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Torts--Emotional Distress--Georgia Continues to Cling to the Impact Rule

Wallace Miller III

TORTS—EMOTIONAL DISTRESS—GEORGIA CONTINUES TO CLING TO THE IMPACT RULE

In *Strickland v. Hodges*,[1] the Georgia Court of Appeals held that there is no independent right of action in a parent for emotional harm suffered upon witnessing the extent of the injury his child has sustained as a result of a defendant's wilful and wanton negligence.[2] An eleven year old girl suffered serious injuries arising out of a collision between the automobile in which she was riding and an automobile negligently operated by the defendant while admittedly under the influence of intoxicants. Although the child's parents were not present at the time of the accident, they became aware of their daughter's condition shortly afterwards.[3] Thereafter, the parents brought an independent action against the defendant seeking recovery for emotional distress and mental suffering. In granting defendant's motion for partial summary judgment, the trial court struck from a three-count complaint those two counts which sought damages based upon great emotional distress.[4] Strickly adhering to Georgia's endorsement of the "impact rule,"[5] the court of appeals affirmed, rejecting plaintiffs' contention that this doctrine should not be applied to such a novel factual setting based on wilfulness and wantonness.[6]

The common law rule which is still in effect in Georgia and in a decreasing majority of jurisdictions[7] is that there is no recovery for the negligent infliction of mental distress unless accompanied by a contemporaneous physical injury or impact or objective manifestation thereof.[8] The general

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1. 134 Ga. App. 909, 216 S.E.2d 706 (1975).

2. In *Strickland*, the court, quoting from plaintiff-appellant's first brief, page seven, was careful in limiting the scope of the appeal to

> when (1) such injury resulted from the wilful and wanton negligence of the defendant; (2) the parent was not a witness to the incident causing such injury; (3) the parent was not nearby when the child was injured; (4) there was no impact to the plaintiff [parent]; (5) the negligent acts of the defendant were "directed toward" the child and not the plaintiff [parent] and (6) the parent learned of the injury a short time afterward and then suffered emotional harm.

Id. at 909, 216 S.E.2d at 707.

3. While written for an unanimous court, Judge Clark's opinion lacks specificity as to the particular time lapses between the accident, the parents' learning of their child's misfortune, and the moment of visual confirmation.

4. A single count by the father for medicals and loss of services was not a concern of the appeal.

5. *See* Southern Ry. v. Jackson, 146 Ga. 243, 91 S.E. 28 (1916); Kuhr Bros. v. Spahos, 89 Ga. App. 885, 81 S.E.2d 491 (1954); Blanchard v. Reliable Transfer Co., 71 Ga. App. 843, 32 S.E.2d 420 (1944).

6. Apparently, it was the degree of negligence involved that compelled the court to label the appeal as a question of first impression.

7. *See* Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965); Zelinsky v. Chimics, 196 Pa. Super. 312, 175 A.2d 351 (1961); Monteleone v. Co-Operative Transit Co., 128 W.Va. 340, 36 S.E.2d 475 (1945).

8. RESTATEMENT OF TORTS (SECOND) §436A (1965).

consideration underlying this treatment of mental distress in terms of parasitic[9] damages is to guarantee that the mental disturbance is genuine, thereby precluding fraudulent claims. It must be noted that in those jurisdictions which follow the "impact rule," the doctrine is generally applied only in cases involving ordinary negligence; however, where the wrongful act is wilful or wanton, it is practically the unanimous view that a defendant is liable for serious emotional distress regardless of the element of impact.[10]

The holding in *Southern Ry. v. Jackson*[11] is indicative of the diminishing majority view that there can be no recovery for mental trauma suffered as a result of observing the injury sustained by a third person, where the mental trauma is unaccompanied by physical impact of injury. Bypassing the impact requirement, other jurisdictions have extended the right of recovery for such damages where the defendant's negligent act threatened the plaintiff himself with possible harm or placed him within what has been called the "zone of danger."[12] Moreover, precedent now exists for the allowance of recovery for emotional harm suffered by one who is not within the "zone of danger." Thus, in the landmark case of *Dillon v. Legg*,[13] the Supreme Court of California granted recovery to a mother standing outside the "zone of danger" who witnessed the death of her child in an automobile accident. As was to be expected, the California courts quickly extended the rationale of *Dillon* to encompass a parent who had not actually witnessed her child's misfortune but came upon the scene moments after the negligent act.[14]

Certain jurisdictions have begun to follow the lead of the California courts in expanding the right of recovery for negligently inflicted emotional distress. In upholding a judgment for a homeowner who suffered mental anguish from negligently induced flood damage, the Supreme Court of Hawaii succinctly concluded in *Rodriquez v. State*[15] that there is "a duty to refrain from the negligent infliction of serious mental distress."[16] The

9. The parasitic tort theory emerged as one of the earliest theories under which mental or emotional harm could form the basis for a cause of action for damages. According to this theory, any existing tort, no matter how technical, could be used as the peg upon which to hang the mental damages, thus creating a cause of action for such parasitic damages. *See, e.g.*, Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 880 (1939).

