Torts

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Abstract

Throughout the law there are powerful forces which are resistant to change. The need for continuity and stability, the need to be able to plan one's actions with some assurance as to the outcome of proposed courses of conduct, argue for the status quo.

KEYWORDS: liability, consortium, distress
I. Introduction

Throughout the law there are powerful forces which are resistant to change. The need for continuity and stability, the need to be able to plan one's actions with some assurance as to the outcome of proposed courses of conduct, argue for the status quo. These forces are at work.

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in the area of torts (partly because of the need to insure against loss), but these stabilizing forces are weaker than in some other areas of law. In general, people do not plan accidents (which makes up a large part of modern tort law) and the judicial response to them has tended to be somewhat fluid. Change seems to come more easily in the tort field than in others as society wrestles with human interactions gone wrong, which demand resolution.

At times it may still be debated whether there is tort law (suggesting a coherent body of law with some unifying principle) or whether there is merely the law of torts (a disparate group of actions lumped together for convenience as much as for any other reason). While this debate is not a wholly useful one, it does suggest a perception that torts seems to change, often very quickly, and at times in seemingly contradictory directions. To some degree, this perception is correct. Courts are confronted daily with new situations and questions in a context where they are less constrained by precedent and history than they might be when dealing with a question arising in some other area of law. We see in any study of torts, the attempt to react to a changing world, and the attempt to balance competing interests following situations of unplanned and unexpected tragedy resulting in often horrible injury to the lives and limbs of people.

In one year no court is able to examine all or even most aspects of an area as broad and diverse as torts. Yet, many different issues are addressed each year. The Florida Supreme Court, for example, examined issues as varied as the duty not to cause emotional distress and the meaning of a statute concerning injuries caused by dogs. Thus, a survey such as this, taking, as it were, a cross section of current issues, may prove valuable not only for the practitioner who wishes to be aware of the latest developments, but also for those attempting to chart the future course of the law of torts in Florida.

II. Intentional Infliction Of Emotional Distress

The "new" tort of intentional infliction of emotional distress was


2. "It is time to recognize that the courts have created a new tort. It appears, in one disguise or another, in more than a hundred decisions, the greater number of them within the last two decades." Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 Mich. L. Rev. 874 (1939). Leading "early" cases such as Wilkinson v. Downton, 2 Q.B. 57, 66 L.J.Q.B. 493 (1897), in which defendant falsely told plaintiff
well-established in Florida before this year. Every district court of appeal, except the Second District, had recognized it. Yet, although giv-

that her husband had been in a terrible accident and was lying injured in the road, pointed the way. But, as late as 1934, the Restatement continued to reject any protection for intentionally caused emotional distress, with the exception of that caused by assault, false imprisonment or that caused by a common carrier to its passengers, in recognition of the special responsibility of such carriers toward their passengers. Restatement (Second) of Torts § 46 (1948 Supp.).

3. See Ford Motor Credit Co. v. Sheehan, 373 So. 2d 956 (Fla. 1st Dist. Ct. App. 1979), in which an employee of a credit company, in an effort to locate the plaintiff, called plaintiff's mother, represented herself as an employee of a hospital and stated that plaintiff's children had been involved in a serious accident. The mother supplied plaintiff's address and communicated the content of the call to plaintiff. This resulted in a frantic seven-hour attempt by phone to hospitals and police to locate his supposedly injured children until he finally confirmed that the information was false. The jury awarded both compensatory and punitive damages and the district court of appeals affirmed, holding, "[W]e conclude that there is in Florida no bar to an independent action for intentional infliction of severe mental distress when the conduct alleged is beyond all bounds of decency . . . [A]s stated, Ford Motor Credit's conduct falls within that description." Id. at 960. The court certified the issue to the Florida Supreme Court, but certiorari was dismissed.

In Dominguez v. Equitable Life Assurance Soc'y of the United States, 438 So. 2d 58 (Fla. 3d Dist. Ct. App. 1983), an employee of defendant insurance company falsely represented to plaintiff that plaintiff's eye doctor had stated in a letter that plaintiff's eyes were in good condition and that plaintiff was not any longer disabled. Building upon this lie, the employee told plaintiff that he was no longer covered under the insurance policy and attempted to have plaintiff sign a paper to that effect. The court of appeals held that an action could be maintained on those facts. Id. at 61. It then reversed the order of the trial court dismissing the complaint for failure to state a cause of action. Id. at 64.

In Scheur v. Wille, 385 So. 2d 1076 (Fla. 4th Dist. Ct. App. 1980), where a funeral home, knowing that the deceased was Jewish, nevertheless embalmed the body, the court of appeals acknowledged the existence of the action, and reversed a summary judgment which had been entered by the trial court in favor of the funeral home, remanding the case. Id. at 1078.

In Food Fair, Inc. v. Anderson, 328 So. 2d 150 (Fla. 5th Dist. Ct. App. 1980), in which plaintiff was terminated from her employment after being required to take polygraph tests in regard to thefts which had taken place, the court acknowledged the existence of the action while concluding that the particular facts did not demonstrate outrageous conduct as required. Id. at 153.

By contrast, in Gmeur v. Garner, 426 So. 2d 972 (Fla. 2d Dist. Ct. App. 1982) (per curiam) (rehearing partly granted and partly denied 1983), in which plaintiff, an employee of Hillsborough Community College, complained of alleged sexually offensive remarks and propositions from the college president, the court held that the tort was not recognized in Florida. Id. at 973. On motion for rehearing, the court granted the motion to the extent of certifying the question to the Florida Supreme Court a a matter
ing hints that it would recognize the tort, the issue was not finally decided by the Florida Supreme Court until this year, when *Metropolitan Life Insurance Co. v. McCarson* was decided.

In *McCarson*, a group insurance policy had been issued by the defendant which covered the employees of the plaintiff's paint and body shop and the plaintiff's wife. Sometime later it was discovered that the wife had Alzheimer's disease. The defendant first claimed the disease was a preexisting condition for which no payment was due. After a lawsuit by McCarson, however, the defendant was found to be in breach of contract and was ordered to continue payments under the policy. Eventually, the plaintiff's wife needed full-time nursing care.

of great public importance, but otherwise denied it. *Id.* at 975.

4. See, e.g., *Slocum v., Food Fair Stores of Fla.*, 100 So. 2d 396 (Fla. 1958). The court noted a "strong current of opinion in support of such recognition [of the tort]." *Id.* at 397, and carefully distinguished a supposed precedent against recovery, *Mann v. Roosevelt Shops, Inc.*, 41 So. 2d 894 (Fla. 1949), as a case dealing only with "an action in defamation for injury to reputation as opposed to peace of mind." *Id.* The court then declined to address this particular question, because the facts as presented would not have met the requirements that the conduct be likely to cause severe emotional distress. *Id.*

In *Slocum*, a shopper in a food store asked the price of an item and was told by an employee in essence that he would not help her because she smelled. The conduct, although insulting and rude was, essentially, no more than "vulgarities obviously intended as meaningless abusive expressions." *Id.* at 398. The court noted that this action would hold only if the conduct or words are "calculated to cause 'severe emotional distress' to a person of ordinary sensibilities, in the absence of special knowledge or notice." *Id.* Thus, it did not have to decide whether the tort would be recognized upon properly pleaded facts.

5. "We have skirted that issue [recognition of the tort] in previous cases, finding it not to be directly before the Court." *Metropolitan Life Ins. Co. v. McCarson*, 467 So. 2d 277, 278 (Fla. 1985). Besides *Slocum*, see supra note 4, the court cited two other cases in which the issue had been "skirted". They are: *Kirksey v. Jernigan*, 45 So. 2d 188 (Fla. 1950) (en banc), in which the Florida Supreme Court recognized an action for emotional distress based upon the "tortious interference with rights involving dead human bodies," and *La Porte v. Associated Indeps., Inc.*, 163 So. 2d 267 (Fla. 1964), in which mental suffering was held to be a proper element of damages caused by the malicious killing of the plaintiff's dog in his presence. Both of these cases stand for no more than that a malicious act which interferes with some other legally-protected interest of the plaintiff permits recovery for the proximately caused mental suffering of the plaintiff as well. Neither can be read to decide whether recovery is allowed when the only interest of the plaintiff involved is the interest in freedom from intentionally-caused mental distress.

6. 467 So. 2d 277 (Fla. 1985).

The defendant was liable for such care until the wife became entitled to Medicare. The defendant requested proof that the wife was not eligible for Medicare but received no answer. The defendant thereupon stopped its payments. The full-time nursing care had to be discontinued.\(^8\) Plaintiff\(^9\) sued once again, but during the pendency of the litigation, his wife had to be taken from her home and placed in a nursing home. Her condition deteriorated and she died of a heart attack a few months later.

The plaintiff won at trial.\(^10\) The trial court upheld all but the award for the wife’s emotional distress while living.\(^11\) The Fourth District Court of Appeals upheld the award based upon intentional infliction of emotional distress and did not reach the issues raised concerning breach of contract and bad faith.\(^12\)

The Florida Supreme Court held that the tort of intentional infliction of emotional distress was recognized in Florida,\(^13\) and expressly disapproved *Gmeur v. Garner,*\(^14\) which had held the opposite. The court gave neither reason nor analysis for its decision.\(^15\) The supreme court may have been relying on the reasoning of the Fourth District Court of Appeals, which basically argued, first, that the very cases cited later by the supreme court as having “skirted the issue”\(^16\) had actually “implic-
itly approved an action for intentional infliction of emotional distress upon sufficient facts." Finally, the Fourth District Court of Appeal noted that "there is a need for the recognition of such an action to control intentionally harmful conduct which would otherwise go unpunished, and which, in cause and effect, can hardly be distinguished from other intentional torts such as assault." It may well be that the supreme court felt no extensive discussion of the reasons for its decision was necessary due to the wide acceptance of the emotional distress doctrine throughout Florida and the nation. It also seems probable that earlier cases such as Slocum had strongly suggested an implicit recognition of the action. Interestingly, the supreme court could have chosen to duck the issue of recognition of the tort just as it did in Slocum because, as in Slocum, the facts in McCarson were held not to meet the requirements for the emotional distress action. The supreme court even noted the requirement that the act of a defendant must be "extreme and outrageous." In McCarson, how-

17. 429 So. 2d 1287, 1290 (1983). The Fourth District also relied on dicta from a previous supreme court case, Gilliam v. Stewart, 231 So. 2d 593 (1974). Although the case actually dealt with negligently caused emotional distress, and the certified question was whether the impact rule should be abolished, the supreme court focused its major attention on the fact that the Fourth District Court of Appeals had openly "overruled" decisions of the Florida Supreme Court. In Gilliam, the impact rule was upheld and the opinion is a restrained reprimand of the Fourth District Court. Perhaps for this reason, Gilliam is not cited in the supreme court's opinion in McCarson.

18. Id. at 1291.

19. RESTATEMENT (SECOND) OF TORTS § 46 (1964) states:
   Outrageous Conduct Causing Severe Emotional Distress
   (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 such person who is present at the time, if such distress results in bodily harm.

20. Supra note 4.

21. 467 So. 2d 277, 279 (Fla. 1985). A later case, in which a cause of action was stated, and which was affirmed by the supreme court on the authority of Metropolitan Life, was Crawford and Co. v. Dominguez, 467 So. 2d 281 (Fla. 1985).

22. See generally RESTATEMENT (SECOND) OF TORTS § 46 (1965).
ever, the defendant company had a right under the policy to demand proof that Mrs. McCarson was not eligible for Medicare. Defendant did no more than it had a legal right to do and the means used were reasonable. Thus, the court felt the acts were "privileged under the circumstances." 23

What is clear from this case is that the action for intentional infliction of emotional distress as outlined in the Restatement 24 has been formally adopted in Florida. Although this result is not startling, when read in conjunction with other cases decided this year 25 which expanded recovery for negligently inflicted emotional distress, it can be seen that the push to gain recognition for the right to be free from tortiously-caused emotional distress has moved forward significantly in Florida during 1985.

III. Negligent Infliction Of Emotional Distress

The question "duty" asks, in essence, is whether the defendant was under any legal obligation to take care for the safety of the plaintiff. 26 When affirmative acts by a defendant are involved, it is often safe to say that a duty will be owed by a defendant to a plaintiff when the defendant "as a reasonable person, [would] foresee that his conduct will involve an unreasonable risk of harm to . . . [the plaintiff]. . . . [The defendant] is then under a duty to [the plaintiff] to exercise the care of a reasonable person as to what he does or does not do." 27

Theoretically, it should not matter whether a defendant creates foreseeable risks of physical or mental harm to the plaintiff. If any type of harm is foreseeable, a duty of due care would arise. However, although any foreseeable harm could create this duty, physical and

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23. McCarson, 467 So. 2d at 279. The supreme court went on to discuss the breach of contract and bad faith issues, but they are beyond the scope of this article.

24. See supra note 19.

25. See infra notes 27-56 and accompanying text.


27. Id. at 358. The notion of duty arising because of foreseeability of harm (which can also be understood as a duty arising out of the relationship between plaintiff and defendant) probably got its start in Heaven v. Pender, 11 Q.B.D. 503 (1883), and can also be recognized in cases such as Donoghue v. Stevenson, App. Cas. 562 (H.L. 1932), and the well known Palsgraf v. Long Island R.R. Co., 248 N.Y. 339 (1928), in which no injury to the plaintiff was foreseeable from the act of defendant in shoving another passenger at the other end of the platform, and therefore no duty was owed to the plaintiff as to that act.
mental harms have always been treated differently. For a variety of reasons, courts have been unwilling to handle mental harms as they do physical harms, and have, instead, limited the duty owed in relation to foreseeable mental harms with special rules and restrictions.\textsuperscript{28} The rule in Florida had been that there could be no recovery for emotional distress injuries (mental harms) unless the plaintiff suffered some physical impact from defendant's conduct.\textsuperscript{29} Thus, if defendant's negligently-driven automobile careened toward plaintiff, stopping one foot from him, causing plaintiff to have a heart attack from fright, there could be no recovery, since there was no physical impact. Many jurisdictions allowed recovery in these circumstances under the more liberal zone-of-danger rule in which a plaintiff within the zone of physical risk from defendant's negligent conduct could recover when that conduct caused emotional distress and resulting physical injuries, even absent any physical impact upon the plaintiff.\textsuperscript{30} Under a zone-of-danger theory, it also becomes possible to recover damages for emotional distress and resulting physical injuries from \textit{observing} physical injuries to another as long as the plaintiff was in the zone of danger.\textsuperscript{31} It should be noted, however, that the distance from the accident becomes crucial. Unless the plaintiff is close enough to be within the zone of danger, recovery will still be denied.

\textsuperscript{28} Absent an assault, there was no recovery until recently even for intentionally-caused emotional distress. Florida did not finally adopt the tort until last year. \textit{See supra} notes 2 to 26 and accompanying text. Early influential cases also refused recovery for negligently-caused emotional distress. For example, \textit{Spade v. Lynn and B.R. Co.}, 168 Mass. 285, 47 N.E. 88 (1897) refused compensation for emotional harm and the physical injuries which that harm caused when defendant forced another passenger off its tram. The court seemed to feel that such distress would only be suffered by overly sensitive plaintiffs and did not warrant compensation. \textit{Spade} was not finally overruled until 1978 in the case of \textit{Dziokonski v. Babineau}, 380 N.E.2d 1295 (Mass. 1978).

\textsuperscript{29} In \textit{Gilliam v. Stewart}, 291 So. 2d 593 (Fla. 1974), the supreme court reaffirmed the rule that no recovery could be had for negligently-caused emotional distress, even when the distress produced physical injuries as well, absent physical impact. A thorough dissent by Justice Adkins analyzed the history of the impact rule and the trend away from it.

\textsuperscript{30} \textit{Restatement (Second) of Torts} § 436 (1965).

\textsuperscript{31} The classic situation would be the mother watching her child at play. The defendant's negligently-driven car crashes into the child. The mother suffers a heart attack caused by emotional distress. Under the impact rule, the mother would be denied recovery. Under the zone-of-danger rule, the plaintiff \textit{might} recover or might not depending on whether the plaintiff was standing close enough to the accident to be within the zone of physical danger. A matter of a few feet could make the difference.
In another context, this author has examined the various reasons which have been proposed to explain why recovery for emotional distress should be limited. When the various reasons are analyzed, what emerges is a fear that the scope of liability will be so sweeping that the doctrine will get out of control. It is a concern about the inability to set realistic limits to emotional distress recovery that initially led courts to refuse any recovery at all.

As time went by, various limiting rules were devised. The impact rule and the zone-of-danger rule were two of these. There is a similar rule in effect in many, but not all, jurisdictions that no recovery will be permitted for emotional distress unless that distress produced physical injuries or symptoms. Essentially, any such line or limit is arbitrary. By that is meant that it is hard to defend any rule falling short of normal foreseeability as sensible in and of itself. What must be recognized, however, is that these lines are drawn as alternatives to complete denial of the claim by courts which are worried about keeping some reasonable control over the possible spread in the scope of litigation. Historically, the lines have been drawn, little by little, in the direction of allowing more meritorious plaintiffs to recover. The line has been drawn ever nearer to that which would be allowed if normal foreseeability principles were permitted to operate.

Thus, even though each rule is arbitrary in a sense, each must be viewed not as the end, but rather as only an intermediate stop along the way. As a court gains experience with a particular rule and finds that runaway liability is not the result, it relaxes the rule still further. It is possible that emotional or mental injury eventually will be treated no differently than physical injury. If this is the case, it will happen, in most jurisdictions, incrementally.

The impact rule is about dead and the zone-of-danger rule is under attack. While England seems ready to take the leap of faith to pure foreseeability, no American jurisdiction has gone quite that far.

32. Joseph, Dillon's Other Leg: The Extension of the Doctrine Which Permits Bystander Recovery for Emotional Trauma and Physical Injuries to Actions Based on Strict Liability in Tort, 18 DUQ. L. REV. 1 (1979). Many reasons have been used by courts to explain the "no recovery" result, including lack of precedent for the extension (a weak reason which is no longer applied as more and more jurisdictions abandon the older rule), floodgates of litigation (that the courts will be swamped with claims), problems of proof (that mental upset is hard to recognize or measure), fraud (that courts will not be able to tell real from feigned claims), and that duty is lacking (an argument that such injuries are not actually foreseeable).

33. In McLoughlin v. O'Brian, 2 All E.R. 298 (1982), the English House of
Rather, the next wave toward foreseeability in the United States was begun by the California Supreme Court in *Dillon v. Legg*. In *Dillon*, the California Supreme Court considered injuries caused by defendant's negligent driving. Defendant hit Erin Lee Dillon who died. Actions were also brought by Erin's sister and her mother who claimed they were near the scene of the accident, witnessed it, and suffered emotional distress, shock, and related injuries. The trial court granted a judgment for the defendant on the pleadings of the mother's action because she was not within the zone of danger and so could have had no fear for her own safety. The sister's action was allowed to continue because her location was close enough to raise an issue of fact as to whether she was within the zone of danger. Rejecting such incongruous results, and overruling its own prior decision in *Amaya v. Home Ice, Fuel and Supply Co.*, the California Supreme Court abolished the zone-of-danger limitation.

While purporting to adopt a foreseeability approach, the rule of *Dillon* falls short of that, because it created and applied specific requirements for testing foreseeability instead of permitting a case-by-case determination of that issue. While speaking of the three requirements of *Dillon* as mere "factors," it has been pointed out that they have generally been applied as absolute requirements or elements, and that the absence of any one of them has generally resulted in a "no duty" rule being applied. The three factors articulated by the California Supreme Court were:

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 observance of the accident, as contrasted with learning of the accident from others after its occurrence.
3. Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

Lords, while considering various factors which might limit recovery in particular cases, adopted a foreseeability approach as the test in emotional distress cases.

