Sticks and Stones: An Analysis of the Impact Doctrine in Florida

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STICKS AND STONES: AN ANALYSIS OF THE IMPACT DOCTRINE IN FLORIDA

by

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A thesis submitted in partial fulfillment of the requirements for the Honors in the Major Program in Legal Studies in the College of Health and Public Affairs and in The Burnett Honors College at the University of Central Florida

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ABSTRACT

Within the last few decades, public opinion has greatly shaped the justice system to prevent “slippery slopes”. This is most evident in the common law doctrine that restricts an alleged victim for recovering damages of emotional distress without notable physical manifestation in the eyes of a layperson—The Impact Doctrine. However, emotional distress is manifested in many psychological illnesses that do not require physical injury that are recognized as legitimate in psychology. This research explores the history of the rule and how it is inconsistent with not only areas of science; but also, other areas of the law.

The purpose of this thesis is to explore alternatives to “The Impact Doctrine”. Through analysis of American common law, Florida common law, and British common law, it can be concluded that the British have found the best alternative to the rule that helps prevent “slippery slopes”, while also bridging the gap between science and the law. By analyzing the LGBT (Lesbian, Gay, Bisexual, and Transgender) community and Civil Rights Actions, the LGBT community may bring a suit for emotional distress based upon a Civil Rights action.
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Chapter 1: An Introduction to the “Impact Doctrine”

Emotional distress commonly refers to the psychological harm that inevitably agonizes one in a daily routine—this psychological harm can affect a person’s earnings, relationships, and can limit other everyday activities. In the court system, emotional distress refers to a modern tort that can have occurred intentionally or negligently depending on the lawsuit. The American Law Institute (ALI) first promoted this tort as a freestanding cause of action in 1948. Under the law emotional distress can be intentional or negligent. Intentional infliction of emotional distress is classified as an intentional tort that manifests outrageous conduct. On the other hand, negligent infliction of emotional distress stems from the negligence of a defendant of a duty that he or she owes to the plaintiff. The tort is further expanded in their Restatement (Second) of Torts, in which the freestanding tort is only acknowledged in two instances. In the first instance, a defendant can be liable for a claim of emotional distress if the damage occurred due to extreme and outrageous conduct, or in the second, if the conduct displayed results in bodily harm (the impact doctrine). Thus, a Plaintiff’s claim of emotional distress is not justifiable if the defendant acted simply unreasonably.

If the emotional distress that is endured by the Plaintiff is extreme and outrageous there must be:

(a)... 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) …any other person who is present at the time, if such distress results in bodily harm (Restatement [Second] of tort § 46).

The former instance in which a freestanding claim of emotional distress can be brought consists of behavior that surpasses all expectations of society of a reasonable person. Outside of these two circumstances it can be difficult for a court to determine what is considered “outrageous and extreme”. Thus, causing inconsistencies in judge’s decisions due to the torts limiting, yet, ambiguous language.

Emotional distress lawsuits are a concept of tort law. The laws surrounding tort law usually require the standard of proof of preponderance of evidence, to claim damages. The plaintiff must present physical evidence, which shows the case is more probable than not probable.

The limitation and the barring of independent causes of actions of emotional distress stems from the country’s public concern of such causes of actions. Many Americans postulate that emotional distress lawsuits can cause a flood of litigation based on trivial and fraudulent claims, or “slippery slopes” (Fear of Disease in Another Person: Assessing the Merits of an Emerging Tort Claim, 2000). The courts conceived the “impact rule”—a rule in which the suffering of emotional and psychological harm had to be associated with a physical injury to recover damages for the perplexing tort. This stems from a concern or belief that what can not be seen must not be real, and if citizens are able to sue for what is not real this could open the door to a flood of fraudulent claims. The irony of the prescribed rule is that mental instability doesn’t
always accompany physical injuries. The “impact rule” has been abandoned in many state courts and replaced with some sort of “physical manifestation requirement”—a requirement for plaintiffs to only prove that there was some observable physical symptom in their action of emotional distress. (Which will be evaluated in later paragraphs.) These rules observed are liberated versions of the “impact rule” that have been adopted in many states, but not in Florida. The “impact rule” is still powerful in Florida. Thus, public opinion has shaped tort law and claims of emotional distress (Fear of Disease in Another Person: Assessing the Merits of an Emerging Tort Claim, 2000).

