doctor, do you have an opinion based upon a reasonable degree of medical probability as to whether or not he is presently disabled, if that is the word you all use, psychiatrically disabled.

Dr. Stillman answered in the affirmative and explained in what manner the disability existed, including the effect on his social life and the business of Petitioner Brown relating his disability to Petitioner Brown's ability to function in a business setting (T 385). Dr. Stillman concluded his explanation by stating "I believe he falls into the category of the American Medical Association disability range of 15 to 45% and I think he is approaching 45, 35 percent now". (T 386).

Dr. Stillman then explained that if Petitioner Brown acknowledged that he could not control the situation and accepted his medical program for three years he would be able to reduce the disability to 10 to 15 percent of Mr. Brown's functional ability (T 386/387). Dr. Stillman indicated that his charge for the initial evaluation, including testing, was $250.00 and for each session thereafter his charge was $75.00. His total bill to date was $600.00 (T 382). From these figures the jury could easily calculate the cost of three years of sessions at two per week, leaving nothing to speculation.

Gayl Brown testified in corroboration of the doctor's analysis that since the accident over a gradual period of time many things have changed in her husband including the showing of new anxieties, a lot of anger, and a distinct personality change (T 473/474). She described how her husband before the accident was a "very self-confident/ in control person" which condition is present today only in a facade fashion (T 474).

Legally, on the above information, there is no basis for a determination that the damages are speculative. The Respondent, did not present any evidence either by psychiatrists, which they had a right to do, or by lay testimony in contradiction of Petitioner's position. Dr. Stillman's testimony as set out above was presented within the bounds of reasonable medical probability which is the standard of proof required. It was corroborated by Gayl Brown.

The fact that a verdict is large does not make it excessive within the contemplation of the law. General Rent A Car, Inc. v. Dowman, 310 So.2d 415 (Fla. 3rd DCA 1975), neither does it make the award speculative. Nor, is it appropriate to compare awards of other cases to determine whether an award is speculative or excessive. Loftin

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

Analogous to the case at bar, yet offering far less proof in support of the plaintiff's position is the federal appellate decision in Malundus v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 31 F.R. Serv. 233 (C.A. 10th Cir. 1981). Therein, the Federal Appellate Court had for review a jury verdict in a case in which the plaintiff alleged intentional infliction of emotional distress wherein the plaintiff was awarded $1,030,000.00 in compensatory damages. Appellants raised the argument that the award was excessive and clearly disproportioned it to the injuries sustained. The evidence indicated that the $30,000.00 figure added to the One Million as shown in the verdict was the amount of a stock account that had been mismanaged. Two salient points from said decision were made by the Federal Court:

> (A) There is no requirement that the award for mental distress bear any relationship to the financial loss incurred as a result of tortious acts. At P. 247.
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> * * *
>
> Hence the relative inquiry is whether the compensatory award was excessive in relation to the injury - an injury consisting of emotional distress suffered by the plaintiff and its long range effects on her . . at P. 248.

(B) We have said that absent an award so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the damage is considered inviolate.

* * *

Such bias, prejudice or passion can be inferred from excessiveness. However, a verdict will not be set aside on this basis unless it is so plainly excssive as to suggest that it was the product of such passion or prejudice on the part of the jury. At P. 246.

In Malandus, supra, the Appellate Court affirmed the $1,000,000.00 award for mental damages on less proof, as recited in the Statement of the Facts set forth in the opinion ,than was presented in the case at bar. In the case, sub judice, the diagnosis of Petitioner Brown was post traumatic stress disorder. Not only is such condition set forth in the psychiatric manual for disorders (App. Ex. IV) but has been commented on as deserving of compensation:

> Post traumatic stress disorder has familiar symptoms - post traumatic stress disorder injuries have been recognized as deserving compensation when proven to exist. Alfonzo v. Charity Hospital of Louisiana at New Orleans, 413 So.2d 982, 986 (La. 4th Cir. 1982).

The disability rating in this case rendered by the doctor is in accordance with the standards of the American Medical Association (T 386). There is nothing about the symtomology

or effect on Mr. Brown as described by Dr. Stillman which has been challenged in this record. The medical bill for treatment and the cost for future treatment is stated with certainty in the transcript of trial. Petitioner respectfully submits that the evidence in this case is squarely within the requirements of the law.

This Honorable Court in Wackenhut Corporation v. Canty, 359 So.2d 430 (Fla. 1978) indicated to the undersigned, that in the absence of "something out of the ordinary" the decision of the jury and trial judge should not be interferred with. In St. Vincent's Hospital v. Crouch, 292 So.2d 405 (Fla. 1st DCA 1974), the Appellate Court stated:

> Here it is our chore to review the legality of the verdict rendered, it is not our duty, under the guise of appellate review, to enter the jury box and render a verdict to our liking. At P. 408.

In World Insurance Company v. Wright, 308 So.2d 612 (Fla. 1st DCA 1975), the action before the court involved intentional infliction of emotional distress with the appellate issue being whether the damages awarded for the element of emotional distress should be affirmed. Therein, the opinion reflected that the issue before the court concerned the award of $40,000.00 for mental distress caused by the failure to pay Appellee $863.29 due under a disability insurance policy. The testimony recited by the appellate court in upholding the

award did not indicate a psychiatric condition, a specific disease or illness or whether the mental state was of a permanent nature yet on the basis of the facts of the event alone the appellate court determined that the award was justified. See also City of Deland v. Florida Transportation and Leasing Co., 293 So.2d 800 (Fla. 1st DCA 1974).

In the case at bar, the proof as to the emotional distrubance suffered by Petitioner was clear and in total conformance for the presentation of evidence as required by Florida law. In doing total justice, if this Honorable Court should in its wisdom accept the position espoused by Petitioner as to the impact rule, the issue of damages should also be considered and the decision of the Appellate Court reversed, reinstating in its place the decision of the trial forum.

CONCLUSION

This cause should be reversed and the judgment of the trial forum reinstated. This cause does present a case wherein a physical impact had occurred and relief should not be denied. Assuming arguendo, that this Honorable Court does not agree that an impact occurred than as suggested by the Appellate Court in Champion, supra, by Judge Pearson in National Car Rental, supra, and by the Second District Court of Appeal in Stewart v. Gilliam, supra, also by the certification herein, it is time that the impact rule be abandoned as no longer necessary.

Additionally, in order to do justice, Petitioner respectfully submits that the damage aspect of this case be reviewed and that the decision of the District Court of Appeal, Third District, regarding same be reversed as the damages herein are not speculative but were presented in accordance with the standards for presentation of damages in existence in the courts of the State of Florida.

Respectfully,

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the within brief was furnished this 27 day of May, 1983, to the following:

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