34. 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
35. *Id.* at 912, 69 Cal. Rptr. at 75.
38. 441 P.2d at 920, 69 Cal. Rptr. at 80.
Interestingly, as time passed, just what was discussed above came to pass. The California Court modified *Dillon* to permit recovery in some cases even when no physical injuries resulted from the emotional distress. Further, later courts adopting the *Dillon* approach fashioned control devices broader than the three factors in *Dillon*. For example, in *Dziokonski v. Babineau*, the Supreme Judicial Court of Massachusetts essentially adopted the *Dillon* rule in bystander emotional distress cases, but phrased their rule more broadly to include the situation of a plaintiff who did not actually witness the accident but arrived on the scene while the injured person was still present.

Within this context of change, this year the Florida Supreme Court considered the impact rule in two cases: *Champion v. Gray* and *Brown v. Cadillac Motor Car Division*. *Champion* involved an allegation that

Karen Champion, the child of Joyce and Walton Champion, was walking near a roadway when a car driven by a drunk driver left the road, struck the child and killed her. Immediately after the accident, Karen's mother, Joyce, came to the scene and discovered the body of her child. Overcome with shock and grief at the sight of and death of her daughter, Joyce collapsed and died.

Because there was no impact on the mother, the trial court had no choice but to dismiss the action and the court of appeals had no choice but to affirm. The appellate court took the opportunity to thoroughly review the issue and urged that the impact rule be abolished. Although noting that the issue of bystander recovery went beyond mere abolition of the impact rule, since the mother was not in the zone of

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41. 478 So. 2d 17 (Fla. 1985).
42. 468 So. 2d 903 (Fla. 1985).
44. Id. at 350.
danger and clearly suffered her injury only because she was affected by seeing her dead child, the court analyzed the justice of the claim as well as of the trend started by the California Supreme Court in Dillon. The appellate court urged the adoption of the Dillon rule. The question was certified to the Florida Supreme Court.

Rethinking its earlier decisions, such as Gilliam, the Florida Supreme Court, while not ignoring the concern about fraud and limitless claims, nevertheless stated:

We now conclude, however, that the price of death or significant discernible physical injury, when caused by psychological trauma resulting from a negligent injury imposed upon a close family member within the sensory perception of the physically injured person, is too great a harm to require direct physical contact before a cause of action exists.

The court stressed the narrowness of the decision, specifically noting that a total foreseeability approach (such as that adopted in McLoughlin v. O'Brian) was too broad and not what the court had in mind. The court quoted at length from Dillon, including its three factors, and, in particular, stressed that emotional harm alone could not be compensated without "a causally connected clearly discernible physical impairment [which] must accompany or occur within a short time of the psychic injury."

Interestingly, while purporting to be very narrow, the case is actually broader than Dillon was on its facts and continues to demonstrate how courts become familiar with emotional distress recoveries, feel more comfortable with them, and then expand them ever closer to the full extent of recovery granted to physical injuries alone. For example, the Florida Supreme Court jumped right from the impact rule to Dillon without feeling the need to stop for a few years at the zone-of-danger halfway house. Clearly, the experience of other states with the zone-of-danger rule and with the Dillon rule left the court secure

46. Id. at 354.
47. The certified question was: "Should Florida abrogate the 'impact rule' and allow recovery for the physical consequences resulting from mental or emotional stress caused by the defendant's negligence in the absence of physical impact upon the plaintiff?" Id.
48. Champion, 478 So. 2d at 18-19.
49. Champion, 478 So. 2d at 18-19.
enough that the power of *Dillon* could contain the doctrine and that no more restrictive rule was necessary. Additionally, the court stated that the rule would be applied where the plaintiff either saw, heard, or “arrives on the scene while the injured party is still there.”\(^5\) While this makes good sense, it is really the *Dziokonski* extension of *Dillon* and cannot be characterized as a narrow rule. Finally, the court intimated that it might be prepared to go even further, stating:

The English case of *McLoughlin v. O'Brian*, 2 All E.R. 298 (1982), adopting a pure foreseeability rule, allowed recovery when a parent suffered psychic injury upon seeing her child *in the hospital* shortly following an accident. We do not say whether or not we would or would not recognize a claim under such circumstances, but, if so, we would think that this scenario reaches the outer limits of the required involvement in the event.\(^6\)

The court held that “a claim exist[ed] for damages flowing from a significant discernible physical injury when such injury is caused by psychic trauma resulting from negligent injury imposed on another who, because of his relationship to the injured party and his involvement in the event causing the injury, is foreseeably injured.”\(^7\)

Contrasted with the facts of *Champion*, are those of *Brown v. Cadillac Motor Car Division*,\(^8\) in which plaintiff Brown struck and killed his mother who had just exited from the car Brown was driving. Defendant, Cadillac, was found to be at fault because of a defective design of the accelerator pedal. Brown did not allege any physical injuries or trauma. Rather, he suffered only psychological upset alone. The court made it clear that no such recovery could be had:

We hold that such psychological trauma must cause a demonstra-

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50. *Id.* at 20.

51. *Id.* [Emphasis added]. Importantly, the court explicitly acknowledged that the adopted rule was, essentially, just a control devise for the doctrine. “We recognize that any limitation is somewhat arbitrary, but in our view it is necessary to curb the potential of fraudulent claims, and to place some boundaries on the indefinable and unmeasurable psychic claims.” *Id.* Once this is acknowledged, the potential for future modifications and expansions should be obvious.

52. *Id.* The court also emphasized in a footnote: “We reiterate that a claim for psychic trauma unaccompanied by discernible bodily injury, when caused by injuries to another and not otherwise specifically provided for by statute, remain nonexistent.” *Id.* at 20 n.4.

53. 468 So. 2d at 903.
ble physical injury such as death, paralysis, muscular impairment, or similar objectively discernible physical impairment before a cause of action may exist. We hold that there is no cause of action for psychological trauma alone when resulting from simple negligence.54

It seems that the supreme court is firm, for the moment at least, in holding the line of recovery at physical consequences of negligently-caused emotional distress (a line at first held firmly and later abandoned in California). The importance of the decisions, however, is not that they do not go the whole way, but rather, how very far they do go. In one step, the Florida Supreme Court has moved into the growing group of courts charting the future for emotional distress recovery in this country.55 The eventual limit of the growth of this doctrine remains to be seen.56

54. Id. at 904. [Footnote omitted].
55. Recently, a number of jurisdictions have adopted some variant of the Dillon rule including Nebraska: James v. Lieb, 221 Neb. 47, 375 N.W.2d 109 (1985); Wisconsin: Garrett v. City of New Berlin, 122 Wis. 2d 223, 362 N.W.2d 137 (1985); Ohio: Paugh v. Hanks, 6 Ohio St.3d 72, 451 N.E.2d 753 (1983); Montana: Versland v. Caron Transp., 671 P.2d 583 (Mont. 1983); Maine: Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982); Iowa: Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981); and New Jersey: Portee v. Jafee, 84 N.J. 88, 417 A.2d 521 (1980). This does not include cases decided before 1980 adopting the same approach in jurisdictions such as New Hampshire, Massachusetts, Texas, Rhode Island, Arizona, Pennsylvania (plurality), Michigan, Hawaii, and, of course, California which started it all. For a somewhat less enthusiastic view of the doctrine and of Champion v. Gray, see Richmond, Life After Champion: Defending Against Claims of Emotional Distress Stemming From Injuries to Third Parties, 4 TRIAL ADVOC. Q. 43 (1985). Professor Richmond states, “The truly heartening thing about Champion is the willingness of the Court to keep a tight rein on an amorphous and highly questionable cause of action.” Id. at 46.
56. The Florida Supreme Court granted a rehearing limited to the question of whether the cause of action was a derivative one or, by contrast, a separate cause of action. The court stated that the action “is a direct and distinct claim,” Champion v. Gray, 478 So. 2d 17, 22 (Fla. 1985), but also stated, “We do not discuss the possible effects of the minor’s comparative negligence or of contribution because there is no issue of those factors in this case.” Id.

If the action is derivative, then it would seem that any defense which could be raised against the primary plaintiff can also be raised against the bystander suffering emotional distress. This seems to be the correct solution to this question. If the Florida Supreme Court sticks strictly to the view that the action is a separate one and not derivative, then, analytically, this result is not compelled. The fact that the primary plaintiff may, himself, have been negligent would not affect the fact that the defendant’s act was negligent to the plaintiff-bystander suffering foreseeable emotional dis-
IV. Premises Liability

A child's fall from monkey bars in a municipal park reached the Florida Supreme Court in City of Miami v. Ameller. The issue was whether an allegation that the monkey bars were placed over hard-packed earth stated a cause of action when no allegation was made that the monkey bars themselves were defective in any way. The Third District Court of Appeals ruled in a brief per curiam opinion that a cause of action was stated, while acknowledging a conflict with an earlier case from the First District, Alegre v. Shurkey.

There were earlier cases denying recovery. In Hillman v. Greater Miami Hebrew Academy, the supreme court held that no cause of action was stated because the complaint did not allege that the monkey bars contained a latent defect nor was the danger one that a young child would not notice. In addition, there was nothing to indicate that the presence of adult supervision would have prevented the accident. The court in Hillman expressed concern that the complaint amounted to an attempt to make the defendant an insurer of the child's safety.

Later, in Alegre, the First District panel split on the issue. The allegation in Alegre was, as it was in Ameller, that the hard nature of the packed surface under the monkey bars and the failure to provide a softer surface constituted negligence. The majority in Alegre felt bound by Hillman, and quoted extensively from that case. Judge Ervin, concurring in part and dissenting in part argued that if Hillman meant that a complaint was deficient for failing to allege that the defect would not be noticed by the plaintiff because of the child's youth,
then an opportunity could be provided to permit the complaint in *Allegre* to be amended to include such an allegation.⁶⁸ If, on the other hand, *Hillman* intended to require an allegation that the monkey bars contained a latent defect, the case should not be considered controlling. The basic point was that the latent defect rule was, essentially, a duty limitation in the nature of the assumption-of-risk defense, and that the defense and any parallel duty limitation ought to be treated as an issue of the negligence of the child under Florida's comparative negligence rule which had not been adopted when *Hillman* was decided.⁶⁹ The Third District Court of Appeal in *Ameller* specifically adopted the reasoning of Judge Ervin in his *Hillman* dissent, thus setting the stage for review.⁷⁰

The supreme court managed to uphold both the result reached by the Third District and the reasoning of the majority opinion in *Allegre*.⁷¹ The general reasoning in the *Allegre* majority opinion was reaffirmed as to private defendants, however, the supreme court stated "[w]e see no reason, however, why *Hillman* and *Allegre* should protect a municipality or other public agency from liability for the negligent operation of playground equipment."⁷² The court noted that the complaint alleged the defendant violated both its own standards for such equipment as well as those of the playground industry.⁷³ This was sufficient to state a cause of action.

V. The Duty of Parents to Control the Acts of Their Children

It is hornbook law that parents are not liable for the torts of their children merely by virtue of the parent-child relationship.⁷⁴ By the

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⁶⁸. *Id.* at 249. It was noted by Judge Ervin that "a child of tender years may be incapable of comprehending a patent risk and that a greater degree of care may be owed to the invitee-child by the business owner than to an adult of normal intelligence." *Id.*

⁶⁹. *Id.* at 249-50.

⁷⁰. *Ameller*, 447 So. 2d at 1014.

⁷¹. *City of Miami v. Ameller*, 472 So. 2d at 728.

⁷². *Id.*

⁷³. *Id.* "Public safety and welfare demand that a public agency be responsible for making its own standards at the very least." *Id.* at 729. The court stressed that its decision did not have the effect of making the city an insurer because the duty owed was only that the city "maintain its parks in a condition reasonably safe for public use." *Id.*

⁷⁴. W. PROSSER AND W. KEETON, PROSSER AND KEETON ON TORTS § 123 (5th
same token, parents may become liable for unreasonable failure to supervise their children.\footnote{75}

In Florida, the leading case interpreting this doctrine was \textit{Gissen v. Goodwill},\footnote{76} which essentially required parental knowledge that the child had a habit of doing the particular type of conduct before liability could attach.\footnote{77} Allegations in the second amended complaint that the parents knew that their minor child "[had] dangerous tendencies and propensities of a mischievous and wanton disposition,"\footnote{78} and even that the parents had knowledge of other anti-social acts directed at third parties and property,\footnote{79} were not sufficient to state a cause of action when there was no prior history of acts such as the one which injured the plaintiff.\footnote{80}

In \textit{Snow v. Nelson},\footnote{81} the Florida Supreme Court reviewed and retained the \textit{Gissen} decision,\footnote{82} and upheld the district court which had affirmed the order of the trial court directing a verdict for the defend-

\footnotesize{ed. 1984).}

\footnote{75. One of four exceptions to the "no liability" rule is "[w]here he [the parent] fails to exercise parental control over his minor child, although he knows or in the exercise of care should have known that injury to another is a profitable consequences." \textit{Gissen v. Goodwill}, 80 So. 2d 701, 703 (Fla. 1955). \textit{See also} \textsc{Restatement (Second) of Torts} § 316 (1965).}

\footnote{76. 80 So. 2d 701 (Fla. 1955).}

\footnote{77. \textit{Id.} at 705.}

\footnote{78. \textit{Id.} at 702.}

\footnote{79. \textit{Id.}}\footnote{80. It is nowhere claimed that the child here involved had a propensity to swing or slam doors at the hazard of persons using such doors. The deed of a child, the enactment of which results in harm to another and which is unrelated to any previous act or acts of the child, cannot be laid at the door of the parents simply because the child happened to be born theirs. However, a wrongful act by an infant which climaxes a course of conduct involving similar acts may lead to the parents' accountability. \textit{Id.} at 705.}

\footnote{81. 475 So. 2d 225 (Fla. 1985) (per curiam).}

\footnote{82. In \textit{Gissen} we read the exception narrowly, holding that the cause of action must allege that the child had a habit of engaging in a particular act or course of conduct which led to the plaintiff's injury. Consequently, because there was no allegation that the child in \textit{Gissen} had a habit of swinging or slamming the doors to the hazard of persons using such doors, we affirmed the dismissal of the complaint. \textit{Id.} at 226.}
ant. The court rejected the contention that injustice was caused by adhering to such a narrow rule.

VI. Loss of Parental Consortium

Actions for loss of consortium are based on the notion that due to the relationship between two persons, tortious injury to one results in the loss of various "services" owed by the injured party to the other. It is the action to recover for the loss of these services that is labeled an action for loss of consortium. It was held early on that such an action would lie on behalf of the husband when the wife was injured, but it was not until 1950 that it began to be recognized that services were mutually owed between spouses and that an action by the wife for lack of consortium would lie when it was the husband who was injured.

Although historically a parent had a right to the services of his or her children, there has been less than full support for a consortium action on the part of a parent for loss of a child's intangible services. This may be because many felt that a monetary award for the loss of the society, companionship, and affection of the child would do little to remedy the loss. Similarly, the notion of a child's suit for loss of parental consortium was not well-received generally until 1980, when a few courts began to recognize it. In Florida, a limited right for a child's action of loss of consortium had been recognized in Florida's wrongful

83. Id.
84. Id. Justice Ehrlich concurred specially. While agreeing that the facts in Snow did not warrant recovery because the injury occurred to one child by another when both were playing together, a situation in which such injuries are likely to happen, Justice Ehrlich argued that the rule in Gissen was too narrow. He stated:

I would hope that, were Gissen before us today, we would construe that exception to the general rule of parental non-liability to encompass Gissen's facts. Where parents have actual or constructive notice of their offspring's propensity to commit a general class of malicious acts, the child's creativity in developing new ways to bring about injury should not absolve parents from the duty to attend to and discipline the child.

Id. at 227 (Ehrlich, J., concurring).
86. Id. The drive to recognize a wife's action for loss of consortium was begun with Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950), cert. denied, 340 U.S. 852 (1950).
87. See supra note 85.
88. Id.
death act.\(^9\) In *Zorzos v. Rosen*,\(^9\) the Florida Supreme Court considered whether to extend the action by judicial decision to situations in which the parent was injured but not killed by the acts of the defendant.

The positions pro and con for such an action have been well argued in Florida. In *Clark v. Suncoast Hospital, Inc.*,\(^9\) the Second District rejected children's claims for loss of consortium after the permanent injury to their father from a cardiac arrest during surgery, allegedly caused by defendant's negligence.\(^9\) The reasons suggested by the court to justify its denial of the action were several: The court suggested no precedent existed for this action and that it generally was rejected by other courts considering the question. It also pointed out that there was a danger of overlapping claims and double recovery. It was noted that many administrative difficulties existed, including problems of apportionment, the possibility of fraudulent claims, and the uncertainty of how to value the damage. It was also noted that insurance rates could be affected by a recognition of the action.\(^9\)

Many of the reasons above do not attack the basic fairness of such an action. In fact, the court itself in *Clark* noted, "If the claims asserted by plaintiffs were properly circumscribed, there could be merit to their position from a policy standpoint."\(^9\) However, the court concluded that the legislature was the appropriate body to address the

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89. "(3) Minor children of the decedent may also recover for loss of the decedent's companionship, instruction and guidance and for mental pain and suffering from the date of injury." Fla. Stat. § 768.21 (1983).
90. 467 So. 2d 305 (Fla. 1985).
91. 338 So. 2d 1117 (Fla. 2d Dist. Ct. App. 1976).
92. Id. at 1118.
93. Id. at 1118-19. It was also suggested that there was no claim which could be enforced by the child for the services of the parent. It should be remembered that the child *does* generally have a right to financial support from the parents and that child neglect is generally criminalized. These factors might be sufficient to suggest a conceptual basis for a parental consortium action by the child.
94. Id. at 1119.

Plaintiffs make a forceful argument that as children of a disabled father, they will not only suffer a loss of the funds that their father ordinarily would have provided for their food, shelter, and health; but likewise, the loss of love, moral training, example and guidance they would otherwise receive. And while plaintiffs concede that their father is the appropriate claimant to recover for loss of income which would be used to pay for their basic requirements of life, they argue that to deny them the right to recover their own intangible losses is a manifest injustice.

*Id.* at 1118.
problem. By contrast, the Fifth District Court of Appeal in *Rosen v. Zorzos* rejected the concept that the legislature was the proper body to make the decision, stating, "The cause of action for loss of consortium is a creation of the common law and its continued development is properly within judicial authority and responsibility." Additionally, this court noted that some limited authority recognizing the action now exists. The court found it anomalous that a child would have a consortium action if the parent died, but not if the parent were seriously injured. It discussed a pattern where courts allowed consortium actions, in most cases, with only this latter situation left unredressed. It was noted that "[t]he majority of legal commentators support the recognition of an independent cause of action for parental consortium." Finally, it was suggested that recognition of the action would help effectuate the policy of the Florida Constitution that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

The Florida Supreme Court quashed the decision of the court of appeals and specifically approved the opinion in *Suncoast Hospital* instead. The supreme court agreed that the legislature was the proper body to consider the doctrine and to engage in the delicate process of constructing limits for the doctrine if it were to be adopted. Finally, the court raised the possibility that lack of legislative action to extend the doctrine may have represented the legislature's will on the issue.