All jurisdictions require satisfaction of some requirement that could possibly limit a plaintiff’s chances of recovering for emotional distress. While only a small number of states adhere to the common law limitation of emotional distress (the impact rule), other states have adopted a derivative of the rule. The rules implemented in other states include: the zone of danger rule and/or the foreseeability standard. Although these derivatives are much more lenient than the common law rule, they still limit actions for emotional distress. Thus, no state has successfully been relieved from standards that may limit a plaintiff from receiving damages emotional distress.

As previously mentioned, most states have not been completely relieved from laws that limit the plaintiff to recover damages of emotional distress, but have dispensed the outdated “impact rule” and have adopted a more yielding rule—the zone of danger rule. This rule “…permits recovery for emotional injuries resulting from witnessing physical harm to another or from fearing physical harm to oneself, provided that plaintiff was actually threatened by physical harm” Gottshall vs. Consolidated Rail Corporation,
988 F.2d 355 (1993). In plain English, a plaintiff shall only be able to recover damages for a freestanding claim of negligent infliction of emotional distress when the plaintiff was not necessarily physically injured, but in the zone of physical manifestation. This rule permits recovery for plaintiffs that can substantiate fear for their safety due to a defendant’s threats or actions that could have caused a plaintiff’s physical harm. Thus, if the plaintiff could have been physically injured and if the plaintiff feared being injured, the plaintiff is eligible for the recovery of freestanding claims of emotional distress.

*Gottshall vs. Consolidated Rail Corporation, 988 F.2d 355 (1993).*

In 1968, California made the first exception to the zone of danger rule in one of their most infamous cases in tort law: *Dillion v. Legg, 68 Cal.2d 728 (1968).* The case began when Erin Dillion lawfully crossed an intersection and she was hit by a negligent driver. The incident caused injuries, which proximately led to her death. Erin Dillion’s mother, Margery M. Dillion, brought three causes of actions, two of which were claims of intentional infliction of emotional distress. The first cause of action that she brought was for the psychological distress that she, the mother, encountered after being in close proximity and witnessing of the accident that led to her daughter’s death. Margery M. Dillion was with her other daughter, Cheryl Dillion. Margery M. Dillion also claimed that Cherly suffered psychological trauma from witnessing the accident. On December 22, 1965, the defendant filed his answer and moved for a judgment on the pleadings that neither claims for emotional distress were recognized by the courts of California. The trial court granted a judgment on the pleadings against the mother’s count and eventually dismissed the third count of emotional distress against the deceased sister.
The trial court reasoned that the emotional distress claims were not within the scope of the zone of danger rule because the emotional trauma was not due to the fear of her own safety. The plaintiff appealed the trial court’s dismissal of the first court and the findings for the second count.

The appellant court heavily relied on the foreseeability test to determine if the defendant had a duty to the plaintiff and her daughter. The court analyzed three factors in determining duty:

(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 *Dillion v. Legg*, 68 Cal.2d 728 (1968).

In this case, the evaluation of the above factors indicated that the mother had alleged a prima facie case and that contributory negligence was owed to the mother and sister of the deceased. Thus, the court reversed the lower court’s holding. The exception has become prominent in other states and is commonly referred to as the bystander rule.
The importance of this case stems from the history of cases prior to the one just discussed. Courts previously barred a mother’s recovery for emotional damages when she had only learned of the death of her child if the mother was not within the scope of the zone of danger rule. *Dillion v. Legg*, 68 Cal.2d 728 (1968). Thus, this case was the first to make an exception to the rule. Over twenty other courts have reviewed this case to make the same exception in their states. By further evaluating this case and “rule” one can conclude that sometimes even the more liberal “rule” is flawed and can bar a plaintiff from recovering on a genuine claim. One question is whether the zone of danger rule achieves its purpose of barring fraudulent claims? And if the zone of danger rule can bar genuine claims, what consequences are plaintiffs facing when they live in states with a more stringent “rules” for recovering damages of emotional distress?