10. *See* 38 AM. JUR. 2d *Fright, Shock, and Mental Disturbance* §14 (1968) and cases cited therein.

11. 146 Ga. 243, 91 S.E. 28 (1916).

12. *See* Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933). *See also* RESTATEMENT OF TORTS (SECOND) §313, comment "d" at 114 (1965).

13. 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

14. Archibald v. Braverman, 275 Cal. App.2d 253, 79 Cal. Rptr. 723 (1969). In *Archibald*, the California Court of Appeals stated that "the shock of seeing a child severly injured immediately after the tortious event may be just as profound as that experienced in witnessing the accident itself." *Id.* at ____, 79 Cal. Rptr. at 725.

15. 52 Haw. 156, 472 P.2d 509 (1970).

16. *Id.* at 174, 472 P.2d at 520. *Compare* Dold v. Outrigger Hotel, 54 Haw. 18, 501 P.2d

same court, in the more recent case of *Leong v. Takasaki*,[17] held that in connection with such a duty,[18] relief for a plaintiff exists even in the absence of both physical impact and a blood relationship between the victim and the plaintiff. Thus, in each case, the Supreme Court of Hawaii adhered to the general tort law principles that, where the plaintiff suffers mental distress as a reasonably foreseeable consequence of the defendant's negligent act, the defendant is liable thereby. As the Hawaii decisions have demonstrated, the apparent trend is toward a gradual abandonment of the various artificial restrictions to recovery in favor of general tort law principles.[19]

As early as 1892[20] the Supreme Court of Georgia propounded the "impact rule" as requisite to a recovery for mental injury. Subsequently, in *Christy Bros. Circus v. Turnage*,[21] the doctrine was extended so as to include even the slightest touch of impact. Nevertheless, the Georgia courts have also been continuously supportive of an old common law exception to the requirment of impact. This exception was well stated in *Dunn v. Western Union Telegraph Company*:[22]

> While mental suffering, unaccompanied by injury to purse or person, affords no basis for an action predicated upon wrongful acts merely negligent, yet such damages may be recovered in those cases where the plaintiff has suffered at the hands of the defendant a wanton, voluntary, or intentional wrong the natural result of which is the causation of mental suffering and wounded feelings.[23]

Similarly, this exception to the "impact rule" has provided the basis for a plaintiff's recovery for mental distress where "the action was not for a mere negligent tort, but was for a positive and wilful wrong."[24]

The great weight of authority in other jurisdictions recognizes an inde-

368 (1972), which allowed recovery for emotional distress and disappointment where a contract was broken in a wanton and reckless manner.

17. 55 Haw. 398, 520 P.2d 758 (1974).

18. In *Leong*, the court specifically defined duty as "a legal conclusion dependent upon the sum total of those considerations of policy which led the law to say that the particular plaintiff is entitled to protection." *Id.* at ____, 520 P.2d at 764.

19. *See* Leong v. Takasaki, 55 Haw. 398, ____, 520 P.2d 758, 762-64 (1974) for a survey of cases from other jurisdictions. The Supreme Court of California had previously declared in *Dillon* that:

> [T]he problem should be solved by the application of principles of tort, not by the creation of exceptions to them. Legal history shows that artificial islands of exceptions, created from the fear that the legal process will not work, usually do not withstand the waves of reality and, in time, descend into oblivion.
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> 68 Cal.2d at 741, 441 P.2d at 925, 69 Cal. Rptr. at 85.

20. Chapman v. Western Union Tel. Co., 88 Ga. 763, 15 S.E. 901 (1892).

21. 38 Ga. App. 581, 144 S.E. 680 (1928) (horse evacuated bowels into plaintiff's lap).

22. 2 Ga. App. 845, 59 S.E. 189 (1907) (abusive language).

23. *Id.* at 846, 59 S.E. at 189.