95. *Id.* at 1119.
96. 449 So. 2d 359 (Fla. 5th Dist. Ct. App. 1984).
97. *Id.* at 361. [Footnote omitted]. The court also noted several controversial policy expansions of the law which had been made in Florida by judicial decision, including the recognition of a wife's right to sue for loss of the husband's consortium, and the adoption of comparative negligence. *Id.*
98. *Id.*
99. *Id.* at 362-63. The court continued, "To suggest that the disparate treatment between the parent and the child with respect to their right to each other's companionship is historically based, and, consequently, should be perpetuated, is unpersuasive in light of the growing recognition of children's rights." *Id.* at 363. [Footnote omitted].
100. *Id.* at 363 n.8.
102. 467 So. 2d at 307.
103. *Id.*
Justice Ehrlich, in dissent, refused to be moved by legislative inaction, noting that the change of the wrongful death statute was a focused one and limited to that area. No attempt had been made to engage in a general or complete revision of the entire tort system. Rather, Justice Ehrlich argued that, in passing the Wrongful Death Act with a parental consortium provision, the legislature had, in effect, established the public policy of Florida to be in favor of such recovery, thus opening the door for further judicial action. Concluding, Justice Ehrlich argued, "There is no longer any reason to subscribe to the fiction that a minor child has not sustained any recoverable monetary damage resulting from the personal injury of a parent... It is a principle whose time has long since arrived."

VII. Punitive Damages

The Florida Supreme Court had several opportunities to consider issues relating to punitive damages during the past year. In *Como Oil Co. v. O'Loughlin*, the issue was whether gross negligence was sufficient to support an award of punitive damages. The court addressed the issue only the year before in *White Construction Co. v. Dupont*, where it held that gross negligence was not sufficient and that the proper standard was wanton and willful misconduct equivalent to that necessary for criminal manslaughter. In the face of this, however, but has not created a companion action for such loss when the parent is injured but not killed. Although this omission may be only an oversight, it strongly suggests that the legislature has deliberately chosen not to create such a cause of action.

*Id.*

104. *Id.* at 307-08 (Ehrlich, J., dissenting).

I therefore can draw no inference from the fact that the legislature addressed a narrow segment of tort law by enacting the new death statute, and did not attempt an overall revision of this area of the law. This was nothing more and nothing less than the legislative process in action.

*Id.*

105. *Id.*

106. *Id.* at 308. (Justice Adkins also concurred in the dissent).

107. 466 So. 2d 1061 (Fla. 1985) (per curiam).

108. 455 So. 2d 1026 (Fla. 1984).

109. *Id.* at 1028.

The character of negligence necessary to sustain an award of punitive damages must be of a "gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presump-
the Fourth District Court of Appeal reversed the trial court’s entry of a directed verdict for defendant on the issue of punitive damages because the district court of appeal found that there was gross negligence.\textsuperscript{110} The supreme court quashed the decision of the district court of appeal because of its use of the incorrect standard.\textsuperscript{111}

In \textit{Winn-Dixie Stores, Inc. v. Robinson,}\textsuperscript{112} plaintiff bought merchandise at a Winn-Dixie store. When he returned to the store and purchased additional merchandise, an employee of the store erroneously concluded that the original items were stolen. Plaintiff was arrested and the items taken from his car and put back on the shelf. He was charged with petit theft, charges which were eventually dropped. Plaintiff filed suit for false imprisonment, malicious prosecution and conversion. The jury found for the plaintiff and awarded $200,000 in compensatory damages and $750,000 in punitive damages. The trial court granted a motion for a directed verdict in favor of Winn-Dixie on the punitive damage issue and, alternatively, granted remittitur or a new trial.\textsuperscript{113} The district court of appeal reversed the directed verdict as well as the order for remittitur or a new trial.\textsuperscript{114}

The Florida Supreme Court agreed that granting the directed verdict had been improper.\textsuperscript{115} The trial court granted it based upon an

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  \item \textsuperscript{110} We find that there was an adequate basis for the jury to determine that Como’s driver was guilty of gross negligence and that such was attributable to Como Oil because of Como’s failure to oversee and maintain its equipment and failure to train and equip its driver, particularly when handling a hazardous substance.
  \item \textsuperscript{111} 466 So. 2d at 1062. The court also reviewed the evidence and decided that it could not be viewed as amounting to the required wanton and willful conduct. Justice Shaw, joined by Justice Ehrlich concurred in part and dissented in part, arguing that the evidence presented sufficient indications of wanton and willful conduct on the part of the defendant, itself, to preclude a directed verdict on the punitive damages issue. \textit{Id.} at 1063.
  \item \textsuperscript{112} 472 So. 2d 722 (Fla. 1985).
  \item \textsuperscript{113} \textit{Id.} at 723.
  \item \textsuperscript{114} \textit{Id.} at 724.
  \item \textsuperscript{115} \textit{Id.}
\end{itemize}
earlier case, *Mercury Motors Express, Inc. v. Smith*,\(^{116}\) which held that an employer was not vicariously liable for punitive damages based upon the acts of the employee unless the employer was also at fault in some way.\(^ {117}\) But the supreme court held that the holding in *Mercury Motors Express* did not apply when "the suit was tried on the theory of the direct liability of Winn-Dixie, and the jury, by special verdict, decided that Winn-Dixie should be held directly liable for punitive damages."\(^ {118}\) The court disagreed, however, with the action of the district court of appeal in reversing the trial court's order granting remittitur or, in the alternative, a new trial. The supreme court noted "that it is proper for the trial court to issue an order for new trial or remittitur when the manifest weight of the evidence shows that the amount of punitive damages assessed is out of all reasonable proportion to the malice, outrage, or wantonness of the tortious conduct."\(^ {119}\) The correct standard for the review of the trial court's decision is "a clear showing of abuse of discretion."\(^ {120}\) The district court of appeal made no such finding, but merely stated that "it was not convinced that the punitive

\(^{116}\) 393 So. 2d 545 (Fla. 1981).

\(^{117}\) Before an employer may be held vicariously liable for punitive damages under the doctrine of respondeat superior, there must be some fault on his part. . . . Although the misconduct of the employee, upon which the vicarious liability of the employer for punitive damages is based, must be willful and wanton, it is not necessary that the fault of the employer, independent of his employee's conduct, also be willful and wanton. It is sufficient that the plaintiff allege and prove some fault on the part of the employer which foreseeably contributed to the plaintiff's injury to make him vicariously liable for punitive damages. *Id.* at 549.

\(^{118}\) 472 So. 2d at 724. Previously the court had held in Bankers Multiple Line Ins. Co. v. Farish, 464 So. 2d 530 (Fla. 1985), that *Mercury Motors* also did not apply "where the agent primarily causing the imposition of punitive damages was the managing agent or primary owner of the corporation." *Id.*

Because the directed verdict was improper, the alternative order for remittitur or new trial must be considered. In this regard, we disagree with the district court's disapproval of the trial court's entry of the alternative orders entered in the present case. We find that it is preferable for the court to rule on a motion for new trial at the same time it grants a defendant's motion for directed verdict in the event that the appellate court reverses the directed verdict.

*Id.*

\(^{119}\) 472 So. 2d at 725.

\(^{120}\) *Id.*
damages assessed by the jury were unreasonable."¹²¹ This suggests that reasonable minds could differ about the reasonableness of the award which is not a sufficient ground for overturning the trial court's decision.¹²²

In *Tamiami Trail Tours, Inc. v. Cotton*,¹²³ the supreme court held that when the theory upon which defendant was held liable for punitive damages was not mentioned in the pleadings and was not raised until the charge conference and after all of the evidence had been heard, and where no motion was made to conform the pleadings to what had been proved, the theory, although correct, could not be the basis of liability.¹²⁴

In *Bankers Multiple Line Insurance Co. v. Farish*,¹²⁵ the supreme court noted that the trial court is generally in the best position to evaluate the impact of a particular jury instruction and agreed with the trial court that "the charges given the jury did not adequately apprise it that awarding punitive damages is discretionary."¹²⁶

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¹²¹ Id.
¹²² Id.
¹²³ 463 So. 2d 1126 (Fla. 1985).
¹²⁴ The theory was that defendant was "a possessor of property who fails to control the actions of its servant on the property, [and so is liable] even though the servant is acting outside the course and scope of his employment." *Id.* at 1128.

The defense attorney repeatedly objected to both the charge and the special interrogatory on the verdict which allowed finding Tamiami liable for Crosby's actions outside the scope of his employment. No motion was ever made to conform the pleadings to the evidence, nor were the pleadings ever amended to include this theory. In short, Tamiami was sandbagged. It proceeded to trial on notice that it had to defend against charges of tortious interference with a business relationship for actions attributable to it on theories of conspiracy or agency. It won verdicts absolving it of liability on both theories. It was found liable on a theory it never had an opportunity to rebut at trial. While the theory itself is the law of the state, the procedural requirements of due process will not allow it to be raised in this manner.

*Id.*

¹²⁵ 464 So. 2d 530 (Fla. 1985).
¹²⁶ *Id.* at 532. The instruction given was not the standard one. The charge was, "the greater the defendant's wealth, the greater it [sic] must be, the punitive damages assessed, in order to get his attention regardless of the amount of compensatory damages awarded to the plaintiff." *Id.* at 533. Although punitive and compensatory damages do not have to bear any particular relation to each other, neither is the wealth of the defendant alone the mark by which punitive damages are judged.

In *Lassiter v. International Union of Operating Engineers, 349 So. 2d 622 (Fla. 1976)*, we did not intend to abandon the required relation-
VIII. Interspousal Tort Immunity

Immunities protect status. In essence, the raising of an immunity says, "I can't be sued, even though I acted wrongfully and even though my fault caused your injury, because of who or what I am." When understood in this light, immunities ought to be generally disfavored and permitted only when society will clearly benefit from their use. In recent times, immunities have been narrowed or discarded. The traditional immunity of the sovereign, for example, has been partly waived through legislation or court decisions in many jurisdictions.127 Similarly, charitable immunity has waned.128 It is probably safe to say that interspousal tort immunity, which prevents one spouse from suing the other, is in a state of declining health. Yet, this year, the Florida Supreme Court gave it a shot in the arm by upholding it. The case was Snowten v. United States Fidelity and Guaranty Co.129

Snowten involved the negligent use of an automobile by the wife. The husband was struck by the auto and seriously injured. The husband sued his wife and the insurance company. The company moved for summary judgment, which was granted. The judgment was affirmed on appeal, but the First District Court of Appeals certified the issue to the Florida Supreme Court as one of great public importance.130 The immunity of husband and wife is a common law creation,131

ship between the amount of punishment and the nature, extent, and enormity of the wrong and all of the circumstances in relation to the tort. The net worth of a defendant is one factor to be considered, but so are the circumstances and the degree of wantonness or culpability. . . . The instruction as given did not apprise the jury of that fact. We deem it error to fail to do so.

Id.

127. See 28 U.S.C. §§ 2671-2680, Fla. Stat. § 768.28 (1985), and Molitor v. Kaneland Comm. Unit Dist. #302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959). "Although one or two states seem to have retained something like a total sovereign immunity, the great majority have now considered to at least some liability for torts, in all cases retaining the immunity at least to the extent of basic policy or discretionary decisions." W. Prosser & W. Keeton, Prosser and Keeton on Torts 1044 (5th ed. 1984).


129. 475 So. 2d 1211 (Fla. 1985).

130. The question certified was, "Is the doctrine of interspousal immunity waived, to the extent of available liability insurance, when the action is for a negligent tort?" Id. at 1212.

131. See generally McCurdy, Personal Injury Torts Between Spouses, 4 Vill. L. Rev. 303 (1959); McCurdy, Torts Between Persons in Domestic Relation, 43 Harv. L.

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and although it was adopted in Florida's "reception statute," such a statute would not necessarily be understood as denying to the courts of the state the power to develop the common law through subsequent decisions. The Florida Supreme Court seemed to acknowledge that it had the power to abolish or limit the immunity if it had chosen to do so. The court stressed, however, that the common law enacted by the reception statute would not be abrogated by judicial action without a compelling need to do so, and then only when "the reason for the law no longer exist[ed]."

The court cited three main reasons which have traditionally been advanced for the doctrine: 1) The legal unity of husband and wife; 2) Avoidance of marital disharmony; and 3) Avoidance of fraudulent and collusive claims. In the modern world, one would expect the first of these reasons to be rejected out of hand. The legal unity of husband and wife grew at a time when the persona of the wife was almost totally submerged into that of her husband. She could neither sue nor be sued in her own name and she could not enter into contracts. Thus, the conceptual notion of a suit by one spouse against the other would appear impossible because it would be as if a plaintiff were suing himself. Surely, this doctrine of "unity" and the conceptual framework

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132. Florida Statutes section 2.01 states:
The common and statute laws of England which are of a general and not a local nature, with the exceptions hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the Legislature of this state.

FLA. STAT. § 2.01 (1985).


134. "[P]etitioner asserts that this court should use its power to abrogate the doctrine." 475 So. 2d at 1212. The court then considered the policy basis for the immunity.

135. Id. at 1213.

136. Id. at 1212.

137. Historically, the merger of husband and wife and the need for "family harmony" and order resulted in some legal recognition of a right of "family discipline" vested in the husband. "He might administer to his wife 'moderate correction,' and 'restrain' her by 'domestic chastisement'. . . . The altered position and independent legal status of married women in modern society has done away with any such discipline." W. PROSSER AND W. KEETON, PROSSER AND KEETON ON TORTS § 27 (5th ed. 1984).

138. See generally W. PROSSER AND W. KEETON, PROSSER AND KEETON ON
upon which it was based has been discredited. Similarly, any legal rule which flows from so tainted a source ought also to be suspect. Surprisingly, the Florida Supreme Court stated that the unity argument still makes sense. To support that view, the court quoted from respondent's argument to the effect that marriage relationships are different from other relationships and create some “special circumstances” which must be taken into account.139

It is, of course, true, that marriage is a very special relationship of love, trust, and mutual financial interest. This alone, however, does not suggest that those who enter into it should give up rights to bodily security and compensation for injuries suffered that any unmarried person has. In fact, it might well be seen as a sort of “marriage penalty,” in which the natural grief and remorse which one spouse would feel upon injuring another is compounded by the realization that there will be no compensation whatsoever for the injuries in most cases.

It is likely that the first reason to justify this doctrine, the legal unity of husband and wife, is not really the reason upon which the case was decided, or, at least, that it is meant only as an introduction to the other two; i.e., that because of the special relationship of marriage, it should be saved from the strains which a lawsuit would entail, or that it might be the breeding ground for fraudulent claims. As the supreme court saw it, those who would abolish interspousal tort immunity are caught on the horns of a dilemma; either the suit will disrupt family harmony (and so should not be allowed) or the suit will not disrupt family harmony because the claim is fraudulent.140 No third alternative seemed to suggest itself to the court. This avoidance of marital disharmony is the court’s second reason for advancing the doctrine.

One is led to wonder whether a legitimate suit is necessarily going to lead to marital disharmony, especially in a day and age when most

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140. Id. (quoting Raisen v. Raisen, 379 So. 2d 352, 355 (1979)).
people are insured.\textsuperscript{141} Even if the suit is technically "spouse v. spouse" as the court suggested,\textsuperscript{142} it is not hard to imagine that the spouses will understand that the real issue is whether the family unit will recover from the insurance company for its loss.\textsuperscript{143} In fact, in light of insurance, one might well argue that family harmony will be greater in a situation where the family is compensated for the losses it has suffered. A severely-injured spouse, perhaps out of work due to the injury, incurring massive doctor bills, will affect the ability of the family to take care of itself. The strains which this will inevitably cause might be lessened if proper compensation was to be forthcoming.

Finally, then, there is the issue of fraud. Will fraud inevitably occur and go undiscovered in so great a degree that the immunity is necessary to prevent it? Although fear of fraud has often kept courts from permitting certain actions (actions for emotional distress are a good example), as courts became convinced that the action itself was valid, they have rejected fear of fraud as a sufficient reason, standing alone, to deny claims which are valid.\textsuperscript{144}

Although fraud is always possible, and is more probable when those involved in an alleged accident have a close and confidential relationship, there are many types of such relationships and courts, in general, do not seem unable to tell true from false claims. Florida itself, for example, seems to feel that such problems can be overcome when a child sues a parent.\textsuperscript{145} In recent years, in fact, a number of courts have

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  \item \textsuperscript{141} It should be noted that a possible intermediate position, also rejected by the court in this case but accepted in 1982 when the issue was the continuing viability of the parental immunity, is that the immunity is waived when there is insurance and then only up to the limits of the insurance policy.
  \item \textsuperscript{142} 475 So. 2d at 1212.
  \item \textsuperscript{143} It must be conceded that this realization will exist. Without it, the argument that collusive suits are likely would make no sense.
  \item \textsuperscript{144} In Dillon v. Legg, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), the California Supreme Court stated:

[T]he interest of meritorious plaintiffs should prevail over alleged administrative difficulties. "[T]he fact that there may be greater opportunity for fraud or collusion in one class of cases than another does not warrant courts of law in closing the door to all cases of that class. Courts must depend upon the efficiency of the judicial processes to ferret out the meritorious from the fraudulent in particular cases."

\textit{Id.} (citing Emery v. Emery, 45 Cal. 2d 421, 431, 289 P.2d 218, 224 (1955)).
  \item \textsuperscript{145} In Ard v. Ard, 414 So. 2d 1066 (Fla. 1982), the Florida Supreme Court abrogated the parent-child immunity to the level of insurance coverage if any. "We recognize that the possibility of fraud exists in every lawsuit but reject the contention
abolished or modified the interspousal tort immunity doctrine even in the face of a concern about fraud.\textsuperscript{146} It is truly tragic to deny admittedly real claims because of worry about other hypothetical ones which may be feigned. It is, in any case, to be presumed that the insurance companies will be diligent in ferreting out any attempted fraud in this as well as in other areas.

It seems that the policy reasons for the doctrine are weak at best. Indeed, it might be said that the reasons for the doctrine no longer exist. Although it can be argued that there is no compelling need to change the doctrine, it could be argued that there is a compelling need to prevent a situation in which legitimate plaintiffs who have suffered real and serious injuries continue to go uncompensated, with all of the problems which this may cause to the individuals and to society, because of the continued application of a doctrine which has ceased to have any reason for being.

The real basis for the decision, then, seems to be that the court felt a principle settled at the time of the reception statute should usually be changed by legislation or not at all. This was the position taken in Raisen v. Raisen,\textsuperscript{147} and it is consistent with Ard, since the court in that case noted that parent-child immunity "did not have its origin in the common law of England as did interspousal immunity."\textsuperscript{148} This is a valid position although it has not always convinced other courts.\textsuperscript{149}

The legislature appears to have begun a process which the court was unwilling to undertake. Recently a partial abrogation of the immunity has been passed.\textsuperscript{150} Yet, it is to be hoped that the process will continue and that a complete elimination of that immunity will be forthcoming. Even if the court feels unable to take the step itself, it would help if the Court would acknowledge that the reasons for the

\textsuperscript{146} See, e.g., Klein v. Klein, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962).

\textsuperscript{147} 379 So. 2d 352 (Fla. 1979).

\textsuperscript{148} Ard v. Ard, 414 So. 2d 1066, 1067 (Fla. 1982).


\textsuperscript{150} FLA. STAT. § 741.235 (1985) provides: "The common law doctrine of interspousal tort immunity is hereby abrogated with regard to the intentional tort of battery, and the ability of a person to sue another person for the intentional tort of battery shall not be affected by any marital relationship between the persons."
immunity have now ceased. As long as the court continues to hold to the view that the interspousal tort immunity makes logical sense, this can only serve to slow the drive for reform in the legislature.

IX. Sovereign Immunity

Historically, a sovereign could not be sued without his consent. The doctrine grew first from the personal immunity of the king and was taken over as an incident of national sovereignty to protect the governmental entity from suit without its consent.151 In a federal system where individual states retain much of their sovereign character, the immunity of the sovereign applies to them as well.152

The Florida Constitution provides that the immunity may be waived by the legislature.153 The legislature has from time to time provided for broad waivers of sovereign immunity by statute. The Florida Supreme Court was called upon to decide a number of cases involving sovereign immunity during 1985.