The most limiting rule in today’s courts for recovering freestanding claims of negligent infliction of emotional distress is the impact rule, which creates a burden for the plaintiff to prove manifestation of physical trauma upon his emotional trauma. If the plaintiff had no physical contact with the defendant the plaintiff cannot recover damages, requiring there to be a preexisting physical injury or contact for the court to grant the plaintiff compensation. Thus, the impact rule is limiting the purpose of tort law—compensation of the victim. Exceptions to the rule include but are not limited to: the mishandling of a corpse, or a negligent mishandling of a relatives death. Furthermore, although the impact rule is much more limiting than the zone of danger rule, it is safe to say that they are both flawed.
The two rules still tremendously differ. The zone of danger rule provides clearer definition to whether a defendant is liable and provides a better opportunity for a plaintiff to recover damages compared to the impact rule. For instance, where a woman is shopping at a store and as she shops, a car crashes into a tree, shattering the nearby store window. The woman feared that she could have been hit by the car, the tree, or by the shattered glass but luckily was not. However, due to the traumatic event the woman is traumatized and sues for negligent infliction of emotional distress against the driver of the automobile. In a state that requires the satisfaction of the impact rule, the plaintiff would be unlikely to recover for damages because she was not hit by the car or injured. However, if the event occurred in a state where the zone of danger rule applies the plaintiff is likely to recover damages because she was in the scope of danger and feared for her safety. Thus, the impact rule is more limiting than the zone of danger rule; yet it is still a commonly used rule in determining whether a plaintiff can recover damages in emotional distress claims. It is important to analyze the adoption of the rule to better understand emotional distress lawsuits.

The impact rule was first enacted to prevent the flood of litigation, especially of fraudulent claims. However, many have criticized the rule. Critics of the rule believe that the law is too ambiguous to prevent trivial claims, yet, discourages victims for suing for emotional distress. Consequently, it has limited potential plaintiffs from being compensated from a potential defendant’s wrongdoing. Thus, provoking the abandonment of the impact rule in many courts and leading them to adapt the zone of danger rule or to rely upon the foreseeability standard test. Interestingly enough, Florida
has yet to abandon the impact rule, but has recently used the both the impact rule and the foreseeability standard test to determine if a plaintiff should claim damages for their independent claims of the negligent infliction of emotional distress. The thesis will further discuss the limitations of claiming freestanding emotional distress damages. It is imperative to keep in mind the rules that other states have established to determine whether Florida should adapt another rule and whether there is an alternative for emotional distressed plaintiffs to compensate them for the defendant’s wrongdoing.

The thesis has previously mentioned the case *Dillion v. Legg*, 68 Cal.2d 728 (1968). *Dillon* developed the first exception to the zone of danger rule. The exception allows close relatives of a deceased or seriously injured person to recover damages when they are not in the zone of danger, but have witnessed the injury of their relative. However, the case also opened the door to a new standard in tort law regarding the intentional infliction of emotional distress—the foreseeability standard. This standard is more liberal than the zone of danger rule and in some jurisdictions has replaced other rules previously enacted. Under the foreseeability standard, the defendant must be reasonably able to foresee the consequences of his or her actions, in this case the emotional distress endured by the plaintiff. Although *Dillon* only included close relatives within the zone of danger rule, the case has been cited a plethora of instances and has been used as a guideline to help expand and generate the foreseeability standard. Thus, making this standard the most liberal standard commonly used in the states. Although not used widely, it is common for states to adapt the standard when a court believes the impact rule or zone of danger rule are too limiting for a case. For instance,
Florida tends to use the impact rule, but has also previously used the foreseeability standard.

The inception of the impact rule in Florida originates from *International Ocean Tel. Co. v. Sanders*. This case took place in 1893 during the era when telegrams were in use. The Plaintiff sued the defendant for not promptly delivering a telegram from the superintendent of St. Luke's Hospital. The telegram stated to the defendant the following: “Jacksonville, Fla., Oct. 4th, 1890. Charles Saunders, Titusville: Wife dying. Come at once, or send wishes by wire. [Signed] Superintendent St. Luke's Hospital.” The message was not delivered for sixty hours, roughly ten hours after the Sander’s wife’s death. The Plaintiff claimed that he suffered emotional harm due to the telegraph company’s mistake that led to him “not being able to be with his… wife in her dying hours, and in not being able to make preparations for his wife’s funeral and interment, all of which damaged plaintiff in the sum of $1,995,’ etc.” *International Ocean Tel. Co. v. Sanders* (1893). The court held that at most, the plaintiff was entitled to nominal damages for the delay of the message, but that the Court had no authority to grant damages beyond that. The reasoning behind the court’s decision is the that “[t]he resultant injury is one that soars so exclusively within the realms of spirit land that it is beyond the reach of the courts to deal with, or to compensate by any of the known standards of value.” *International Ocean Tel. Co. v. Sanders* (1893).