24. Atlanta Hub Co. v. Jones, 47 Ga. App. 778, 780, 171 S.E. 470, 472 (1933) (drunken conduct by bill collector in efforts to collect a bill from plaintiff).

pendent right of action for severe emotional distress regardless of impact, where such injuries are sustained as a result of the defendant's intentional or wanton conduct being directed at a third person.[25] Although the Second Restatement of Torts appears to limit a defendant's liability to those cases in which the plaintiff is present at the time the intentional or reckless misconduct occurs,[26] the caveat provided therein "is intended to however, leave open the possibility of situations in which presence at the time may not be required."[27] Whereas, Georgia decisions have granted relief for mental suffering without physical impact in circumstances where the wilful act was directed towards the plaintiff,[28] the courts have tenaciously denied those independent claims where such wanton behavior is directed against some third party.[29]

In holding that parents have no right to recover damages for emotional harm suffered after witnessing the extent of their child's wilfully and wantonly[30] inflicted injuries, the *Strickland* court relied most heavily on the illustrious New York decision of *Tobin v. Grossman*.[31] Impressed by the pragmatism supportive of the reasoning in that opinion, the court of appeals ardently endorsed the public policy of limiting the legal consequences of wrongs to a controllable degree, thereby eliminating the possible proliferation of claims. The court in *Strickland* noted that, whereas *Tobin* involved only ordinary negligence, the New York court's logic in refusing to extend liability to parent absentee situations was equally appl-

25. *See* 38 AM. JUR. 2d *Fright, Shock, and Mental Disturbance* §38 (1968) and cases cited therein.

26. RESTATEMENT OF TORTS (SECOND) §46 (1965). This section provides that:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or (b) to any other person who is present at the time, if such distress results in bodily harm.

27. RESTATEMENT OF TORTS (SECOND) §46, comment "1" at 79 (1965).

28. *See* Digsby v. Carroll Baking Co., 76 Ga. App. 656, 47 S.E.2d 203 (1948); Dunn v. Western Union Tel. Co., 2 Ga. App. 845, 59 S.E. 189 (1907).

29. *See* Towler v. Jackson, 111 Ga. App. 8, 140 S.E.2d 295 (1965); Hamby v. Edmunds Motor Co., 80 Ga. App. 209, 55 S.E.2d 743 (1949); Pettett v. Thompson, 33 Ga. App. 240, 125 S.E. 779 (1924); Goddard v. Watters, 14 Ga. App. 722, 82 S.E. 304 (1914). *But see* Pollard v. Phelps, 56 Ga. App. 408, 193 S.E. 102 (1937), which holds that a cause of action for great mental pain and suffering exists for a widow where the defendant wilfully and wantonly mutilates the corpse of her deceased husband. The court of appeals apparently reasoned that the negligence was directed towards the widow with a reckless disregard of her rights to the body.

30. *See* Carr v. John J. Woodside Storage Co., 217 Ga. 438, 123 S.E.2d 261 (1961), which holds that a motorist's reckless and wanton disregard of the consequences, evincing willingness to inflict injury or produce death, may amount to wilfulness, though there is no direct proof of actual intention to inflict injury or produce death.

31. 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

icable to a case involving wilful and wanton negligence.[32] Thus, the court, without any apparent explanation, rejected the plaintiffs' argument that a situation involving a most serious degree of negligence should not necessarily be governed by those Georgia precedents which apply the "impact rule" to cases based upon mere negligence. Although stating at the outset of its opinion that the appeal presented a question of first impression,[33] the *Strickland* court obviously refused to consider the case as anomalous. This may have been due to the fact that the California and Hawaii decisions[34] which plaintiffs cited as supportive of their proposal, did not involve the elements of wilfulness and wantonness. Nonetheless, the court in *Strickland* promptly disposed of plaintiffs' California barrage as being based upon both the "zone of danger" and "fear for another"[35] doctrines, and therefore inapplicable since the Georgia authorities espouse the more stringent "impact rule."[36] Likewise, the court found the Hawaii holdings unpersuasive, for they too gave application to the "zone of danger" and foreseeability tests.[37] Furthermore, the *Strickland* court pointed out that a more recent Hawaii decision[38] reiterates the public policy argument previously voiced in *Tobin*.[39]

Apart from the strong policy arguments against recovery, the court, holding firmly to a line of local precedents, flatly refused to extend the common law exception to the "impact rule" so as to provide an independent right of action where a defendant's wilful act is directed towards a third person.[40] In short, the court in *Strickland* held that where the wilful and wanton conduct is not directed towards the complainant, the impact requirement must still be satisfied. Finding no such satisfaction as to

32. 134 Ga. App. at 913, 216 S.E.2d at 709.