The attempt of a young girl and her parents to obtain compensation for injuries received by the child in a 1980 bus accident eventually required the supreme court to review a complex relationship between several statutes and constitutional provisions in Hess v. Metropolitan Dade County.154 Recovery for the injuries was governed by the state statute providing for, and regulating, the waiver of sovereign immunity.155 In relevant part, the statute provided for "caps" on liability, but also provided that a judgment for more than the statutory "caps" could be obtained and could be paid if legislation was passed so directing.156

152. Id.
153. "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." Fla. Const. art. x, §13 (1968).
154. 467 So. ²d 297 (Fla. 1985).
155. Fla. Stat. § 768.28 (1981). Fla. Stat. § 768.30 (1981) stated: "Section 768.28 shall take effect on July 1, 1974 for the executive departments of the state and on January 1, 1975 for all other agencies and subdivisions of the state, and shall apply only to incidents occurring on or after those dates."
156. Fla. Stat. § 768.28(5) (1981) provides in part:

Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or
In a suit against Dade County, judgments significantly over the statutory caps were obtained and payments up to the caps were made. The Florida Legislature then passed a bill directing Dade County to pay the excess of the judgments. Payment was demanded, but was refused by Dade County, after which the action to require payment was commenced. The county argued that the act of the legislature was unconstitutional because it violated the home rule charter for Dade County in that the legislation was not general but was "a local act relating only to Dade County and constitutes the precise evil sought to be avoided by Dade County's Home Rule Amendment."

The Florida Supreme Court upheld the constitutionality of the legislature's action. It did this primarily by analyzing the relationship between the Dade Home Rule Charter and the waiver of sovereign immunity contained in section 768.28 of the Florida Statutes. The particular act requiring payment of the particular claim was seen as "merely an implementation of the general law authorizing waiver of sovereign im-

subdivisions arising out of the same incident or occurrence, exceeds the sum of $200,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to $100,000 or $200,000, as the case may be, and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature. The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity prior to July 1, 1974.

157. 467 So. 2d at 298. See also 1983 Fla. Laws 393. The bill was styled: "An act relating to Dade County; authorizing and directing the county to compensate Michele Hess, a minor, and Don Hess and Connie Tippett, her parents, for damages suffered as a result of the negligence of the county; providing an effective date." The act recounted the facts of the case in a preamble, enacted a statement that the preamble was true, and then directed payment in specific amounts.

158. In a brief per curiam opinion, the appellate court ruled that it did not have the power to issue a writ of mandamus as requested as "there are other adequate remedies available to the petitioner." Hess v. Metropolitan Dade County, 447 So. 2d 267 (Fla. 3d Dist. Ct. App. 1983). Therefore, the court did not reach the merits of the case. The supreme court held that mandamus was an appropriate remedy and that "the district court was not precluded from exercising its discretion to address the merits . . . ." 467 So. 2d at 298.

159. 467 So. 2d at 299. FLA. CONST. art. VIII, § 11 (1885), the Dade County Home Rule Charter, remained in effect by virtue of article VIII, § 6(e), of the Constitution of 1968.
Thus, the court seemed to conclude that as long as the sovereign immunity waiver provision was constitutional and did not conflict with the Dade Home Rule Charter, any specific implementing act passed under the waiver would also be constitutional. No separate analysis of the relationship between the particular claims act authorizing payment in the *Hess* case and the Dade Home Rule Charter was thought to be necessary.

The waiver of sovereign immunity contained in section 768.28 of the Florida Statutes, after providing for the waiver and for the statutory caps, states that “that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature.” Several sections of the Dade County Home Rule Charter state that “[n]othing in this section shall be construed to limit or restrict the power of the Legislature to enact general laws which shall relate to Dade County and any other one or more counties of the state of Florida.”

There is no doubt that section 768.28 is a general law and applies to all counties equally. It would not, therefore, violate the provisions of the Dade Home Rule Charter. The legislature is empowered to pass acts requiring the payment of the excess of judgments over the statutory cap. Yet, the form such an act may or must take is not spelled out. One can imagine several different approaches which could be taken which would not implicate the Dade Home Rule Charter at all. For example, one could imagine the legislature could establish a statewide fund and pay excess claims out of it rather than to direct specific local entities to pay specific claims. Further, in light of being made aware of the hardships caused by certain classes of injuries, say bus accidents, the legislature could respond by exempting all bus accidents from the cap and ordering that all such claims, from whatever county, be paid. Section 768.28 could, therefore, be implemented through general legislation which would pose no conflict with the Home Rule Charter. Thus, there is no *necessary* conflict between the section and the Home Rule provision.

When, by contrast, the legislature exercises its power to regulate sovereign immunity by passing an act relating only to Dade County, the act is, arguably, not a general law. The unconstitutional act, if any,
would be the passage of the specific claims bill or section 768.28 as applied, and, thus, the issue would not be the constitutionality of the section on its face. The question might be seen, in essence, to be whether the legislature has the power by general law to grant itself the power to pass local laws when such power has been withdrawn by the State Constitution in a home rule bill? This suggests a need to analyze the claim bill's relation to the Home Rule Charter, not merely the relation of section 768.28 to that charter.163

Other questions concerning the administration of the sovereign immunity waiver were tested in Gerard v. Department of Transporta-

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163. Chief Justice Boyd dissented, arguing that the claims bill in the Hess case, 1983 Fla. Laws 393, was unconstitutional because it violated the Dade Home Rule Charter. He relied, in his brief opinion, on Dickinson v. Board of Pub. Instruction of Dade County, 217 So. 2d 553 (Fla. 1968), in which it was stated, inter alia, that a similar claims bill “was a local law...” Id. at 554. The majority discounted Dickinson because it was decided before § 768.28, the waiver of sovereign immunity, was passed. However, if used for the limited purpose of characterizing the nature of a legislative act which affects only one county as local rather than general, this does not seem to matter. Surely an act which is local does not become general merely because the legislature purports to grant to itself the right to pass such acts. This would appear to take deference to the legislature too far.

In Dickinson, the supreme court stated that the claims act “was a local law because it affected only Dade County and made an appropriation out of specific funds due to the schools of that county only.” Id. By this definition, the claims bill in the Hess case was also local and not general and so violated the Dade Home Rule Charter. The majority noted that the claims act was “an integral part of the scheme established by the legislature for waiver of sovereign immunity which we have said should apply equally, and not in a disparate manner, to all constitutionally authorized entities.” 467 So. 2d at 300. The court's citation following the quote, to Cauley v. City of Jacksonville, 403 So. 2d 379 (1981), also reminds us of the following quote from that case that “section 768.28 also furthers the philosophy of Florida's present constitution that all local governmental entities be treated equally.” Id. at 385. Upholding specific claims bills which affect only one county tends to lead to counties being treated unequally. But even if this quote suggests that all should be treated equally in that they are subject to such claims bills, it could be argued that the general policy of the Constitution conflicts with the specific policy of the Dade Home Rule provision. In Dickinson the policy was said to be this:

[T]hat in matters which affect only Dade County, and which are not the subject of specific constitutional provisions or valid general acts pertaining to Dade County and at least one other county, the electors of Dade County may “govern themselves autonomously and differently than the people of other counties of the state.”

Dickinson v. Board of Pub. Instruction of Dade County, 217 So. 2d 553 (Fla. 1968) (quoting in part, S and J Transp., Inc. v. Gordon, 176 So. 2d 69 (Fla. 1965). (Emphasis added)).
The case involved litigation which grew out of injuries and death caused by the fall of a tree limb. A negligence action was brought against the municipality and the Department of Transportation, which then had the action against it transferred to another county. The municipality settled the case and its insurer paid over one-half million dollars.\(^\text{166}\)

The Department of Transportation then sought and obtained a summary judgment on the ground that the statutory caps on the waiver of sovereign immunity had been exhausted, that, therefore, if a judgment were obtained, the department would pay nothing anyway, and that the sole purpose for the suit was to establish a basis for a request to the legislature that it authorize additional payment through a claims bill.\(^\text{166}\)

The district court of appeals held, and the Florida Supreme Court agreed, that the "per incident" cap upon the waiver of sovereign immunity applied "regardless of whether the source of payment is a single governmental entity or multiple governmental entities,"\(^\text{167}\) and that funds received from insurance companies applied toward the "cap" amount.\(^\text{168}\) The appeals court went on to conclude, however, that the action against the Department of Transportation could not be brought at all since no money would be paid under it and it would be, in essence, nothing more than a device to prepare the way for a request to the legislature for an act authorizing payment.\(^\text{169}\)

The supreme court disagreed. While noting that obtaining a judgment against the Department of Transportation was not required before legislative relief could be requested, by the same token, the courts retained jurisdiction over such actions whether or not the statutory cap amounts had been previously paid by others. Thus, the cases could be filed in the courts.

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164. 472 So. 2d 1170 (Fla. 1985).
165. Id. at 1171.
166. Id.
167. Id. at 1172.
168. Id.
169. "We therefore conclude that an excess judgment is statutorily permitted only when accompanying a claim which is otherwise authorized by section 768.28." Gerard v. Department of Transp., 455 So. 2d 500, 502 (Fla. 1st Dist. Ct. App. 1984). The appellate court certified, as a question of great public importance, the question of "[w]hether satisfaction of a claim by payment of the statutory amount specified in section 768.28(5), Florida Statutes, precludes a further claim, in excess of the specified statutory amount?" Id.
We therefore hold that Gerard is entitled to proceed in the trial court against the Department of Transportation. We note, however, that he assumes certain risks if he elects to proceed. A costly trial may result in a judgment of no liability against the Department and the assessment of court costs. It is also possible that a trial may result in a judgment for less than the settlement amount. In that event, Gerard would not be able to seek a claims bill. Even if he is able to obtain a judgment against the Department of Transportation on excess of the settlement amount and goes to the legislature to seek a claims bill with the judgment in hand, this does not mean that the liability of the Department has been conclusively established. The legislature will still conduct its own independent hearing to determine whether public funds should be expended, much like a non-jury trial. After all this, the legislature, in its discretion may still decline to grant him relief.\textsuperscript{170}

The bulk of the cases dealing with sovereign immunity which came before the supreme court raised the issue of whether certain conduct was or was not actionable. That is, whether the conduct fell within the statutory waiver of sovereign immunity. The court had become committed to a case-by-case determination of the issue when it decided \textit{Commercial Carrier Corp. v. Indian River County}.\textsuperscript{171}

In \textit{Commercial Carrier}, the supreme court analyzed the scope of the statutory waiver of sovereign immunity and determined that despite the lack of any specific provision in the statute, it would still be read as continuing immunity for "discretionary governmental functions."\textsuperscript{172} The court distinguished between those activities requiring policy making or "planning" and those which were deemed to be "operational."\textsuperscript{173} The court approved a "preliminary test" which had been proposed in a Washington state case,\textsuperscript{174} but acknowledged that a case-by-case ap-

\textsuperscript{170}. 472 So. 2d at 1173.
\textsuperscript{171}. 371 So. 2d 1010 (Fla. 1979).
\textsuperscript{172}. \textit{Id.} at 1022.
\textsuperscript{173}. \textit{Id.}
\textsuperscript{174}. \textit{Id.} at 1019 (quoting Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P.2d 440 (1965)).

Whatever the suitable characterization or label might be, it would appear that any determination of a line of demarcation between truly discretionary and other executive and administrative processes, so far as susceptibility to potential sovereign tort liability is concerned, would necessitate a posing of at least the following four preliminary questions: (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission,
The scope of the immunity waiver was tested when the First District Court of Appeals certified to the Florida Supreme Court the question: "May prisoner classifications ever give rise to tort liability, and, if so, under what circumstances?" The case was brought by Smith who was shot by one Prince during a robbery. Prince was an escaped prisoner with a history of violent crime and escape from jail. In 1976, one Reddish, an employee with the Department of Corrections (DOC) had had Prince's classification changed to minimum custody status and had arranged for Prince's transfer to a minimum custody situation from which Prince escaped. While on the loose, Prince shot Smith.

or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a discretionary governmental process and non-tortious, regardless of its un-wisdom. If, however, one or more of the questions call for or suggest a negative answer, then further inquiry may well become necessary, depending upon the facts and circumstances involved.

Id.

175. 371 So. 2d at 1022.

So we, too, hold that although section 768.28 evinces the intent of our legislature to waive sovereign immunity on a broad basis, nevertheless, certain "discretionary" governmental functions remain immune from tort liability. This is so because certain functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance. In order to identify those functions, we adopt the analysis of Johnson v. State, supra, which distinguishes between the "planning" and "operational" levels of decision-making by governmental agencies. In pursuance of this case-by-case method of proceeding, we commend utilization of the preliminary test iterated in Evangelical United Brethren Church v. State, supra, as a useful tool for analysis.

Id.


177. Id. at 1339. The court of appeal held "that there is no sovereign immunity when an inmate is negligently given preferential treatment and placed in inadequately supervised confinement." Id. at 1340.
The supreme court in Reddish v. Smith answered this certified question in the negative. "The administrative process in question is an inherent feature of the essential governmental role assigned to the Department of Corrections." Thus, the action against the DOC for wrongful classification of Prince and the action against Reddish "to the extent based upon negligent performance of duties within the scope of employment . . . are precluded by sovereign immunity." The court also articulated a second basis for its decision. The waiver of sovereign immunity essentially makes the state and its sub-divisions liable as a private person would be. It was not intended to create new causes of action in tort. To the extent that there is no analogy to the private sector from the particular act by the government at issue, immunity is not waived. Since, "the decision to transfer a prisoner from one correctional facility to another is an inherently governmental function not arising out of an activity normally engaged in by private persons . . . the statutory waiver of sovereign immunity does not apply."

Can the decision not to arrest a suspect give rise to tort liability or are such decisions protected by the doctrine of sovereign immunity? This question was raised by a number of cases, the principal one being Everton v. Willard. In Everton, a sheriff's deputy stopped an auto after it made an illegal turn. Although the driver admitted that he had

178. 468 So. 2d 929 (Fla. 1985).
179. Id. at 931. The court reasoned that all four of the questions in the preliminary test of Evangelical United Brethren Church would be answered in the affirmative. FLA. STAT. § 944.012(6) (1977) contained statements of legislative intent setting out the policy considerations involving the classification of prisoners. The particular administrative processes were authorized by FLA. STAT. § 945.06 (1977).
180. 468 So. 2d at 931.
181. Id. at 932. The court also considered allegations of bad faith which suggested that Reddish had actually exceeded his authority but found the allegations without sufficient allegations of fact to state a cause of action. Further, even if the claims had been specific, the Court, in dicta, stated that it would have found that the causal link between the acts of transfer and the later escape and shooting was not foreseeable as a matter of law. Id. at 933. In a later case, Ursin v. Law Enforcement Ins. Co., 469 So. 2d 1382 (Fla. 1985), in which a "mentally disordered sex offender" was improperly made a trustee, after which the inmate escaped and committed another crime, the supreme court, following the decision in Reddish, held in a two-paragraph opinion that sovereign immunity prevented the action. Id. In dissent, Justice Shaw observed: "If holding the government entity liable for negligence would 'chill' this type of government discretion, as the majority fears, I express a strong belief that this is precisely what the people and the legislature intended when they waived sovereign immunity." Id. at 1382-83 (Shaw, J., dissenting).
182. 468 So. 2d 936 (Fla. 1985).
been drinking, the officer merely gave the driver a ticket and allowed him to go on his way. A few minutes later, the driver was involved in an auto accident which caused serious injury and death to occupants in the other car. Plaintiffs alleged that the failure of the officer to take the driver into custody for intoxication was a proximate cause of the accident.\textsuperscript{183} The supreme court held that the actions of the officer in deciding whether or not to arrest the driver was protected by sovereign immunity.\textsuperscript{184}

The court felt that the enforcement of the criminal laws, the police function, was one of which the essence was discretion. Further, whatever duty can be said to grow out of the police function was not one which traditionally gave rise to tort duties absent some undertaking to protect a particular person.\textsuperscript{185} The immunity was analogized to that afforded to prosecutors and judges and spoke of in very broad terms. The court stated, "the basic principle involved concerns the liability of all governmental bodies and their taxpayers for the negligent failure of their law enforcement officers to protect their citizens from every type of criminal offense."\textsuperscript{186}

\textsuperscript{183} Everton v. Willard, 426 So. 2d 996, 998 (Fla. 2d Dist. Ct. App. 1983).
\textsuperscript{184} \[We\] hold that the decision of whether to enforce the law by making an arrest is a basic judgmental or discretionary governmental function that is immune from suit, regardless of whether the decision is made by the officer on the street, by his sergeant, lieutenant or captain, or by the sheriff or chief of police. 468 So. 2d at 937.

\textsuperscript{185} Id. at 938. Among other sources, the court cited the ABA STANDARDS FOR CRIMINAL JUSTICE Standard 1-4.1 (2d ed. 1980), which states: "The nature of the responsibilities currently placed upon the police require that the police exercise a great deal of discretion — a situation that has long existed but is not always recognizable." The court disapproved Huhn v. Dixie Ins. Co., 453 So. 2d 70 (Fla. 5th Dist. Ct. App. 1984), which had held, on similar facts, that a police officer who stops an intoxicated driver does not have discretion to refuse to enforce the law as no legitimate policy of government could be furthered by such a decision. "Although the police officer had some discretion in how he would handle the matter, his duty was plain (and operational) — he could not turn this drunken driver loose on the street." Id. at 76.

\textsuperscript{186} 468 So. 2d at 938. However, the court stated: "We note as we did in Trianon that this is a narrow decision of making an arrest under the police power of a governmental entity. It does not have the broad ramifications attributed to it by the dissent, nor does it recede from Commercial Carrier." Id. at 939.

Several other cases were decided with brief opinions on the authority of Everton. In Duvall v. City of Cape Coral, 468 So. 2d 961 (Fla. 1985), a driver was apprehended after driving on the wrong side of the road.
In dissenting opinions, Justice Ehrlich and Justice Shaw drew a distinction, inter alia, between issues of the allocation of police resources (for example, a suit alleging negligence in failing to provide adequate police protection), and issues merely of the requirements for dealing with a law violator once actually apprehended. While immunity would shield the former, the dissenters argued that no immunity could be invoked in the latter situation. Justice Shaw argued more broadly that the entire approach to sovereign immunity questions, the standards set down in Common Carrier, were flawed and had to be altered. He argued, in essence, that the waiver statute, when combined with the "open court" policy in the constitution, creates a broad waiver to sovereign immunity and required the state courts to hear the actions. He argued that Common Carrier was based upon the notion that certain decisions of other branches of government were beyond the power of courts to review and the class of such cases was small, not encompassing decisions of the type raised in Everton. The justice pointed out that no discretionary exemption from the sovereign immunity waiver appeared in the statute. Justice Shaw's basic point was that

The police apprehended McNally, whose estimated blood alcohol count of .34 placed him between a stupor and a coma. McNally was not arrested or placed in custody, but was turned over to a cab company to be driven home. Through a series of errors in judgment and execution on the part of both the police and the cab company, McNally was permitted to return to his car and drive away despite the timely efforts of onlookers to summon the police in order to reapprehend him. About four minutes after driving away McNally crashed into another car, killing two people and horribly injuring two others.

Id. at 962. The facts are from the dissent by Justice Shaw. Rodriguez v. City of Cape Coral, 468 So. 2d 963 (Fla. 1985) and City of Daytona Beach v. Huhn, 468 So. 2d 963 (Fla. 1983), also found the actions of officers in not taking intoxicated people into custody to be immune from suit on the authority of Everton.