The evolution of the impact rule is most evident in the late 1900’s in several Florida Supreme Court cases; in *Champion v. Gray*, a complaint was filed after a drunk driver drove off the rode and killed a pedestrian, Karen Champion. Joyce Champion,
Karen’s mother, heard the impact and went to the accident scene immediately where she found that her daughter had died on the spot. Due to precedent on the impact rule, the trial court immediately dismissed the case. The dismissal was affirmed by the district court since the plaintiff, Joyce Champion, was not physically impacted. The Florida Supreme Court was then able to consider if the impact rule should be overturned in certain instances where the Plaintiff has suffered emotional harm due to the physical impact of another. The Florida Supreme Court held that emotional harm resulting from death or significant physical injury as a result of “a negligent injury imposed upon a close family member… is too great a harm to require direct physical contact before a cause of action exists.” *Champion v. Gray* (1985). Thus, an exception to the impact requirement was established by the court.

Following the ruling, the court established a foreseeability test that other courts in the United States have adopted. The objective of the test is to prevent fraudulent claims for emotional distress, while also recognizing that the defendant has a duty to the plaintiff. The three factors in the test are as follows:

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. *Champion v. Gray* (1985).

Thus, the ruling and precedent that the court established opened the doors to exceptions to the impact rule.

Ten years later, the impact rule was questioned once again by *Zell v. Meek* (1995). At night, after arriving from a long day of fishing, Meek and her parents went to her father’s apartment to find a box at his front door. When Meek’s father went to pick it up from the floor, the box exploded. Meek and her mother were in the kitchen, where numerous damages occurred during the explosion. However, Meek was not physically injured and made her way outside her father’s apartment, by the front door, where she witnessed her father dying. Meek suffered from numerous mental illnesses and she had to see multiple psychologists over a span of two years. She did not immediately suffer from physical injuries, but nine months after the explosion she began suffering from several physical impairments. Meek sued the owner of the apartment complex (Zell) and the management company (First Property) for negligent infliction of emotional distress.

The Circuit Court of Duval County granted the defendant summary of judgment; the Plaintiff appealed. The District Court of Appeals reviewed the following questions:
(1) Is the interval of time between physical harm and emotional harm one of importance in determining if there is a cause of action according to Champion v. Gray, (1985)? (2) Or is there an arbitrary period that can be presumed? The District Court of Appeals reversed and remanded and certified the question presented as one of public importance. The Supreme Court of Florida concluded that the interval of time between physical and emotional harm is critical in acknowledging if causation exists, but the question can be answered on a case-by-case basis. Meek v. Zell (1995). The Supreme Court affirmed the district court’s decision, which allowed Meek to establish all elements of the Champion test; and thus, he recovered damages for emotional distress.

In 2001 Florida’s Supreme Court revisited the impact rule. The court reevaluated the impact rule and once again make an exception. In September 1992 Linda Hagan and Barbara Parker were drinking Coke that they agreed was flat. After holding the bottle in the light, Hagan, saw what appeared to be a condom in the bottle. Both women were distraught by what had happened and Hagan was immediately nauseated. The next day, both women went to a test facility and were tested for HIV/AIDS; the tests came back negative. After the incident, Dr. Bayer, Coca-Cola’s beverage analyst, examined the bottled and claimed that what Hagan and Parker believed to be a condom was actually mold. Hagan v. Coca-Cola Bottling Co. (2001).