33. *Id.* at 909, 216 S.E.2d at 707.

34. Dillon v. Legg, 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); Archibald v. Braverman, 275 Cal. App.2d 253, 79 Cal. Rptr. 723 (1969); Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974); Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970).

35. *See* Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935), which is commonly regarded as the leading decision. *Accord*, Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Cote v. Litawa, 96 N.H. 174, 71 A.2d 792 (1950).

36. 134 Ga. App. at 910-11, 216 S.E.2d at 707-08.

37. *Id.* at 911, 216 S.E.2d at 708.

38. Kelley v. Kokua Sales & Supply, Ltd., ___ Haw. ___, 532 P.2d 673 (1975). In *Kelley*, the Supreme Court of Hawaii concluded that it was not a reasonably foreseeable consequence that a person in California would die of a heart attack upon being informed of a family member's death from an automobile accident which occurred in Hawaii.

39. In *Strickland*, the Georgia Court of Appeals quoted with approval the following popular language:

> 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, including every bystander shocked at an accident, and every distant relative of the person injured, as well as his friends.

134 Ga. App. at 911, 216 S.E.2d at 708 *quoting from* W. PROSSER, LAW OF TORTS §54 at 334 (4th ed. 1971).

40. *Id.* at 912-13, 216 S.E.2d at 709.

physical impact,[41] the court thus denied the injured child's parents their right of action for emotional distress and mental suffering. As an apparent afterthought, obviously made for consolation, the *Strickland* court recalled that "the overwhelming factor is that our law already gives the injured child her right to damages for her injuries, including punitive damages, and gives the father the right to recover medical expenses and loss of services."[42]

The Georgia Court of Appeals in *Strickland v. Hodges* failed to take the initiative in abolishing Georgia's continuing parasitic approach to the tort of negligent infliction of emotional distress. Whereas, the growing trend among the various jurisdictions is a departure from the artificial guidelines to recovery,[43] the Georgia courts have devotedly sanctioned application of the "impact rule." Thus, the *Strickland* court rehashed the illogical view that there should be at least some physical impact in order to guarantee the reality of the cause of the injuries suffered. If the negligence of the defendant is such that it would naturally cause severe emotional injury, the absence of physical contact should have little or no weight when determining the sufficiency of a claim. From the viewpoint of analogy, certainly, such claims are no more likely to be false than claims for damages for intentionally inflicted emotional distress, already recognized in this state.[44] Moreover, it may not be said with any reasonable measure of certainty how often fraudulent claims would be presented. Therefore, it seems that public policy should not require that all honest claims be barred merely because, otherwise, some dishonest ones might prevail. The better view would be to allow an independent cause of action for mental distress and emotional harm with recovery based on the facts and proof of each particular case. To allow this independent cause of action without requiring the cause to be tacked on to some other recognized and existing claim, would be a step toward making the law answerable to wrongs that should not go unrighted.[45] As one author so aptly expressed nearly seventy years ago:

> The treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is today

41. The criteria for establishing impact that the court alluded to is set forth in Southern Ry. v. Jackson, 146 Ga. 243, 91 S.E. 28 (1916).

42. 134 Ga. App. at 913, 216 S.E.2d at 709.

43. *See* text accompanying notes 7 and 19, *supra*.

44. Dunn v. Western Union Tel. Co., 2 Ga. App. 845, 59 S.E. 189 (1907). *See also* Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260 (1921).

45. Note, *Torts—Expanding the Concept of Recovery for Mental and Emotional Injury*, 76 W. VA. L. REV. 176 (1973). *See also* Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 892 (1939):

> All of these problems could be dealt with in far more intelligent fashion if we were to jettison the entire cargo of technical torts with which the real cause of action has been burdened, and recognized it as standing on its own feet. There is every indication that this will henceforth be done, and that the intentional infliction of extreme mental suffering by outrageous conduct will be treated as a separate and independent tort.

recognized as parasitic will, forsooth, tomorrow be recognized as an independent basis of liability. It is merely a question of social, economic, and industrial needs as those needs are reflected in the organic law.[46]

WALLACE MILLER III

46. 1 T. STREET, THE FOUNDATION OF LEGAL LIABILITY 470 (1906).