187. 468 So. 2d at 939 (Ehrlich, J., dissenting) and 468 So. 2d at 940 (Shaw, J., dissenting).

188. FLA. CONST. art. I, § 21. Also cited was FLA. CONST. art. V, § 1, which establishes that the judicial power is vested in specified courts.

189. "The exception we carved out in Commercial Carrier can only be applicable to non-justiciable political questions which the courts are unable to answer: should a law be enacted, should a legislative bill be vetoed." 468 So. 2d at 946 (Shaw, J., dissenting).

190. "The decision to release or not release a drunk driver is not a political decision. The issues presented by this case are justiciable in a court of law applying traditional tort principles." Id. at 947.

191. The conflict between the approach taken by federal, California, and Massachusetts courts, on the one hand, and this Court, on the other hand,
the court had effectively castrated the sovereign immunity waiver\textsuperscript{192} and thwarted the intent of the legislature.\textsuperscript{193} His obvious frustration appeared to be based not on any one case, but rather on the pattern of decisions exemplified by cases such as \textit{Everton, Reddish,} and \textit{Trianon Park Condominium Association v. City of Hialeah,}\textsuperscript{194} which were all decided the same day.\textsuperscript{195}

\textit{Trianon Park Condominium Association} involved negligent inspections of condominium units during their construction. It was alleged that the damage to the unit was caused by the defects which would have been discovered during a reasonable inspection by the city inspectors.\textsuperscript{196} The appellate court held that the city could be liable to the condominium unit owners for the damage caused by the negligent

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\textit{Id.} at 949.
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\textsuperscript{192} After today a plaintiff suing a government tortfeasor will have to overcome a formidable series of hurdles which effectively restore full sovereign immunity to the state and its political subdivisions. First, there is the four-part \textit{Evangelical Brethren} test which is ambiguous enough to produce whatever answer is desired. If the wrong answer is produced, i.e., that the government is not immune, then the plaintiff must pass the discretionary action test of \textit{Commercial Carrier}, which has been so broadly interpreted as to include a dog catcher knowingly releasing a vicious pit bulldog on the public as a discretionary activity. In the extremely unlikely event the plaintiff's action survives these tests, the government by virtue of today's opinions is in a position to administer the \textit{coup de grace}; there is no liability where the injurious action is performed under the police powers of the state. If that is not enough, the plaintiff will also discover that governmental functions are also immune, as are all functions not performed by private persons.

\textit{Id.} at 941-42.

\textsuperscript{193} "Given the sweep of discretionary activities and police power actions, I suggest that there is very little, if anything, left in the way of government action on which a tort victim could sue." 468 So. 2d at 942.

\textsuperscript{194} 468 So. 2d 912 (Fla. 1985).

\textsuperscript{195} April 4, 1985.

\textsuperscript{196} 468 So. 2d at 914.
inspections but certified the question to the supreme court. The question reads:

Whether under section 768.28, Florida Statutes (1975), as construed in Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010 (Fla. 1979), a municipality retains its sovereign immunity from a suit predating liability solely upon the allegedly negligent inspection of building, where that municipality played no part in the actual construction of the building. 197

The Florida Supreme Court, however, restated the question as follows: “Whether a governmental entity may be liable in tort to individual property owners for the negligent actions of its building inspectors in enforcing provisions of a building code enacted pursuant to the police powers vested in that governmental entity.” 198

Not surprisingly, the court answered the question “no,” making several points which it elaborated at length in its opinion. The points were: 199

1) The sovereign immunity waiver statute was not intended to create any new cause of action, but only to remove a bar which otherwise would have presented suit upon an already existing recognized tort action.
2) No duty was owed at common law to individuals in regard to the police power of the state.
3) The adoption of the building code did not create a statutory duty to individuals.
4) Unless there is a violation of “constitutional or statutory rights,” the doctrine of separation of powers prevents interference in governmental discretionary functions of government. 200
5) Discretionary acts which are “inherent in the act of governing” retain immunity. 201

197. Id.
198. Id.
199. See also 468 So. 2d at 914-15.
200. See also Id. at 918.
201. Id. The court also noted:

[I]n rejecting the general duty/special duty dichotomy contained in Modlin v. City of Miami Beach, [we] did not discuss or consider conduct for which there would have been no underlying common law duty upon which to establish tort liability in the absence of sovereign immunity. Rather, we were dealing with a narrow factual situation in which there was a clear common law duty absent sovereign immunity. We expressly
The court restricted use of the four-part test in *Evangelical Brethren* (which assists in distinguishing between the discretionary/planning and the merely operational levels of governmental activity, a distinction made in the *Johnson* case and adopted by the Florida Court) to situations in which, absent sovereign immunity, there would be "an underlying common law or statutory duty of care."202 Despite this, the court characterized its decision as "narrow" and stated:

We caution trial and appellate courts who apply this decision that our holding does not have the broad ramifications characterized by the dissents, nor does it recede from *Commercial Carrier*. This decision addresses only the narrow issue of exercising basic discretionary judgments in the enforcement of the police power, public safety functions by a state, county, or municipal governmental entity.203

In dissent, Justice Enrlich characterized the decision as one which "further eroded the legislature's unequivocal waiver of sovereign immunity and further reduced the rights of citizens of this state to be reimbursed for injury caused by negligent performance of statutorily mandated duties."204

recognized that there were areas of governmental activity where "orthodox tort liability stops and the act of governing begins.

*Id.* (quoting Modlin v. City of Miami Beach, 371 So. 2d at 1018).

202. 468 So. 2d at 919. The *Evangelical Brethren* test "need not be applied in situations where no common law or statutory duty of care exists for a private person because there clearly is no governmental liability under those circumstances." *Id.*

203. *Id.* The court noted four kinds of governmental functions: "(I) legislative, permitting, licensing and executive officer functions; (II) enforcement of laws and the protection of the public safety; (III) capital improvements and property control operations; and (IV) providing professional, educational, and general services for the health and welfare of the citizens." *Id.* at 919. Other cases decided on the authority of *Trianon Park* were; Department of Business Regulation v. Bryan, 474 So. 2d 807 (Fla. 1985) (per curiam) (negligent inspection of an elevator); and Johnson v. Collier County, 474 So. 2d 806 (Fla. 1985) (per curiam) (negligent inspection of a construction site).

204. 468 So. 2d at 923 (Ehrlich, J. dissenting). Justice Ehrlich raised the interesting point that the net effect of the immunization of the governmental entities, combined with the establishing of an immunity for the individual employees, an action which was available prior to the enactment of FLA. STAT. § 968.28(9), could very well render the latter statutory provision unconstitutional in that it deprived access to the courts in violation of article I, § 21 of the Florida Constitution, which provides that: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."
If sovereign immunity protects officers deciding whether or not to arrest, and building inspectors in the course of their duties, it would come as no surprise to find that the failure of a city to enforce an ordinance is also immunized since it involves questions of enforcement priorities and the allocation of resources. The Florida Supreme Court so held in *Carter v. City of Stuart*, in which an ordinance requiring the impoundment of dangerous dogs was not enforced against a pit bull which had bitten in the past. Somewhat surprisingly in light of the

Justice Shaw also dissented with an opinion in which he charged that the majority had improperly mixed the issue of sovereign immunity with that of duty under traditional tort law. He agreed with Justice Ehrlich that by undertaking to conduct building inspections, a duty arose to conduct them reasonably, and a duty was owed to those who purchased units which were certified as complying with code requirements when, in fact, they did not. *Id.* at 926. He stated:

I differ from him in two basic respects. First, I am persuaded that the legislative waiver of sovereign immunity is comprehensive: neither operational nor planning functions are immune from suit. Government entities are subject to suit on planning level functions just as private persons are. The separation of powers doctrine can only bar suit on nonjusticiable political questions. To hold otherwise is to frustrate the constitutional and statutory provisions waiving sovereign immunity. Second, the operational/planning test is a failed instrument as demonstrated by the progeny of *Commercial Carrier*. The simple truth is that planning alone will very rarely if ever injure anyone and for that reason is extremely unlikely to become the subject of a tort suit. However, when the planning becomes operational, it is properly the subject of a suit if the elements of a tort can be proven. The attempts to distinguish between planning and operational functions is an elaborate but irrelevant artifact when the legislature has completely waived sovereign immunity. If a governmental entity ‘plans’ a tort and carries it out, thus injuring someone, the entity should be subject to suit just as a private person would be under the same circumstances.

468 So. 2d at 928 n.4 (Shaw, J. dissenting). (Justice Adkins concurred in the dissenting opinions of Justices Ehrlich and Shaw).
205. 468 So. 2d 955 (Fla. 1985).
206. *Carter v. City of Stuart*, 433 So. 2d 669 (Fla. 4th Dist. Ct. App. 1983). The opinion of Chief Judge Letts is noteworthy for its expressed frustration with the attempt to apply the test set down by the supreme court.

As to the overall question of what constitutes “planning” and what is “operational,” it is our view that the Florida case law is in disarray. Indeed, the only way out of the impasse at the District Court level is to certify each and every case to the Supreme Court, on its particular facts, and let our superiors show us the way until the law is clarified or *Commercial Carrier* is receded from.

*Id.* at 670. Although the decisions reported here might help to clarify the situation somewhat, the extent to which they will do so is not entirely clear. In *Carter*, for exam-
above cases, the supreme court held that a city could be held liable and that sovereign immunity did not bar an action for the city's failure to warn the public about a known hazard on its beaches. The case was Ralph v. City of Daytona Beach.\textsuperscript{207}

Plaintiff was run over by an automobile while sunbathing on the beach. A charter provision made the part of the beach within the city limits a public highway and authorized the city to regulate traffic. Plaintiff argued that this gave rise to a duty to do so and to warn those using the beach for non-traffic purposes that such traffic might be on the beach. Breaches of these duties was alleged to have been a proximate cause of the accident.\textsuperscript{208} The trial court dismissed the complaint and the appellate court affirmed.\textsuperscript{209} The appellate court reasoned that decisions about how much and what sort of resources to use for traffic regulation, and whether or not (or how) to limit beach vehicular traffic were seen as issues of policy not subject to second guessing in tort litigation.

The fact that the City has the power to curtail or regulate traffic on the beach cannot and should not make it liable in tort when the determination of when and how to exercise that power is a matter of governmental discretion, at least not under the facts presented here. It is not a tort for government to govern.\textsuperscript{210}

\footnotesize{ple, responding to the argument that once the dog was observed there was no longer discretion about what action to take, the court stated:

There may be some compelling circumstances, where there is no room for the exercise of discretion, which mandate action because it is clear that a government's failure to act has caused a breach of duty. Where, if ever, such a situation exists will have to await another claim on another occasion.

468 So. 2d at 957. Such an interesting and provocative statement without any guidance as to its meaning, would seemingly insure a new round of certified questions in a wide variety of situations.

207. 471 So. 2d 1 (Fla. 1983) (The case originally appeared at 8 FLA. L. WEEKLY 79 (1983), the revised version appeared at 10 FLA. L. WEEKLY 348 (1985)).

208. Ralph v. City of Daytona Beach, 412 So. 2d 875, 876 (Fla. 5th Dist. Ct. App. 1982).

209. \textit{Id.} at 877.

210. \textit{Id.} at 878. The court cited to Wong v. City of Miami, 237 So. 2d 132 (Fla. 1970), in which the city was not liable for failing to have police present at a demonstration which got out of hand and became a riot. The case was approved in Commercial Carrier. It is worth noting that the appellate court carefully reviewed the facts and the supreme court tests. It concluded that the act was essentially one of discretion and governmental policy. It tested its view under the four part test in Evangelical United

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In its revised opinion, the supreme court stated the issue to be this:

Whether a complaint that alleges that the City of Daytona Beach allowed a known hazardous condition to exist on the beach without warning the public invited to use the beach for recreational purposes of that known hazardous condition, states a cause of action able to withstand a motion to dismiss. We hold that it does.211

The court suggested that the key was the allegation of a dangerous condition which was known to the city and for which no proper warning was given.212 The court also noted that it was not addressing the issue of whether there was, in fact, a breach of duty, considering the possible apparent nature of the danger. The only issue addressed was whether the complaint stated a cause of action or was barred by sovereign immunity.213 The result in this case is particularly interesting in light of Everton, supra, in which the driver of the car was apprehended for an illegal u-turn and where, "[the deputy] knew, by his own observations and by . . . [the driver's] own admissions, that . . . [the driver] had been drinking to some extent,"214 and in which the driver was allowed to go on his way shortly after which he was involved in an accident in which third parties were injured and killed.215

It would seem, after Ralph, that if the complaint had stated that the officer knew the driver was intoxicated, then releasing him would be the creation of a known hazard for which a duty to warn would arise. Since there would be no effective way to warn in such a case,

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Brethren Church. Yet, the supreme court concluded it had arrived, through this process, at the wrong answer.

211. 471 So. 2d at 1.

212. Id. at 2. The court cited with approval Department of Transp. v. Neilson, 419 So. 2d 1071 (Fla. 1982), which deemed failure to warn of a known danger to be "operational." The court also cited City of St. Petersburg v. Collom, 419 So. 2d 1082, 1083 (Fla. 1982), stating:

We hold that when a governmental entity creates a known dangerous condition, which is not readily apparent to persons who could be injured by the condition, a duty at the operational level arises to warn the public of, or protect the public from, the known danger. The failure to fulfill this operational-level duty is, therefore, a basis for an action against the governmental entity.

471 So. 2d at 2 (citing Collom, 419 So. 2d at 1083).

213. 471 So. 2d at 3.


215. 468 So. 2d at 937.
other effective action would have to be taken which, for all practical purposes, would require the arrest of the driver for intoxication. Hence, the allegation of the officer would convert the issue from one dealing with discretion to make arrests to one dealing with failure to warn or act in relation to known hazards created by a defendant's acts.

There is no doubt that the net effect of the above decisions has been to limit the scope of the immunity waiver statute and to continue immunity for a broad range of discretionary, political and policy decisions of government. It is not clear that the broad scope of this continuing immunity was intended by the legislature since no such exception appears in the statute. Further, decisions such as *Everton* and *Ralph* are likely to cause continuing confusion among lower courts and to lead to ingenious attempts on the part of plaintiffs' counsel to somehow plead cases as ones dealing with failure to warn of known hazards. It is likely that the supreme court will have to continue to guide the development of this area of law closely for some time to come.

X. Statutes of Limitation and Repose

*Celotex Corporation v. Copeland*, the case in which the issue of market share liability was considered, also reviewed the question of whether the statute of limitations had run, thus barring the action. The applicable limitation period was four years. In general, the period would run from the time that plaintiff discovered, or a reasonable person in plaintiff's position would have discovered, the facts which would trigger a cause of action.

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216. 471 So. 2d 533 (Fla. 1985).
217. *See infra* notes 263 to 266 and accompanying text.
218. *Fla. Stat.* § 95.11(3) (1981), which was deemed to be the applicable limitation statute provided that a number of actions had to be brought “within four years.” Subsection (e) provided that the four year limitation would apply to “[a]n action for injury to a person founded on the design, manufacture, distribution, or sale of personal property that is not permanently incorporated in an improvement to real property, including fixtures.” *Id.*
219. *Fla. Stat.* § 95.031 (1981) provided: “Except as provided in subsection (2) and in § 95.051 [concerning tolling of the statutes] and elsewhere in these statutes, the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues.”

Subsection (2) provided:

Actions for products liability and fraud under § 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered.
The facts showed that the plaintiff was exposed to asbestos in the course of his employment as a boilermaker from 1942 until 1975. Plaintiff became aware that there were potential health risks from asbestos exposure as early as 1958, but had no physical symptoms of any trouble until the late 1960's. The symptoms grew worse in 1972 and continued to do so. Plaintiff retired in 1975 and was finally diagnosed as having asbestosis in 1978. Suit was brought in 1979.220

Defendants moved for summary judgment which was granted by the circuit court on the ground that the applicable statute of limitations had run.221 The appellate court reversed, holding:

Where, as here, the claimed injury in a products liability action is a so-called "creeping disease," like asbestosis, acquired over a period of years as a result of long-term occupational exposure to injurious substances, such as asbestos dust, the courts have held that the action accrues for purposes of the statute of limitations "only when the accumulated effects of the deleterious substance manifest themselves [to the claimant]."222

Because the issue of just when the effects manifested themselves was one of fact and was in dispute, it was improper for the circuit court to grant a summary judgment on the issue.223 The supreme court agreed with the decision and the reasoning of the district court of appeals.224

The statute of limitations in a medical malpractice case was considered in Moore v. Morris.225 The petitioner (the action was commenced by her parents on her behalf) was born in 1973. At the time of the birth some problems developed and a Caesarean section was per-
formed. The father noticed that the baby appeared to be blue and that oxygen was used. The baby then had to be transferred to Jackson Memorial Hospital’s infant emergency unit. There was some thought that the baby would not live, and emergency surgery had to be performed to help her breathing.\textsuperscript{226}

The district court of appeals confirmed that the applicable statute of limitations was two years\textsuperscript{227} and that it had begun to run at the birth since there was notice of the injury at that time. Since the suit had not been commenced until 1978, the action could not be brought. The appellate court therefore affirmed the summary judgment which the trial court had entered.\textsuperscript{228}

The Florida Supreme Court quashed the appellate court’s decision and remanded the case, holding that a summary judgment was not appropriate.\textsuperscript{229} Although the father could see that there were problems, the court said:

There is nothing about these facts which leads conclusively and inescapably to only one conclusion — that there was negligence or injury caused by negligence. To the contrary, these facts are totally consistent with a serious or life threatening situation which arose through natural causes during an operation. Serious medical circumstances arise daily in the practice of medicine and

\begin{itemize}
  \item \textsuperscript{226} Moore v. Morris, 429 So. 2d 1209, 1209-10 (Fla. 3d Dist. Ct. App. 1983).
  \item \textsuperscript{227} The applicable statute at that time was FLA. STAT. § 95.11 (6), which provided:
    \begin{quote}
      WITHIN TWO YEARS — [A]n action to recover damages for injuries to the person arising from any medical, dental, optometric, chiro-
      podial, or chiropractic treatment or surgical operation, the cause of action in such cases not to be deemed to have accrued until the plaintiff discovers, or through the use of reasonable care should have discovered, the injury.
    \end{quote}
  \item \textsuperscript{228} 429 So. 2d at 1210. In dissent, Chief Justice Schwartz noted that although the child’s parents knew there was something wrong at the time, they did not appear to know that there was any permanent injury to her until years later. As the Chief Judge stated:
    
    I very strongly dissent from the conclusion, inherent in the summary judgment below and its affirmance here, that one is obligated as a matter of law to bring an action before there is a clear indication that damages have even been sustained. Such a holding will require the bringing of protective actions in every case in which a supposed medical misadventure may have occurred, on the off chance that an injury will subsequently manifest itself.
    
    \textit{Id.} at 1210 (Schwartz, C.J., dissenting).
  \item \textsuperscript{229} 475 So. 2d at 667.
\end{itemize}
because they are so common in human experience, they cannot, without more, be deemed to impute notice of negligence or injury caused by negligence.230

Pullum v. Cincinnati, Inc.231 involved an equal protection challenge to the state’s statute of repose in product liability actions. The statute required, in addition to the restrictions imposed by the statute of limitations, that any products action had to be brought no later than twelve years after delivery of the product to the first purchaser.232 The product which injured the plaintiff was a pressbrake machine which was delivered to the first purchaser in November 1966. The injury to the plaintiff occurred in April 1977. Suit was filed in November 1980. This was within the statute of limitations period, but after the time permitted by the statute of repose. The trial court entered a summary judgment and the appellate court affirmed.233

Earlier, in Overland Construction Co. v. Sirmons,234 the supreme
court had considered an analogous statute of repose dealing with defects in improvements to real property, and held that when the statute had the effect of barring an action before it accrued, it was unconstitutional in that it violated the provision in the state constitution assuring the right of access to courts. The reasoning was extended to the products liability statute of repose in Battilla v. Allis Chalmers Manufacturing Co. By contrast, when the repose statute had the effect of shortening the existing time for bringing the action, but not of barring the action altogether, it had been upheld.