At the trial court, the jury returned the verdict in favor of the plaintiffs, but the court reduced the jury award. Both sides appealed to the district court. The district court agreed that it there was conflicting evidence at trial as to whether there was a condom or mold in the Coca-Cola beverage, therefore there was sufficient evidence to create a
jury issue. Although the court established there was a question of fact for the jury, the court reversed the verdict reasoning that the plaintiffs did not have a claim under the impact rule because neither of the women had suffered physical injury. The plaintiffs appealed to Florida’s Supreme Court. The certified question of law presented to the court was as follows: Does the impact rule bar claims for consumption of foreign substances in a beverage product if there is no physical injury? The Supreme Court created another exception and held that “a plaintiff need not prove the existence of a physical injury to recover damages for emotional injuries caused by the consumption of a contaminated food or beverage.” *Hagan v. Coca Cola Bottling Co.* (2001). Therefore, quashing the prior decision and remanded the case to trial court.

One of the most recent cases in which Florida’s Supreme Court attempted to redefine the impact rule was in *Willis v. Gami Golden Glades* (2007). Upon arriving at a Holiday Inn in Miami Dade County Mrs. Willis was instructed by a security guard to park across the street due to the hotel’s overflowing parking lot. Mrs. Willis’ expressed concerns to the security guard of the parking lot across the street, the security guard would not escort her and the hotel assured her that the lot was safe. As she exited her vehicle, Mrs. Willis was approached by a gunman. The gunman put a gun to her head, and ordered her to empty her pockets and he took the keys to her rental car. As Mrs. Willis was trying to walk away, the gunman waived for her to come back and sexually assaulted and battered her. After the robbery and sexual harassment, Holiday Inn’s security guard and staff were inattentive with Mrs. Willis’ situation. The next morning, she went to the emergency room where she was attended by several doctors that would
prescribe medication for her to deal with her anxiety, depression, panic attack, and post-traumatic stress disorder that resulted from the incident.

Mrs. Willis sued Holiday Inn for emotional damages, but the trial court entered summary judgment against her, reasoning that the impact rule barred damages that Mrs. Willis could receive. The plaintiff appealed and the district court affirmed the trial court’s decision. The Florida Supreme Court reviewed the following questions: (1) Is the pistol being placed against the victim’s head and her being sexually assaulted satisfy Florida’s impact rule? (2) Is being battered and assaulted sufficient to satisfy a “freestanding tort” exception to the impact rule? (3) Is there a “special relationship” that satisfies and exception to the impact rule? and (4) Should the impact rule be abolished? The Florida Supreme Court affirmed the first certified question and did not answer the other two certified questions; thus, quashing and remanding the district court of appeals decision. Their reasoning was that Mrs. Willis’ assailant made contact with her left temple with the gun, with her body when her assailant searched her, and again with her body when he sexually battered her. This concluded that “actual impact” according to the impact rule includes even the slightest impact is sufficient whether or not there was physical harm. Willis v. Gami Golden Glades (2007).
Chapter 2: Neuroscience, Psychology, and Emotional Distress

There is currently a gap between the current Restatement torts and science in defining emotional distress. Although the term “emotional distress” is currently legally defined by the courts, neuroscientists claim that emotional trauma be accompanied by physical injury is misleading in that it presumes that with emotional distress there always is physical injury, unless the emotional injury falls under the bystander rule. Furthermore, neuroscientists, unlike the courts see the emotional injury as just as important and trustworthy as physical injury because current advances in the field prove that emotional distress is physiological and not just imagined.

Through neuroimaging neuroscientists have a better understanding of how and why emotional distress, a cognitive disorder, develops after a tragic event, Neuroimaging “allow[s] scientists to look closely at the brain regions involved during and after a traumatic event to learn how they function and interact.” (Grey, 2011, p. 10). The field has proven that neural systems are affected during and following stressful situations, “the brain is flooded with stress hormones, which result in a number of physiological changes to the neural networks that regulate memory and fear” (Grey, 2011, p. 11). Furthermore, leading neuroscientists believe that there is physiological impact in the brain or “physical injury”. Extensive neurological research has proven that physiological impact occurs during such events because:

[w]itnessing or experiencing a traumatic event involves a state described as acute stress, which activates a number of hormonal and neurotransmitter systems. The systems that
are activated trigger a chain of chemical processes that result in alterations in the neural networks that regulate memory and fear. These physiological changes can materialize in the form of emotional distress symptoms, particularly anxiety symptoms. (Grey, 2011, p. 11).

