

THE IMPACT RULE AND INGESTION OF FOREIGN SUBSTANCES
by Ted Babbitt -- March 2002

Before recovering for emotional distress, the plaintiff must demonstrate that the injuries which caused the stress resulted from an impact. R.J. v Humana of Florida, Inc., 652 So.2d 360 (Fla. 1995). Despite many other states abolishing what has become known as the "Impact Rule," Florida still adheres to the rule with a number of exceptions.

For example, emotional distress can be recovered despite the lack of an impact if someone suffers death or physical injury from psychological trauma because they witnessed a close family member being seriously injured. Champion v Gray, 478 So.2d 17 (Fla. 1985). Indeed, the event which causes the initial injury need not be in direct proximity in time. Zell v Meek, 665 So.2d 1048 (Fla. 1995). Intentional infliction of emotional distress does not require impact. Eastern Airlines, Inc. v King, 557 So.2d 574 (Fla. 1990). The Supreme Court has also exempted wrongful birth from the requirement of having a physical impact. See Kush v Lloyd, 616 So.2d 415 (Fla. 1992). A parent's malpractice claim as a result of a stillbirth is also exempted from the requirement of impact. See Tanner v Hartog, 696 So.2d 705 (Fla. 1997). So too, bad faith claims against an insurance carrier do not require physical impact. See Time Ins. Co. v Burger, 712 So.2d 389 (Fla. 1998). Mental pain and suffering can be recovered in

negligent defamation cases despite the lack of an impact. Miami Herald Publishing Co. v Brown, 66 So.2d 679 (Fla. 1953). There is no requirement for impact in cases of invasion of privacy. Cason v Baskin, 20 So.2d 243 (Fla. 1944).

In the recent case of Hagan v Coca-Cola Bottling Co., 26 F.L.W. S812 (Fla. Dec. 13, 2001), the Supreme Court was faced with the issue of whether physical injury was required in order to recover damages for emotional distress caused by the consumption of a contaminated beverage. In that case, the plaintiffs ingested soda from a coke bottle which they later found out contained a used condom. A jury returned a verdict in their favor and the District Court reversed, holding that the impact rule precluded the claim. In that case the Supreme Court reviewed enough ingestion cases to make the reader sick, including everything from a can of spinach containing worms to a rat in a coke bottle. The Court then concluded that the issue before it was controlled by Tanner v Hartog, supra, and Doyle v Pillsbury Co., 476 So.2d 1271 (Fla. 1985).

In Doyle, the plaintiff fell over a chair and suffered physical injuries when she jumped back in alarm after observing an insect floating in the top of a can of peas. The Court held that the producer or retailer of food is required to foresee that a person may become either physically or psychologically ill after consuming

part of a food product that contains a foreign object. The Court then held that since the plaintiff in that case had not actually consumed any of the peas, liability would not ensue but inferentially held that if consumption had taken place, a physical injury might not be required.

In Tanner v Hartog, *supra*, the Court held that in a stillbirth case the impact rule does not apply because public policy dictates that an action by the parents for negligent stillbirth should be recognized in Florida notwithstanding the existence or lack of an impact. In Hogan, *supra*, the Court held:

As this Court recognized in *Tanner*, the impact rule does not apply where emotional damages are a 'consequence of conduct that itself is a freestanding tort apart from any emotional injury.' 696 So.2d at 708 (quoting *Kush*, 616 So.2d at 415). And, of course, *Doyle* recognized a cause of action based on the ingestion of a contaminated food since ingestion itself constitutes an impact. Consistent with our opinions and holdings in *Tanner* and *Doyle*, we hold that a plaintiff need not prove the existence of a physical injury in order to recover damages for emotional injuries caused by the consumption of a contaminated food or beverage. As this Court made clear in *Doyle*, those who market foodstuffs should foresee and expect to bear responsibility for the emotional and physical harm caused by someone consuming a food product that is contaminated by a foreign substance.

This reasoned opinion joins a line of recent decisions intellectually questioning some of the tenets of Florida tort law.