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235. FLA. STAT. § 95.11(3)(c) (1975).
236. 369 So. 2d at 575. The Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." FLA. CONST. art. I, § 21.
237. 392 So. 2d 874 (Fla. 1980) (per curiam). The per curiam opinion in its entirety stated:

This cause is before the Court on appeal from a judgment of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County. The judgment passed upon the validity of a state law. The notice of appeal was filed January 12, 1979. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. (1972).

The Circuit court held that this product liability action was barred by the statute of limitations, section 95.031, Florida Statutes (1975). We reverse on the authority of Overland Construction Company v. Sirmons, 369 So. 2d 572 (Fla. 1979), and hold that, as applied to this case, section 95.031 denies access to courts under article I, section 21, Florida Constitution. See also Purk v. Federal Press Co., 387 So. 2d 354 (Fla. 1980); Bauld v. J.A. Jones Construction Co., 357 So. 2d 4012 (Fla. 1978).

It is so ordered.

Id. Justice McDonald dissented in an opinion joined by Justices Overton and Alderman, arguing that while a 12-year statute of repose might not be reasonable when improvements to real property were involved, it was when dealing with products. Justice McDonald suggested that the limitation was a reasonable compromise between alternative policies, one that recognized the need to compensate consumers for injuries from dangerous products and one which sought to avoid excessive and endless liability on manufacturers. "I perceive a rational and legitimate basis for the legislature to take this action, particularly in view of the relatively recent developments in expanding the liability of manufacturers." Battilla, 392 So. 2d at 875.

238. In Bauld v. J.A. Jones Constr. Co., 357 So. 2d 401 (Fla. 1978), plaintiff was injured by a pneumatic message conveyor system. The work was done in 1961, the injury occurred in 1972, and under the subsequently passed statute of repose with a special grace period applicable to actions which would otherwise have been barred by the passage of the act, the action had to be brought by January 1, 1976. The supreme court rejected the argument that the effect of this change — i.e., that plaintiff had about seven months less time to sue than under the statute of limitations alone — violated the state constitution. The court affirmed the summary judgment. Id. at 403.
In *Pullum*, the plaintiff conceded that the statute of repose itself was unconstitutional, but argued that after *Battilla*, the application of the statute amounted to a violation of equal protection. "Pullman argues that the statute now irrationally applies to a very limited class of persons, i.e., those persons injured during a time period of eight to twelve years after delivery of the completed product to its original purchaser."  

In *Purk v. Federal Press Co.*, 387 So. 2d 354 (Fla. 1980), a products liability action, the product which was injured was first sold in 1961. The injury took place in 1973. The statute of repose took effect in 1975, and under its grace period, the right to sue for an action otherwise barred under the new statute was extended until January 1, 1976. The action was brought on April 13, 1976. The supreme court contrasted *Bauld* with *Overland Constr. Co.*, and held that access to the courts was not denied. *Purk*, 387 So. 2d at 356-357. The repose statute was also upheld against an equal protection challenge. *Id.* at 357-58.

He pointed out that if the accident had occurred twelve years or more after delivery of the machine, the statute of repose would not have barred his action, and he would have had, pursuant to Section 95.11(3), four years from the accident date within which to file his suit. . . . The results of the interplay among the regular four-year limitations statute, the twelve-year statute of repose and the holding in *Overland* are: (1) that a person who sustains an injury at any time within eight years from the product's initial delivery date will have four years from the date of injury within which to file suit; (2) that a person injured twelve years or more after the delivery date will also have four years from the date of injury to sue because *Overland* would preclude the operation of the twelve-year statute; provided, however, that such person might not have as many as four years to bring the action where his injury occurred prior to January 1, 1975, the effective date of Chapter 74-382, Laws of Florida (the law creating Section 95.031), and where he would be required to file suit by January 1, 1976, by virtue of the one-year savings clause provided for by Chapter 74-382, section 36; and (3) that those persons injured during the time frame of eight to twelve years after delivery date will be governed by a limitations period of something less than four years, such period depending upon the point, during that time frame, when the injury occurs (i.e., if the injury occurs nine years after delivery, the party would have three years to sue; if the date of injury was 10 years after delivery, suit would have to be brought within two years; etc.). *Pullum* complains that he is denied equal protection because he had only one and a half years from his injury within which to file suit, whereas a person injured by the same machine approximately two and one half years later (at least 12 years after delivery) would have, by virtue of the holding in *Overland*, four years within which to file.
In the face of this challenge, the supreme court reconsidered its decision in Battilla, and "receded" from it, holding that the repose statute is not violative of the Florida Constitution. The court stated: "[I]n enacting this statute of repose, [the legislature] reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product." Since the supreme court had "receded from" the case which had, allegedly, created the problem, the basis of the equal protection argument was gone. Granting the summary judgment was, therefore, upheld.

XI. Causation: Market Share Liability

As a general proposition, it is fair to assert that plaintiff must

241. Id. The supreme court approved the result of the district court of appeal only. That court had found no violation of equal protection on the authority of Purk. The court noted that Justice McDonald, who had dissented in Battilla, had correctly analyzed the different considerations involved in a statute of repose for improvements to real property as contrasted with those applicable to a statute of repose dealing with manufactured goods. Id. at 659-60.

242. The court stated that it had "reconsidered" Battilla, twice that it had "receded" from Battilla, and "held" that section "95.031(2) is not unconstitutionally violative of article I, § 21 of the Florida Constitution." 476 So. 2d at 659. The court also dropped this interesting footnote:

Pullman also refers to Diamond v. E.R. Squibb and Sons, Inc., 397 So. 2d 671 (Fla. 1981), as being in accord with Battilla. In Diamond, we held that the operation of section 95.031(2) operated to bar a course of action before it accrued and thereby denied the aggrieved plaintiff access to the courts. But Diamond presents an entirely different factual context than existed in either Battilla or the present case where the product first inflicted injury many years after its sale. In Diamond, the defective product, a drug known as diethylstilbestrol produced by Squibb was ingested during plaintiff's pregnancy shortly after purchase of the drug between 1955-56. The drug's effects, however, did not become manifest until after plaintiff daughter reached puberty. Under these circumstances, if the statute applied, plaintiff's claim would have been barred even though the injury caused by the product did not become evident until over twelve years after the product had been ingested. The legislature, no doubt, did not contemplate the application of this statute to the facts in Diamond. Were it applicable, there certainly would have been a denial of access to the courts.

Id.

243. 476 So. 2d at 660.
prove that defendant’s act caused him harm.244 Even so, the realities of
the world mean that factual situations arise in which the possibility of
causation is high, but proof is difficult or impossible. Such situations
have resulted at times in modifications of the basic causation doctrine.
In the area of products liability, the most controversial modification of
causation recently took place in California in Sindell v. Abbott Labora-
tories.245 This doctrine, called “market share liability,” was considered
recently in Florida.

The facts of Sindell were tragic. A number of different companies
manufactured and sold a drug called diethylstilbestrol (DES). The
drug was approved on an experimental basis although these companies
allegedly sold it on an unlimited basis. The drug was administered to
pregnant women to help prevent miscarriages. It allegedly continued to
be marketed despite the fact that the companies “knew or should have
known that it was a carcinogenic substance, that there was a grave
danger after varying periods of latency it would cause cancerous and
pre-cancerous growths in the daughters of the mothers who took it, and
that it was ineffective to prevent miscarriage.”246 The drug was manu-
factured by all of the companies from a single government-approved
formula. Plaintiff (and those similarly situated, who were “DES daugh-
ters”) had no way of knowing or proving exactly which company’s
product her mother had taken so many years before, prior to her own
birth, yet her injury was real, caused by the DES which her mother
had taken.247

There are several possible solutions to the causation problem posed
by these facts. One is that plaintiff loses and collects nothing since she
is unable to prove exactly which company manufactured the actual

244. While the statement is accurate as a general principle in negligence and
strict liability actions for damage to persons and property, a reference to the historical
right of action for libel per se without proof of actual harm will serve as a necessary
reminder that even such a basic principle may not be universal in the law of torts.

245. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), cert. denied, 449

246. Id. at 594, 607 P.2d at 925-926, 163 Cal. Rptr. at 133-134. It was alleged
that the companies negligently failed to test the drug and “the tests performed by
others, upon which they relied, indicated that it was not safe or effective.” Id. at 594,
607 P.2d at 926, 163 Cal. Rptr. at 134.

247. See 26 Cal. 3d at 594-5, 607 P.2d at 925-926, 163 Cal. Rptr. at 133-134.
DES was sold under many different names and was often prescribed generically by
doctors. It was given to as many as three million pregnant women. See 26 Cal. 3d at
597, 607 P.2d at 927, 163 Cal. Rptr. at 135.
doses of DES which her mother consumed. Under the basic causation rule, this would have been the result. Generally, a plaintiff should not recover from a defendant unless she can show that the defendant caused the harm about which she complains. In most cases where causation cannot be proven, it is either because the defendant did nothing wrong at all or did nothing wrong with respect to the plaintiff. Defendant is, in essence, a stranger to the injury. In Sindell, by contrast, it was clear that all of the defendants were negligent in manufacturing and marketing DES despite the evidence of danger. The negligence of each was alleged to be identical. Additionally, by marketing the drug so that it was mere happenstance which company’s product was actually consumed by the mother, each company was arguably negligent to the plaintiff. In such a situation, a result where plaintiff takes nothing and defendant pays nothing is not palatable. Perhaps for this reason, the California Supreme Court was moved to consider various theories under which the plaintiff might recover.

One possible approach would be to hold all of the defendants jointly and severally liable under a concert-of-action theory. The basis for this would be a finding that the defendants acted together to commit the tort and that was each active participant would, therefore, become liable for the acts of each member of the group. This approach is quite harsh. If each defendant is part of a common tortious plan, then it would not matter whether a particular defendant could prove that he did not manufacture the doses which were consumed. “All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer’s acts done for their benefit, are equally liable.” Without actual evidence that

248.
We begin with the proposition that, as a general rule, the imposition of liability depends upon a showing by the plaintiff that his or her injuries were caused by the act of the defendant or by an instrumentality under the defendant’s control. The rule applies whether the injury resulted from an accidental event (e.g., Shunk v. Bosworth, 334 F.2d 309 (6th Cir. 1964)) or from the use of a defective product (e.g., Wetzel v. Eaton Corp., 62 F.R.D. 22, 29-30 (D. Minn. 1973); García v. Joseph Vince Co., 84 Cal. App. 3d 868, 873-875, 148 Cal. Rptr. 843 (1978)). See also Hursh and Bailey, American Law of Products Liability 2d 125 (1974).

249. See generally Restatement (Second) of Torts § 876 (1977).

250. W. Prosser & W. Keeton, Prosser and Keeton on Torts § 46 (5th ed.)
there was such a common plan, it would not be appropriate to apply the concert-of-action theory to the facts of *Sindell*.

Another approach is to hold the entire industry jointly and severally under a theory of "enterprise liability." This doctrine, which the court noted had been proposed in a federal district court decision, suggests that defendants who act independently can become liable as a group when an industry standard, to which they all independently adhere, is negligent.

The court reasoned as follows: there was evidence that defendants, acting independently, had adhered to an industry-wide standard with regard to the safety features of blasting caps, that they had in effect delegated some functions of safety investigation and design, such as labelling, to their trade association, and that there was industry-wide cooperation in the manufacture and design of blasting caps. In these circumstances, the evidence supported a conclusion that all the defendants jointly controlled the risk. Thus, if plaintiffs could establish by a preponderance of the evidence that the caps were manufactured by one of the defendants, the burden of proof as to causation would shift to all the defendants.

The *Sindell* court rejected this theory on the facts. In the blasting cap case, there was a small number of manufacturers, while over two hundred companies were involved with DES. In the prior case, there was evidence of delegation of safety measures to a trade association, but no such evidence existed in *Sindell*.

Another approach used in these cases is sometimes called "alternative liability." When multiple defendants have all been independently negligent to the plaintiff and are all joined as party defendants, but when it is impossible for plaintiff to determine which of the defendants actually caused the injury, the burden of proof as to causation will be shifted to each defendant. If a defendant can carry the burden and show that he was not the cause of the injury, then that defendant is out of the case. Any defendants who are unable to meet the burden are

1984). [Footnotes omitted].


252. 26 Cal. 3d at 607-08, 607 P.2d at 934, 163 Cal. Rptr. at 142.

253. It was not held to be significant that all of the manufacturers of DES used the same formula because this was the government approved formula which manufacturers were required to use. 26 Cal. 3d at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.
held jointly and severally liable. This doctrine was created by the California Supreme Court in *Summers v. Tice* and was adopted by the Restatement.

In *Summers*, all of the possible people who could have injured the plaintiff were joined as defendants in the action. In *Sindell*, by contrast, only some of the DES manufacturers were joined. Thus, although arguably each of the joined defendants had been independently negligent toward the plaintiff, the actual manufacturer of the DES which plaintiff’s mother took might not have been among those joined in the suit. Balancing the factual differences between *Sindell* and *Summers* against a basic notion of fairness that “as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury,” the court applied the principles of *Summers* but in a modified form. The court held that:

1) Where the defendants, although acting independently, made an identical drug (and so were negligent in the same way to consumers and others affected, including in this case the daughters of consumers; and

2) Where plaintiff had managed to join defendants who collectively accounted for a “substantial share” of the total DES market, but less than all such defendants; then

3) The burden of proof on causation is shifted to the defendants and all defendants will be held liable for the injuries, except those who can prove that they did not manufacture the DES which was taken by plaintiff’s mother; however

4) Joint and several liability would not be applied. Rather, each defendant will be held liable only for a percentage of the damage equal to the percentage of the market in DES which the defendant had.

Besides the general fairness issue raised by the court, it also sug-

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254. 33 Cal. 2d 80, 199 P.2d 1 (1948). In *Summers*, two different defendants, acting independently, negligently fired guns in plaintiff’s direction, but it was impossible for plaintiff to determine which shot or shots injured him.


256. 26 Cal. 3d at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144.

257. *Id.* at 611-13, 607 P.2d at 936-38, 163 Cal. Rptr. at 144-46. Plaintiff alleged that six or seven companies were responsible for 90% of the DES market. Without adopting any particular percentage necessary to meet the “substantial” share of the market requirement, the court noted that if these manufacturers could be joined in the suit, the chance that the manufacturer which had actually made the particular DES taken by plaintiff was absent would be only 10%.
gested that the doctrine was necessary to protect consumers in an increasingly complex society, and that the defendants were in the best position to discover the problems and to insure against them.

Sindell received mixed reviews, and the eventual reception of

258.

In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs.

Id. at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.

259. "These considerations are particularly significant where medication is involved, for the consumer is virtually helpless to protect himself from serious, sometimes permanent, sometimes fatal, injuries caused by deleterious drugs." Id. at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144. The court discounted defendant's arguments.

Most of their arguments, however, are based upon the assumption that one manufacturer would be held responsible for the products of another or for those of all other manufacturers if plaintiff ultimately prevails. But under the rule we adopt, each manufacturer's liability for an injury would be approximately equivalent to the damages caused by the DES it manufactured.

Id. at 613, 607 P.2d at 938, 163 Cal. Rptr. at 146. (Footnote omitted).


[W]e are unable to give a definitive answer on this record whether the manufacturers of DES named as defendants (who probably supplied some of the DES ingested by the mothers of the plaintiffs) can or cannot be held liable to the members of the plaintiff's class when neither the plaintiffs nor the defendants can identify which manufacturers' DES was ingested by the mothers of the plaintiffs. We have indicated, however, the view that we might permit recovery from those defendants shown to be negligent to the extent of their participation in the DES market, even though the plaintiffs cannot identify the particular source of DES which their mothers ingested.

Id.

See also Tidler v. Eli Lilly and Co., 95 F.R.D. 332 (D.C. 1982) (refusing to require defendants to answer interrogatories about their market shares, and deeming the
the doctrine in DES litigation is still somewhat in doubt. Consideration of the doctrine has also begun in the context of litigation over injuries received due to long-term exposure to asbestos. The reception in this context has been decidedly chilly.\(^{261}\) Difficulties arise because of the

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For the full context and citations, please refer to the original source.

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\(^{261}\) See, e.g., Starling v. Seaboard Coast Line R.R., 533 F. Supp. 183, 191 (S.D. Georgia, Brunswick Division 1982). The court rejected market share in general but also noted its particular non-applicability to cases dealing with asbestos exposure because "asbestos products are not fungible commodities. The injuries caused by asbestos exposure are not restricted to asbestos products — other products, such as cigarettes, may have caused or contributed to the injury. Additionally, products containing asbestos are not uniformly harmful — many products contain different degrees of asbestos." [Footnote omitted]. See also In re Related Asbestos Cases, 543 F. Supp. 1152 (N.D. Ca. 1982), which rejected market share partly because it appeared that plaintiff would be able to identify which defendant(s) caused the injury. The court also rejected the theory because:

Where asbestos is the product in question, numerous factors would make it exceedingly difficult to ascertain an accurate division of liability along market share lines. For example, unlike DES, which is a fungible commodity, asbestos fibers are of several varieties, each used in varying quantities by defendants in their products, and each differing in its harmful effects. Second, defining the relevant product and geographic markets...
many different kinds of products which incorporate asbestos, each with varying levels of danger to the plaintiff. This is a problem which does not exist in DES litigation.

It is within the context of the continuing debate about this controversial doctrine that the Florida Supreme Court considered market share for the first time in Colotex Corp. v. Copeland. The case was brought by "a former asbestos worker, who contracted asbestosis and asbestos-related cancer, and his wife, against sixteen manufacturers of asbestos products." The court of appeals essentially adopted the mar-

would be an extremely complex task due to the numerous uses to which asbestos is put, and to the fact that some of the products to which the plaintiffs were exposed were undoubtedly purchased out of state sometime prior to the plaintiff's exposure. A third factor contributing to the difficulty in calculating market shares is the fact that some plaintiffs were exposed to asbestos over a period of many years, during which time some defendants began or discontinued making asbestos products.

Id. at 1158.

See also Hannon v. Waterman Steamship Corp., 567 F. Supp. 90 (E.D. Louisiana, 1983); Thompson v. Johns-Manville Sales Corp., 714 F.2d 581, 583 (5th Cir. 1983), cert. denied, 104 S. Ct. 1598 (1984). The Thompson court stated: "We see little purpose in discussing in detail the potential applicability of these theories to Mr. Thompson's case; writing in diversity, we write on the wind." But see Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1359 (E.D. Texas 1981), where the court stated: "In summary, the Court holds that the Erie-indicators support a conclusion that the Texas court would adopt some form of Sindell liability in the asbestos-related cases." The application of market share was not challenged on appeal but the case was reversed on other grounds in Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir. 1982).


263. 471 So. 2d 533 (Fla. 1985). The case involved review of two decisions. The first was Copeland v. Celotex Corp., 447 So. 2d 908 (Fla. 3d Dist. Ct. App. 1984), in which plaintiff sued sixteen corporations involved in the manufacture/distribution of asbestos insulation products. Plaintiff alleged that he could identify some but not all of the products, and he further alleged that determining the brand name of various products became virtually impossible once the products were removed from their original packaging. The second case was Copeland v. Armstrong Cork Co., 417 So. 2d 922 (Fla. 3d Dist. Ct. App. 1984).

264. 471 So. 2d at 534.