Research suggests that specific sub regions are associated with the emotional trauma and that the dysfunction in these regions triggers and maintains the emotional trauma. Multiple studies highlight the dysfunction in these sub regions when anxiety disorders are experienced and that traumatic memory is what forms the basis of anxiety disorders.

The amygdala/prefrontal cortex circuitry is central to this process. The consolidation process enables the interpretation of emotional information as well as controls the mechanisms that influence what individuals perceive in their environment and how they interpret that information (the attentional and interpretive processes.) Research suggests that when this circuitry is disrupted, anxiety results…

[Concluding that] acute stress impairs the prefrontal cortical function. This … leads to alterations in interpretive processes, or more precisely, a threat-oriented bias in anxious individuals. As a result of this bias, individuals with anxiety disorders react to stimuli that would objectively be
interpreted as neutral or only mildly aversive with distress, hyperarousal, and attempts to avoid the anxiety-provoking object or situation (Grey, 2011, p. 13).

The physiological changes within the brain should be sufficient for a person with such anxiety disorders to recover from emotional damages, but it is not. It is not something that is not “seen” and hence according to public opinion, it cannot be legitimate. However, the impact rule was created during a time that people were not aware of PTSD and other severe anxiety disorders. The awareness and research of these anxiety disorders amongst the United States is starting to reshape public opinion of anxiety disorders. Americans are starting to realize that these emotional damages have an impact on one’s neurological activity, more specifically one’s amygdalar activity.

The amygdala is the central focus to neurologists when studying fear in experiments because it is the part of the prefrontal cortex that is mostly affected by emotions, especially in cases of PTSD (post traumatic stress disorder), which is the most severe case of anxiety disorder. As a matter of fact, “[neuroimaging] results… show that fear conditioning leads to increases in amygdalar activity… which can… influence sensory processing… [resulting] in the individual experiencing and exhibiting a fear response” (Grey, 2011, p. 15). This has been supported in two studies, which will be discussed.
The first study that will be discussed was conducted in 2004, this study compared thirty-six Vietnam veterans with PTSD, who had no history of major conditions, to veterans without using PET scans. The results of the study found that:

[the] hyperresponsivity of the amygdala and… of medial prefrontal regions are… reciprocally related. The more hyper- and hypoactive these regions were, the more severe the symptoms. These results support the hypothesis that PTSD symptoms reflect extreme dysregulation in these regions and neural mechanisms. While such a relationship between the amygdala and medial prefrontal regions in clinically diagnosed PTSD patients had been suspected, no previous studies in the literature had documented data in support of such a relationship (Grey, 2011, p. 16).
The second study conducted by neurologists was a meta-analysis of studies to investigate the emotional processing of patients with anxiety disorders using fMRI and PET scans in 2007. These scans were taken of individuals with PTSD, social anxiety disorder, and specific phobia. The scans of these individuals were then compared to healthy individuals who had undergone fear conditioning.

The results indicated that patients with the anxiety disorders showed consistently greater activity in the amygdala and insula. Even more significant, the dysregulation in the neural circuitry of PTSD patients was more exaggerated than that of patients suffering from the other anxiety disorders. Only patients with PTSD showed hypoactivation in the dorsal and rostral anterior cingulated cortices and ventromedial prefrontal cortex additional structures linked to the experience and regulation of emotion (Grey, 2011, p. 16).

These results are imperative because they reveal that “the amygdala and insula are critical structures in the common neurobiological pathway in anxiety disorders, and support the view that a core fear system exists and when it is activated, anxiogenic symptoms result” (Grey, 2011, p. 16).

Aside from the two studies that support neurologists' belief that emotional distress affects one physiologically or manifests physical impact, neurologists have also another finding that is important when analyzing the limitations for recovering in emotional distress cases. The finding suggests that after stress is triggered there is a
time delay in which it takes for cellular changes to be completed. Thus, providing evidence that “a single exposure to a traumatic event can cause long-lasting cellular changes, or stress-induced plasticity, in the amygdala” (Grey, 2011, p. 12).