The facts of this cause are as follows. Copeland worked from 1942 until 1975 as a boilermaker. During this time he was exposed to various asbestos products while employed in from 50 to 100 different jobs. Copeland became aware of the possible health hazards of asbestos dust in 1958 or 1959, but he did not suffer any physical problems until the late 1960's, and he was not conclusively diagnosed as having asbestosis until 1978.
ket share approach and, in a separate order, certified the question to the Florida Supreme Court.\textsuperscript{265} The Florida Supreme Court reviewed the \textit{Sindell} decision, as well as the approach to the problem adopted by the court of appeals, and decided not to decide the issue. Although it answered the certified question in the negative and quashed the appellate court decision in \textit{Celotex}, it stated that “[o]ur holding is based principally upon the fact that Copeland was able to identify many of the manufacturers of the products to which he was exposed.”\textsuperscript{266}

The Florida Supreme Court noted the differences between the facts in DES and asbestos cases. Because there was a single formula for DES, the risk to a plaintiff was the same for each defendant. In the asbestos cases, by contrast, there were differences in the degree of risk.\textsuperscript{267} Additionally, the administrative aspects of the market share

\textit{Id.} The couple filed suit in 1979 against sixteen companies, on negligence, warranty, and strict liability theories. Plaintiffs were able to identify some but not all of the defendants as those which had supplied various asbestos products with which plaintiff had come in contact during his work. \textit{Id.} at 534-35.

265. The certified question was “[w]hether market share liability as announced in Sindell v. Abbott Laboratories . . . should be adopted in Florida.” [Citation omitted]. The court of appeals noted that the modification of alternate liability made good sense in cases of cancer where even a single exposure to asbestos would be enough to trigger the disease but where it would be impossible to know which of the defendants’ fiber had been the one which plaintiff inhaled. In the case of asbestosis, however, where the cause of the disease is exposure over a long period of time to all of the products, the better approach was to consider the problem as one of apportionment of damages under \textsc{Re}\textsuperscript{statement (Second)} of \textsc{Torts} § 433B, which states:

Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

The court modified the section to apply market share principles to the apportionment. Copeland v. Celotex Corp., 447 So. 2d 908, 916 (Fla. 3d Dist. Ct. App. 1984).

266. 471 So. 2d at 537.

267. This divergence is caused by a combination of factors, including: the specific type of asbestos fiber incorporated into the product; the physical properties of the product itself; and the percentage of asbestos used in the product. There are six different asbestos silicates used in industrial applications and each presents a distinct degree of toxicity in accordance with the shape and aerodynamics of the individual fibers. Further, it has been established that the geographical origin of the mineral can affect the substance’s harmful effects. A product’s toxicity is also related to whether the product is in the form of a solid block or a loosely packed insulating blan-
doctrine, while perhaps not easy to define in any case, appeared to the court to be particularly difficult in the asbestos context. While clearly concerned about problems which the doctrine could entail, the court declined to take a final position on it, stating:

While we recognize the clearly established majority view on this issue [against adoption of the doctrine] . . . we do not find it necessary to accept or reject the market theory approach; rather, we find that, since Copeland has identified several of the named defendants as having manufactured the products that caused his injury, this case neither requires nor justifies the major policy changes necessary to adopt the market share theory in Florida.

While the issue of market share can still be considered an open one, it seems unlikely that the court will adopt it in the asbestos context. On the other hand, many of the court’s reasons against the doctrine would not apply to a DES case where all of the defendants produced identical products and so exposed plaintiff to the same risk. In such a case, the market share doctrine could have more appeal.

XII. The Seat Belt Defense

The Florida Supreme Court adopted the “seat belt defense” in Insurance Co. of North America v. Pasakarnis. The court considered possible ways to treat the failure to use an available operational seat belt (negligence per se, contributory negligence, and mitigation of damages) and adopted the position that, unless failure to use the belt actually caused the accident, it should be considered in the mitigation of damages. The court stated that defendant had:

ket and to the amount of dust a product generates.

471 So. 2d at 538.
268. Id.
269. Id. at 539.
270. 451 So. 2d 447 (Fla. 1984).
271.
The burden of *pleading* and proving that the plaintiff did not use an available and operational seat belt, that the plaintiff's failure to use the seat belt was unreasonable under the circumstances, and that there was a causal relationship between the injuries sustained by the plaintiff and plaintiff's failure to buckle up.\(^{272}\)

The meaning of *Pasakarnis*\(^{273}\) was tested in *Volkswagen of*
In that case, defendant failed to specifically plead the seat belt defense but did generally plead the contributory negligence of the plaintiff as the proximate cause of the accident and the injuries. The question was whether this was sufficient, and the Florida Supreme Court held that it was not. “The record clearly reflects that the seat belt issue was not specifically asserted as a defense either in the pleadings or by pretrial motions. We reject the argument by Volkswagen that an allegation of comparative negligence includes the seat belt defense.”

XIII. Injury From Contaminated Food

It is clear that one who consumes contaminated food and suffers injury thereby may recover against the manufacturer of the food product. Doyle v. Pillsbury Co. considered the issue of whether the

274. 476 So. 2d 1267 (Fla. 1985).
275. The key portion of the defendant’s answer alleged in part that “Plaintiffs... so carelessly and negligently conducted themselves in the operation of the motor vehicle... as to proximately cause or contribute to the accident and injuries complained of.” Id. at 1268.
276. Id. at 1269. The district court of appeals had based its decision in the case on pre-Pasakarnis authority which rejected any use of the “seat belt defense” at all. Thus, the supreme court upheld the result only of the lower court decision. Id. The decision was consistent with an earlier decision by the supreme court, Protective Casualty Ins. Co. v. Killane, 459 So. 2d 1037 (Fla. 1984), in which the court agreed that the issue could not be raised at trial when it had not been mentioned in the pleadings or in the pretrial stipulation. The trial judge had ordered that all issues be included in the stipulation whether they were issues of law or of fact. Id. at 1038.
277. An implied warranty action was recognized in favor of a non-purchaser member of the household of the purchaser against the manufacturer of an unwholesome food product which the plaintiff partially consumed, in Blanton v. Cudahy Packing Co., 19 So. 2d 313 (Fla. 1944); against retailers in Sencer v. Carl’s Markets, Inc., 45 So. 2d 671 (Fla. 1950) (en banc), and against restaurants in Cliett v. Lauderdale Biltmore Corp., 39 So. 2d 476 (Fla. 1949).

In Food Fair Stores of Fla., Inc. v. Macurda, 93 So. 2d 860 (Fla. 1957), a breach of warranty action was allowed against the retailer for nausea, vomiting, diarrhea and related injuries caused by ingesting a portion of canned spinach only to discover worms and worm pieces in the remainder. The court discussed the question of whether worms made the spinach “deleterious, unwholesome or unfit for human consumption,” as follows:

Admittedly we are no connoisseurs of cuisine that qualifies us to view as delicacies some foodstuffs that might be indigestible by others. To certain tribes of American Indians we understand that such creatures as worms, grasshoppers, snails and the like are acceptable as delicious mor-
food must actually be ingested in order for recovery to be permitted.

_Doyle_ involved a can of peas contaminated with an insect. Upon opening the can, the plaintiff saw an insect floating in it. This startled plaintiff, who "jumped back in alarm, fell over a chair and suffered physical injuries." The courts below considered the issue one of lack of "impact." The trial court granted a summary judgment and the appellate court affirmed on that basis. The appellate court used the case, however, to add its voice to others who were questioning the continued validity of the impact rule in Florida.

The Florida Supreme Court declined to see the issue as one of "impact" and saw it, instead, as one of foreseeability. When part of the unwholesome food is consumed, the illness of the consumer is foreseeable. Merely observing such food is not generally as traumatic, and so the requisite foreseeability necessary to hold the defendant liable is lacking. For this reason, the court felt the granting of summary judgment to the defendants was proper.

sels of food. We are told that canned Mexican worms grace the shelves of many delicatessens and in certain swank social levels, which few of us ever reach, it is said that roasted snails are available with the trays of hors d'oeuvres at pre-dinner cocktail parties. However, for the masses who have moved ahead of the Indians but who perhaps have not yet reached the "snail set," such invertebrates as worms and snails are generally frowned upon as totally unwholesome and unfit for human consumption. Indeed they are in a class with roaches, mice, flies and other nauseous intruders that the cases indicate have at times found their way into bottles, cans or other foodstuff containers.

_Id._ at 861.

278. 476 So. 2d 1271 (Fla. 1985).
279. _Id._
280. _Id._

281. The question certified as one of great public importance was: "Should Florida abrogate the 'impact rule' and allow recovery for physical injuries caused by a defendant's negligence in the absence of physical impact upon the plaintiff?" _Id._ See the discussion of the partial abrogation of the impact rule, _supra_ text accompanying notes 26 through 56.

282. 476 So. 2d at 1271. While noting in a footnote that "the impact rule itself is a convenient means of determining foreseeability," the court, while approving the affirmance of the summary judgment, "quash[ed] that portion [of the district court opinion] applying the impact rule to the circumstances of this case." _Id._ at 1272.
XIV. Defamation

*Mid-Florida Television Corp. v. Boyles* 283 considered the status of the libel per se action and of pleading libel per se in light of the United States Supreme Court decision in *Gertz v. Robert Welch, Inc.* 284 In Florida:

Words [are] actionable per se [if] their injurious character is a fact of common notoriety, established by the general consent of men, and the courts consequently take judicial notice of it. Words amounting to a libel per se necessarily import damage and malice in legal contemplation, so these elements need not be pleaded or proved, as they are conclusively presumed as a matter of law in such cases. 285

Common law defamation action by private plaintiffs against media defendants seemed to be altered when the United States Supreme Court balanced the traditional right to protect oneself against being defamed with the freedom of speech and press guaranteed by the first amendment. In *Gertz*, the Court held on the facts that liability without fault was not permissible under the first amendment, 286 and that neither presumed nor punitive damages were constitutional unless plaintiff could show malice as that term was defined by *New York Times Co. v. Sullivan*. 287

283. 467 So. 2d 282 (Fla. 1985).
285. Layne v. Tribune Co., 146 So. 234, 236 (Fla. 1933). “But words or publications actionable only per quod are those whose injurious effect must be established by due allegation and proof.” Id.
286. “We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.” 418 U.S. at 347 [Footnote omitted].
287. 376 U.S. 254, 280 (1963) (“‘actual malice’ — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” 418 U.S. at 349). “It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury.” Id. *Gertz* also states, “We also find no justification for allowing awards of punitive damages . . . . In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.” Id. at 350.

Recently, in Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939 (1985), the Supreme Court narrowed the presumed application of *Gertz, Dun and
In light of *Gertz*, what is the effect of pleading negligence and actual damage, as required by that case?\(^{288}\) Also, what is the effect of characterizing the action, in the pleadings, as one which was "defamatory per se . . . libel per se, and slander per se"?\(^{289}\) The district court of appeal held that *Gertz* had not abolished the libel per se section but had merely altered the pleading requirements for the action. It stated that "[a] distinction still remains between libel per se and libel per quod: the necessity in the latter action for pleading and proving the innuendo."\(^{290}\)

The Florida Supreme Court stated that as long as the complaint satisfied the *Gertz* requirements, there was nothing wrong with characterizing the action as one of libel per se, and that the term "remains a useful shorthand for giving a media defendant notice that the plaintiff is relying upon the words sued upon as facially defamatory and therefore actionable without resort to innuendo."\(^{291}\)

**XV. Interference With Business Relationships**

The Florida Supreme Court considered the pleading requirements for tortious interference with a business relationship in its review of the First District Court of Appeal decision in *Tamiami Trail Tours, Inc. v. Cotton.*\(^{292}\) Plaintiff essentially alleged that defendants engaged in a smear campaign against plaintiff's taxi cabs, designed to steer business

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\(^{288}\) Boyles v. Mid-Florida Television Corp., 431 So. 2d 627, 634 (Fla. 5th Dist. Ct. App. 1983). These allegations were included in count one. Count four incorporated count one by reference and also alleged "New York Times" malice. *Id.*

\(^{289}\) Boyles, 431 So. 2d at 632 (Fla. 1983).

\(^{290}\) *Id.* at 633. "'Innuendo' simply means that facts extrinsic to those published must be known in order to inflict an injury." *Id.*

\(^{291}\) 467 So. 2d at 283. Justice Ehrlich, concurring specially, wisely argued that the term was not useful and would tend to confuse parties and courts alike. *Id.*

\(^{292}\) 432 So. 2d 148 (Fla. 1st Dist. Ct. App. 1983).
away from the plaintiff. The campaign included sabotage, verbal harassment, speaking ill of plaintiff to prospective customers, and assault.\textsuperscript{293} Plaintiff's income allegedly dropped substantially and eventually the plaintiff filed suit.\textsuperscript{294} There was a jury verdict for plaintiff.\textsuperscript{295} Defendants appealed, arguing, \textit{inter alia}, that the case for tortious interference with a business relationship could not be made out without a showing that they acted to obtain a business advantage over the plaintiff.\textsuperscript{296} The appellate court rejected defendant's position, stating the four elements necessary to make out the prima facie case: "1) the existence of a business relationship not necessarily evidenced by an enforceable contract; 2) knowledge of the relationship on the part of the defendant; 3) an intentional and unjustified interference with that relationship by the defendant; and 4) damage to the plaintiff as a result of the breach of the relationship."\textsuperscript{297}

The supreme court agreed, stating: "We approve that portion of the decision of the district court and, to the extent they conflict, disapprove the decisions of the Third District Court of Appeal in \textit{Hales},\textsuperscript{298} \textit{John B. Reid and Associates, Inc.}\textsuperscript{299} and \textit{Berenson}."\textsuperscript{300}

\begin{itemize}
\item \textsuperscript{293} Id. at 150.
\item \textsuperscript{294} Id.
\item \textsuperscript{295} Id. at 151.
\item \textsuperscript{296} Id.
\item \textsuperscript{297} Id.
\item \textsuperscript{298} Hales v. Ashland Oil, Inc., 342 So. 2d 984 (Fla. 3d Dist. Ct. App. 1977), cert. denied, 359 So. 2d 1214 (Fla. 1978).
\item \textsuperscript{299} John B. Reid and Assoc's v. Jimenez, 181 So. 2d 575 (Fla. 3d Dist. Ct. App. 1965).
\item \textsuperscript{300} Berenson v. World Jail-Alai, Inc., 374 So. 2d 35 (Fla. 3d Dist. Ct. App. 1979) (quoting Tamiami Trail Tours, Inc. v. Cotton, 463 So. 2d, 1126, 1127 (Fla. 1985) (per curiam)). The court quoted with approval the four factors listed in the appellate court opinion.
\end{itemize}

It may well be that most such cases will involve proof that the defendant's motive was to secure a business advantage and, thus, that the interference was intentional. However, we see no logical reason why one who damages another in his business relationships should escape liability because his motive is malice rather than greed. \textit{Id.} at 1128. "This issue is controlled by our decision in \textit{Dade Enterprises} [Inc. v. Wometco Theatres, Inc., 119 Fla. 70, 160 So. 209 (1935)] which does not require that the plaintiff in such suit establish that the defendant interfered with the business relationship in order to secure a business advantage." \textit{Id.} at 1127-28.

In The Florida Bar Standard Jury Instructions Civil 85-1, 475 So. 2d 682, 689-91 (Fla. 1985), two new jury instructions were approved for publication.

\begin{itemize}
\item MI 7.1 Interference With A Contract Not Terminable At Will
\end{itemize}
XVI. Strict Liability for Damage by Dogs

Florida provides by statute that "[o]wners of dogs shall be liable

The issue(s) for your determination on the claim of (claimant) against (defendant) are whether (defendant) interfered with a contract between (claimant) and (name) and did so intentionally; and, if so, whether such interference caused damage to (claimant).

A person interferes with a contract between two [or more] persons if he induces or otherwise causes one of them to breach or refuse to perform the contract.

Intentional interference with another person's contract is improper. Interference is intentional if the person interfering knows of the contract with which he is interfering, knows he is interfering, and desires to interfere or knows that interference is substantially certain to occur as a result of his actions.

If the greater weight of the evidence does not support the claim of (claimant) then your verdict should be for (defendant). However, if the greater weight of the evidence does not support the claim of (claimant), then your verdict should be for (claimant) and against (defendant).

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

If you find for (defendant), you will not consider the matter of damages. But, if you find for (claimant), you should award (claimant) an amount of money that the greater weight of the evidence shows will fairly and adequately compensate (claimant) for such [loss] [or] [damage] as was caused by the intentional interference. Such interference is the cause of [loss] [or] [damage] if it directly and in a natural continuous sequence produces or contributes substantially to producing such [loss] [or] [damage].

Id.

MI 7.2 Interference With Contract Terminable At Will Or With Prospective Business Relations; Competition Or Financial Interest Defense. The issues for your determination on the claim of (claimant) against (defendant) are whether (defendant) interfered with business relations between (claimant) and (name) and did so improperly and intentionally; and if so, whether such interference caused damage to (claimant).

The first question is whether (defendant) interfered with (claimant's) business relations with (name) by inducing or otherwise causing (name) [not to enter into a contract with (claimant)] [not to continue doing business with (claimant)] [to terminate or bring to an end a contract which (name) was not bound to continue with (claimant)] [(describe other interference)].

If (defendant) did [interfere with (claimant's) business relations with (name)] [cause (name) to cease doing business with (claimant)], then the next question is whether, as contended by (claimant), the interference by (defendant) was improper. A person who enjoys business relations with
for any damage done by their dogs to . . . persons." The construction of that statute was tested by the Florida Supreme Court in Jones another is entitled to protection from improper interference with that relationship. However, another person is entitled to [compete for business] [or] [advance his own financial interest] so long as he has a proper reason or motive and he uses proper methods.

A person who interferes with the business relations of another with the motive and purpose, at least in part, to advance [or protect] his own business [or financial] interests, does not interfere with an improper motive. But one who interferes only out of spite, or to do injury to others, or for other bad motive, has no justification, and his interference is improper.

So also, a person who interferes with another's business relations using ordinary business methods [of competition] does not interfere by an improper method. But one who uses physical violence, misrepresentations, illegal conduct or threats of illegal conduct, and the like, has no privilege to use those methods, and his interference using such methods is improper.

If (defendant's) interference was improper, the last question is whether it was intentional as well. Interference is intentional if the person interfering knows of the business relationship with which he is interfering, knows he is interfering with that relationship, and desires to interfere or knows that interference is substantially certain to occur as a result of his action.

If the greater weight of the evidence does not support the claim of (claimant), [that (defendant) intentionally interfered with (claimant's) [contract] [business relationship] with (name),] then your verdict should be for (defendant).

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence of the case.

[However, if the greater weight of the evidence does support the claim of (claimant), then you shall consider the defense of (defendant). On the defense, the issue for your determination is whether (defendant) acted properly in interfering as he did.]

If the greater weight of the evidence [does not support the defense of (defendant) and the greater weight of the evidence] does support the claim of (claimant), the [sic] your verdict should be for (claimant).

If you find for (defendant), you will not consider the matter of damages. But, if you find for (claimant), you should award (claimant) an amount of money that the greater weight of the evidence shows will fairly and adequately compensate (claimant) for such [loss] [or] [damage] as was caused by the intentional interference. Such interference is the cause of [loss] [or] [damage] if it directly and in a natural and continuous sequence produces or contributes substantially to producing such [loss] [or] [damage].

Id. [Notes and Comments omitted].

301. FLA. STAT. § 767.01 (1985).
v. Utica Mutual Insurance Co. Several boys, one of them the son of Roy Davis, the respondent's insured, hitched the dog owned by the Davis family to a wagon. While so hitched, the dog chased another dog. The wagon hit and injured another one of the boys, Donnie Jones. The dog itself never touched Jones. The major questions raised before the supreme court were whether the statute should be interpreted as broadly as its words, or restricted to risks associated particularly with dog ownership and whether the dog was a cause of the injury.

Arguably, these two issues blend into each other. Dean Prosser has stated the issue to be one of the limits of liability for injuries caused without fault:

The intentional wrongdoer is commonly held liable for consequences extending beyond the scope of the foreseeable risk he creates, and many courts have carried negligence liability beyond the risk to some extent. But where there is neither intentional harm nor negligence, the line is generally drawn at the limits of the risk, or even within it. This limitation has been expressed by saying that the defendant's duty to insure safety extends only to certain consequences. More commonly, it is said that the defendant's conduct is not the "proximate cause" of the damage. But ordinarily in such cases no question of causation is involved, and the limitation is one of policy underlying liability.

Generally, strict liability is imposed upon some activity which it is reasonable but highly dangerous to do. Thus, if this reasoning were followed, the statute would apply only if the injury was caused by a

302. 463 So. 2d 1153 (Fla. 1985).
303. Id.
305. Jones, 463 So. 2d at 1155. Another issue considered was whether the policy of insurance covered the accident at all. The policy had been issued to cover accidents in relation to a nursery business, and the supreme court found that since the dog involved was a watchdog, the function of which was to run free in the nursery, and since the dog was doing so at the time of the injury, the issue of whether the facts showed that the dog's action was within the scope of coverage of the policy had been properly left by the trial court to the jury. Id. at 1156.
307. "In general, strict liability has been confined to consequences which lie within the extraordinary risk whose existence calls for such special responsibility." PROSSER, THE LAW OF TORTS 518 (4th ed. 1971).
peculiar characteristic of dogs.\textsuperscript{308} The Second District Court of Appeal acknowledged that a dog chasing another dog is a "canine characteristic."\textsuperscript{309} The dog, however, did not, itself, hit the boy. Only because the dog was hooked to a wagon was there an injury. Therefore, said the Second District Court, the canine characteristic did not cause the injury.\textsuperscript{310}

The supreme court rejected this argument, holding that the statute imposes strict liability in any situation where, by the normal rules of causation, the dog was a proximate cause of the injury.\textsuperscript{311} Thus, while some "affirmative or aggressive act by the dog is required,"\textsuperscript{312} it is not required that the act be directed specifically against the one injured, as had been required by some earlier cases.\textsuperscript{313} The supreme court found by implication, that contrary appellate court opinions had improperly ignored doctrines of concurrent causation, holding that only one of the two actual causes was the proximate cause of the injury.\textsuperscript{314}

\begin{thebibliography}{9}
\item 309. \textit{Id}.
\item 310. \textit{Id}. The Second District Court of Appeal also argued for a narrow interpretation because of the interesting enacting history of the statute. On two different occasions, the statute, as enacted, applied to damage to livestock only and each time the compiler had added language making the statute applicable to people. \textit{Id}. The Second District Court of Appeal answered this objection by noting that the statute in its present form had been re-enacted and was, therefore, valid. \textit{Id}. The supreme court did not address the point directly, only noting that "plain and unambiguous language in a statute need no construction and creates the obvious duty to enforce the law according to its terms." Jones v. Utica Mut. Ins. Co., 463 So. 2d 1153, 1156 (Fla. 1985).
\item 311. \textit{Id}.
\item 312. \textit{Id}.
\item 313. See, e.g., Rutland v. Biuel, 277 So. 2d 807 (Fla. 2d Dist. Ct. App. 1973) (plaintiff heard a dog cry out, looked down, saw the dog, stepped down and tripped over the animal) The Second District held "that F.S. section 767.01 F.S.A. is not applicable to a situation where the dog takes no affirmative or aggressive action toward the injured party. \textit{Id}. at 809. [Emphasis added].
\item 314. In the ordinary negligence context, a defendant is liable for injury produced or substantially produced in a natural and continuous sequence by his conduct, such that "but for" such conduct, the injury would not have occurred. Such liability is not escaped in the recognition that the injury would not have occurred "but for" the concurrence or intervention of some other cause as well. The defendant is liable when his act of negligence combines with some other concurring or intervening cause in the sense that, "but for" the other cause as well, injury would not have occurred.
\end{thebibliography}
One reason for adopting "negligence" proximate cause standards in this strict liability context was "the difficulty of fashioning a workable and administrable alternative to the traditional notion of proximate cause." The court was concerned about the struggle to define just what is and is not a canine characteristic, and shied away from the horrific vision of expert witnesses endlessly debating the true limits of behavior dubbed "Canine."

An example of the problem can be seen in Mapoles v. Mapoles. A dog in a car managed somehow to discharge a shotgun (probably by bumping it) which was also in the car. The majority opinion, later approved by the supreme court in Jones, simply held that as long as "the injury resulted from the affirmative act of the dog," the owner would be liable. By contrast, the dissent was led to reject liability because "dogness played no more a part than if the trigger had been jostled by a cat or a falling sack of groceries." Such an approach invites speculation about what is unique "dogness" as opposed to characteristics which are to be found both in dogs (covered by the statute) and cats (not covered by the statute). It would require, in effect, that a court define the essence of "dog." It is this philosophical quagmire that the supreme court declined to enter.

Jones, 463 So. 2d at 1156. The court apparently adopted this same proximate cause rule for the strict liability statutory action, rejecting by implication any narrowly drawn proximate cause rules. The court stated, "The standards of causation applicable in the case of ordinary negligence were amply satisfied in this case." Id.

315. Id.

316. Id. In dissent, Justice Overton found no such problem, arguing that such characteristics were things such as "biting, barking, chasing, jumping, vicious or rambunctious conduct." Id. at 1161. Of course, the majority's point might well be made out of the dissenting position. It could easily be argued that the injury was, at least in part, caused by "chasing" and the court would then have to decide whether the fact that the dog was hitched to a wagon when it exhibited its "chasing" behavior ought to be deemed legally significant. Id. at 1160. It was precisely to avoid such issues that the majority held as it did. Id.


318. Id. at 1138.

319. It was the conflict between Mapoles and Jones which brought the issue before the supreme court.

320. Id. The court noted that, in its view, the statute essentially had the effect of making dog owners insurers for damage done by their dog.

321. Id.

322. Id. (Smith, J., dissenting).

323. The facts of other cases are also instructive. In Smith v. Allison, 332 So. 2d 631 (Fla. 3d Dist. Ct. App. 1976), a dog on the road and the attempt of a vehicle to
Thus, dog owners in Florida are strictly liable for damage caused by their dogs, and the liability is recognized to be very broadly construed. This decision will make it easier for plaintiffs to prove avoid it resulted in a crash. The district court of appeals rejected the notion that the dog had inflicted the damage and saw the case rather as one where “the damage resulted from some physical agency set into motion by a chain of events which may have been triggered by the presence of the dog,” id. at 634, and so declined to apply the statute.

By contrast, in English v. Seachord, 243 So. 2d 193 (Fla. 4th Dist. Ct. App. 1971), plaintiff jumped up on a car and injured himself after defendant’s dog growled at him. The court reversed the jury verdict for defendant because the charge to the jury by the trial judge had permitted the jury to consider plaintiff’s alleged contributory negligence. Id. at 195. The court stressed that contributory negligence was not a defence as such and that only plaintiff’s provocation of the dog or other conduct which would be “so blatant as to supersede the dog’s behavior as the legal or proximate cause of plaintiff’s injuries,” would be a defense. The court noted that the statute made the dog owner “virtually an insurer,” as to injuries caused by the dog. This opinion was cited with approval in dicta in a per curiam opinion dismissing a writ of certiorari previously issued, because of a finding that no conflict among the circuits actually existed. Seachord v. English, 359 So. 2d 136 (Fla. 1972). “[T]he scholarly opinion by the District Court of Appeals Judge David L. McCain [in English] is eminently correct in enunciating the law.” Id. (English was also cited with approval in Jones).

In Brandeis v. Felcher, 211 So. 2d 606 (Fla. 3d Dist. Ct. App. 1968), dogs were jumping at a four feet high fence along a sidewalk. This scared children who ran into the street where one of them was hit by a truck. Id. at 606-07. The court of appeals reversed the summary judgment granted by the Dade County Circuit Court and remanded the case. Id. at 609. The court held that liability under the statute was not predicated on contact between the dog and the plaintiff and that the only question was whether the dog was a proximate cause of the injury. Id. at 608. The court applied a “substantial factor” test, as used in negligence when concurrent causes are present, and argued that the issue of causation was the same under the statute as in a negligence case. Id. at 609. The court followed a trend it perceived in Florida toward permitting juries to decide such questions. “The Courts of Florida have become increasingly liberal in allowing a jury to pass upon questions similar to this.” Id.

The statute was held to apply by the Third District Court of Appeal when a Great Dane ran into the street and plaintiff’s car swerved to avoid it causing him to strike a power pole. The court noted that the dog had taken an “aggressive action,” and that under the statute, defendant remained liable in a multiple cause situation. The court also noted that comparative negligence was not a defense to the action. Allstate Ins. Co. v. Greenstein, 308 So. 2d 561 (Fla. 3d Dist. Ct. App. 1975).

Section 767.01 is a strict liability statute which has consistently been construed to virtually make an owner the insurer of the dog’s conduct.” Jones v. Utica Mut. Ins. Co., 463 So. 2d at 1156.

324. The court displayed an understanding of the multiplicity of ways in which a causative agent can result in an injury. “Thus, it also cannot be said that liability is only appropriate when the animal actually touches the plaintiff, for animals and people
such cases.  

XVII. Medical Malpractice

The Florida legislature has provided a detailed statutory scheme to regulate actions for medical malpractice. Parts of that scheme were examined in a series of cases by the Florida Supreme Court during the last year. Section 768.56 provides for court-ordered attorney's fees to the victorious party in medical malpractice actions and regulates the awarding of said fees. In *Florida Patient's Compensation Fund v. Rowe*, the constitutionality of that section was tested.

The court upheld the section against due process and equal protection claims, as well as the claim that the provision denied access to the courts in violation of the Florida Constitution. The court rejected the notion that the attorney's fee provision was an unlawful penalty. Although the statute might deter the filing of some claims (particularly those where chance of success was slight), it could also encourage others (particularly those in which the chance of success was high).

326. It should be noted that earlier supreme court decisions relating to dog bites determined that a related statute, FLA. STAT. § 767.04 (1975), dealing with liability for dog bites, superseded the common law, Belcher v. Stickney, 450 So. 2d 1111 (Fla. 1984) and also superseded common law defenses, leaving only statutory defenses available. Donner v. Arkwright-Boston Mfg. Mut., 358 So. 2d 21 (1978).


328. FLA. STAT. § 768.56 (1981). In Young v. Altenhaus, 472 So. 2d 1152 (Fla. 1985), the supreme court held that the section could not be applied to actions which accrued before the effective date of the statute. The court noted the general rule that statutes which “interfere with vested rights,” or which are “substantial in nature,” will only be applied prospectively while those which “relate only to the procedure or remedy are generally held applicable to all pending cases.” *Id.* at 1154. Since there had been no obligation to pay the opposing party’s attorney’s fees before the statute, the statute could be applied only prospectively. *Id.* On the authority of Rowe and Young, the supreme court upheld a decision of the Fourth District Court of Appeal which had held the section to be constitutional. The case was Karlin v. Denson, 472 So. 2d 1155 (Fla. 1985). The Fourth District Court of Appeal decision can be found at 447 So. 2d 897 (Fla. 4th Dist. Ct. App. 1983).

329. 472 So. 2d 1145 (Fla. 1985).

330. *Id.* at 1146.

331. The court also noted other examples of attorney’s fees statutes in Florida.
The court also considered how a determination of the amount of attorney’s fees was to be made. The approach requires a court to “determine the number of hours reasonably expended on the litigation.”

The number of hours reasonably expended, determined in the first step, multiplied by a reasonable hourly rate, determined in the second step, produces the lodestar, which is an objective basis for the award of attorney fees. Once the court arrives at the lodestar figure, it may add or subtract from the fee based upon a “contingency risk” factor and the “results obtained.”

More generally, the court saw the issue of two competing rules (the “English” rule, that the victor obtains attorney’s fees from the vanquished, and the “American,” that each side pay its own fees), with the choice solidly within the scope of legislative decision. 472 So. 2d at 1147-48.

The supreme court stressed the necessity of accurate and complete record-keeping by attorneys and that the attorney could include only hours which could be “properly” billed to the client. The court noted that failure to maintain such records could result in the total hours allowed by a court being reduced.

In general, the court instructed that the criteria in Disciplinary Rule 2-106(b) of the FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY be used. These are:

1. The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly.
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
3. The fee customarily charged in the locality for similar legal services.
4. The amount involved and the results obtained.
5. The time limitations imposed by the client or by the circumstances.
6. The nature and length of the professional relationship with the client.
7. The experience, reputation, and ability of the lawyer or lawyers performing the services.
8. Whether the fee is fixed or contingent.

The first part of the process would be determined using factor number one, the second part, by using the rest with the exception of “time and labor required,” the ‘novelty and difficulty of the question involved,’ the ‘results obtained,’ and ‘whether the fee is fixed or contingent.’” 472 So. 2d at 1150-51. The court stated that the fee calculated by the court should be increased in contingency cases by a “contributory risk factor,” somewhere between 1.5 and 3 inclusive, and that when it would seem that the chance for success at the start was about even, the correct multiplier would be 2. The amount of the award may not exceed that which was stipulated in the fee agreement between attorney and client, but is not strictly governed by it either because it is being paid by the other party which was not a party to the agreement. 472 So. 2d at 1150-51. The computed figure can also be reduced if there was a failure to prevail on some of the claims of relief.
Other key provisions in the statute\textsuperscript{335} were upheld in \textit{Florida Patient's Compensation Fund v. Von Stetina}.\textsuperscript{336} The case involved medical malpractice which left a 27-year-old woman with irreversible brain damage, blindness in one eye, and a refractured leg. The jury awarded a total of over twelve million dollars.\textsuperscript{337}

Florida's statutory scheme establishes a patient's compensation fund. The primary defendants are directly responsible only for the first one hundred thousand dollars and the fund become responsible for the rest. The statute also permits the court to determine the manner of payment for liabilities over two hundred thousand dollars.\textsuperscript{338} The court noted that the purpose of the act was to spread the losses from medical malpractice in a way which benefits both the patients and the health care providers, and that plaintiff is not denied recovery of her claim under the fund system.\textsuperscript{339} The various methods of payment were also upheld. "We find the legislation at issue does not implicate a funda-

\textsuperscript{335} FLA. STAT. §§ 768.54(2)(b), 768.54(3)(e)3, and 768.51 (1981).
\textsuperscript{336} 474 So. 2d 783 (Fla. 1985) (per curiam).
\textsuperscript{337} The young woman will need round the clock nursing care and has a life expectancy of 40 years. The award reflected past and future medical/nursing care, past and future lost earnings, and past and future pain and suffering. \textit{Id.} at 785-86.
\textsuperscript{338} \textit{Id.} at 786. The trial court also held unconstitutional a cap of one hundred thousand dollars to be paid from the fund in any given year on a claim. This cap was repealed in 1982, but the trial court ruled that the earlier provision applied to the case. The supreme court disagreed, holding that the cap provision and the later amendment repealing it were statutes which controlled procedure or remedies, and thus applied to all cases pending at the time of the change. Since the 1982 amendment to section 768.54 applied, it did not have to evaluate the earlier form of the statute. The court did note, however, that the cap on payments per year would have prevented the fund from paying even the actual costs of the patient's care. \textit{Id.} at 787. Payment may be ordered to make a lump-sum payment or to make periodic payments. FLA. STAT. § 768.51 (1981).
\textsuperscript{339} The court noted, however, that it was not considering what might be the result if the fund proved to be insolvent or for other reasons could not pay the claim. 474 So. 2d at 789.
mental right or suspect classification.\textsuperscript{340} The court found that the legislation had a rational relation to the interest in protecting public health by easing the upward trend in medical and insurance costs.\textsuperscript{341} “We specifically uphold the constitutionality of sections 768.54(2)(b), 768.54(3)(a)3, and 768.51, Florida Statutes (1981).”\textsuperscript{342}

\textsuperscript{340.} Id.  
\textsuperscript{341.} Id.  
\textsuperscript{342.} Id. The judgment was vacated on the grounds that some evidence had been improperly admitted and that the error was not harmless. The court did not address the issue of damages because the judgment had been vacated. Finally, the court noted that the issue of attorney's fees, if any, would be governed by the process set out in Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985). 474 So. 2d at 790.

Justice Ehrlich had not participated in Rowe or Young, but did participate in all except the attorney's fees section of Von Stetina. Justice Ehrlich explained his reasons for recusing himself on the attorney fee issue:

I had been a witness in the trial of a case wherein a former law partner, John E. Mathews, Jr., was plaintiff and a number of doctors were defendants. The trial of that case resulted in a favorable verdict for the doctors, who, post-judgment sought to assess attorney's fees against plaintiff Mathews pursuant to section 768.56. While the trial court refused to assess attorney's fees on constitutional grounds, the DCA in Polhman v. Mathews, 440 So. 2d 681 (Fla. 1st DCA 1985), reversed the trial judge on that issue, and discretionary review was sought and accepted by this Court. Counsel for Mathews filed an amicus brief in this case on that one issue. That was the reason for my recusal. 474 So. 2d at 794. Since the issue of attorney's fees had been settled, Justice Ehrlich saw no reason why he could not participate in the remainder of the issues raised in Von Stetina. On rehearing, Justice Ehrlich elaborated upon his decision. Justice Ehrlich acknowledged that when a recusal was mandated, a change of condition did not permit a judge to re-qualify to hear the case, but:

Here, I recused for cause on only one issue of Von Stetina. That issue was legally and procedurally severable from the remaining issues. As a matter of judicial economy, I withdrew from consideration of any issue in that case. There was no legal bar to my considering issues relating to liability and damages, but my presence during argument and conference on those issues and my recusal during argument and conference on the attorneys' fees would have been awkward and inefficient. As noted in my explanation appended to the Court's opinion in Von Stetina, there came a time when judicial economy would no longer be served by my withdrawal from consideration of issues unrelated to attorneys' fees in this case. Rather, as a matter of judicial economy, it was necessary that I consider these issues. No legal bar had been removed. There was no change in circumstances which allowed me to 'requalify.' I have never considered any aspect of the issue from which I was legally and ethically required to recuse myself. 474 So. 2d at 795-96. The other members of the court expressed their "full approval" of Justice Ehrlich's explanation in a short per curiam opinion. Id. at 795.
XVIII. Conclusion

The tort issues confronting the Florida Supreme Court in 1985 ranged widely over the diverse landscape of this interesting area of law. Almost invariably, the question which will be asked is "Who won?" Did plaintiffs or defendants make the most gains?

This question is not easily answered. Plaintiffs made gains by convincing the court to recognize new duties in the emotional distress area, for example, while defendants won a round on causation with the refusal to recognize the market share theory. The state, as a defendant, was granted significant protection from liability with the interpretation of the sovereign immunity waiver statute, and there may be some debate about which interests were protected when the medical malpractice provisions were upheld.

While no group will be completely pleased with all of the 1985 supreme court decisions, each side can claim some significant victories during the year. The situation is analogous to that of Alice and the various creatures which she encountered in Wonderland. After swimming in the pool of tears, the group held a "caucus race" to get dry. There was no set course in the race and the runners, who were placed at various points randomly around the course, started and stopped running whenever they liked. Eventually, the question was asked, "Who has won?" The answer was, "Everybody has won, and all must have prizes."343

343. L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND 31 (1898).