… [N]eurologists have been able to concur that: physiological changes… occur in the brain after an individual experiences or witnesses a traumatic event can result in a dysfunction of the neural networks that regulate memory and fear.…[When such a traumatic event occurs the prefrontal cortex is supposed to override adverse effects from emotional stress.]…However, when the prefrontal cortex is prevented from carrying out this function, that dysfunction manifests itself in the symptoms of anxiety disorders. Even though the only symptoms the individual may demonstrate are emotional in nature (and misleadingly believed to be solely subjective symptoms), scientists may now begin to document and observe the physiological changes that occur in the brain after experiencing trauma as a result of advanced neuroimaging techniques (Grey, 2011, p. 17).

Thus, neurologists have found overwhelming evidence that not only does emotional distress impact one physiologically, but can also have a delay occurring after a traumatic event. This is imperative when analyzing tort law in American courts because
it provides justification that there is a gap between the legal definition of emotional
distress and scientific evidence.

Psychologists also acknowledge general anxiety disorders and posttraumatic
stress disorders as legitimate and are classified under the DSM-5 as disorders.
According to the Anxiety and Depression Association of America (ADAA) people who
are affected by general anxiety disorders “experience excessive anxiety and worry,
often expecting the worst even when there is no apparent reason for concern… [it] is
diagnosed when a person finds it difficult to control worry on more days than not for at
least six months and has three or more symptoms” (“General Anxiety Disorder (GAD)
”, 2015). These disorders come on gradually and can be sparked from a traumatic
experience.

According to psychologists and the Anxiety and Depression Association (ADAA)
posttraumatic stress disorder “is a serious potentially debilitating condition that can
occur in people who have experienced or witnessed …life-threatening events”
(“Posttraumatic Stress Disorder (PTSD)”, 2015). They do not believe that there is
apparent and noticeable physical injury to a reasonable person in order for one to be
affected by these disorders. Thus, making the impact rule inconsistent with psychology.

English courts take a distinctive approach on emotional distress claims. Whereas
American courts define emotional distress based upon whether there is notable physical
injury which occurred with the claim of emotional distress, English courts have bridged
this gap between science and law by making medical professionals the primary decision
makers in deciding whether someone suffers from emotional distress by using scientific
evidence and medical professional witnesses to testify to the emotional distress and its manifestations. Thus, making the English requirements more favorable for recovery based upon emotional distress than it is under the Restatement of Torts. (Grey, 2011, p. 17).

Under the Restatement of Torts for emotional distress claims, the term “emotional disturbance” is not defined nor included within the definition of physical harm. However, emotional disturbances are defined and included in English law for claims of emotional distress. Furthermore, “English law has traditionally required the emotional disturbance to constitute a ‘recognizable psychiatric illness’ before it is actionable in the absence of physical harm” (Matthews, 2009, p. 1180). The term “recognizable” in this instance refers to the recognition from the medical profession. Thus, if there is an absence of physical harm, the medical profession can justify a claim of emotional distress (Matthews, 2009, p. 1180).

There is an apparent gap between neuroscience and American tort law. With the help of neuroimaging, neuroscientists have been able to identify that a person is physically impacted by traumatic events that trigger emotional distress and that emotional distress might not occur immediately after the traumatic event. These findings are not consistent with American tort law, where judges (who might not be aware of these findings) must initially indicate whether emotional harm has occurred because of an event. According to the courts, one can only be compensated for emotional distress if noticeable physical injury was manifested with the emotional harm during the accident, unless the bystander rule is applicable. This is clearly inconsistent and the
legal definition should and must be consistent with science. Thus, the need for tort reform is imperative.

Since common law (the impact rule) is not consistent with neuroscience, it would be beneficial to look at other threshold requirements for emotional distress to determine if any of them are more consistent with neuroscience. The other two requirements are the zone of danger rule and the foreseeability standard, which were both previously mentioned.

The zone of danger rule requires the plaintiff to be within the scope of danger, which poses a serious threat of potential physical injury. However, cases have arisen where the court might not believe that the plaintiff was in the zone of danger for physical injury. Once again, there is a gap in neuroscience and the application of this standard. If one is not in the zone of danger, one can still easily suffer from emotional harm, which according to recent studies, has proven to manifest physical harm that is not noticeable to a layperson.

The foreseeability standard is adapted usually when courts do not believe that the zone of danger rule or the impact rule cannot be properly applied. The standard finds the defendant liable if physical impact is foreseeable. Once again this creates a gap in American tort law and scientific facts by making judges and juries the sole finders of whether there is emotional harm and then only if noticeable physical impact was foreseeable or could have occurred.

As noted previously, Florida generally responds to emotional distress claims by applying the common law doctrine—the impact rule. The history of Florida law and the
application of the common law doctrine can be and should be reevaluated with recent scientific studies and findings of emotional distress.

The first flaw that needs to be addressed in Florida’s application of the impact rule is its inconsistencies. The first prominent inconsistency in the application of the impact rule was seen in *Champion v. Gray*, which held that one can recover damages if great harm has been inflicted upon a family member. Although, this case was an appropriate step towards the elimination of the impact rule it creates inconsistencies and does not adhere to the common law doctrine, which requires some tangible proof of injury.

The application of the impact rule’s inconsistencies in Florida partly stems from the ambiguous definition of “physical impact”—what does “physical impact” include and what does it exclude? This question is currently up to interpretation of judges that decide the law on the cases. This is apparent in *Hagan v. Coca Cola Bottling Co.* (2001) and *Willis v. Gami Golden Glades* (2007). The certified question in *Hagan v. Coca Cola Bottling Co.* (2001) was whether or not consumption of a contaminated food or beverage establishes a sufficient as a basis for plaintiffs’ claims of emotional distress, if there was no physical injury? Though the trial court did not believe so, the Florida Supreme Courts did. Thus, allowing another exception to the impact rule. The case in *Willis v. Gami Golden Glades* (2007) differs from *Hagan v. Coca Cola Bottling Co.* (2001) in that in *Willis* the Florida Supreme Court allows sexual battery or assault and the placement of a gun against someone’s head as sufficient impact for the plaintiff to successfully claim damages for emotional distress.
Another major flaw in the application of the impact rule is that it doesn’t consider the doctor’s expertise and opinions to validate or in other cases, invalidate the emotional trauma caused. Neurology and psychology do not believe that emotional harm has to manifest physical injury that is noticeable to a layperson. This provides evidence the impact doctrine is inconsistent with the medical field. For instance, in *Willis v. Gami Golden Glades* (2007) the trial court did not allow the plaintiff to recover for emotional distress even though the judge was aware that the morning after the incident the plaintiff went to the emergency room and was prescribed medication for several psychological disorders, including but not limited to anxiety and PTSD. The judge’s reasoning was that the plaintiff did not show noticeable physical injury under the impact rule even though the emotional trauma that the plaintiff endured was clearly a result from the incident discussed in the case.

Eventually, Florida may adapt a more liberal standard than the impact rule due to the increasing pressure for exceptions made in the past. Thus, it is imperative that the United States’ completely eliminate the impact rule from common law and adapt a more liberal threshold or expand the impact rule’s exceptions that will not overly burden the courts but will allow evidence of verified physical changes in the brain function, which are consistent with the medical field and scientific evidence. The courts rely upon doctors and neuroscientists to legally define the term of emotional distress and implement a threshold requirement similar to England’s. In the United States, courts will determine whether one suffered from emotional distress on a case to case basis from several medical expert witnesses. When the evidence is presented to jurors, they will
have the discretion to decide if the traumatic event that resulted in emotional distress was wrongful, and whether the defendant’s negligence was the cause of the emotional trauma.
Chapter 3: The American Disabilities Act and Emotional Distress

Emotional trauma in many cases can cause a plaintiff to develop severe anxiety disorders, such as Post Traumatic Stress Disorder (PTSD). In this section of the thesis questions asked include: However are these anxiety disorders classified as a disability under the American Disability Act? If so, are the courts legally wrong for requiring the impact rule in emotional distress cases that have proceeded in developing severe anxiety disorders such as Post Traumatic Stress Disorder? To answer these questions one must evaluate what constitutes a disability under the American Disability Act, and how courts interpret it.

The American Disability Act was passed by Congress in 1990 to provide a national mandate that protects the disabled from discrimination. The purpose of the Act is to:

1. to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
2. to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
3. to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities (42 U.S.C.A. § 12101 (b), 1990).

More importantly, the ADA defines what constitutes a disability as an individual who has: “(a) a physical or mental impairment that substantially limits one or more of that individual's major life activities, (b) has a record of such an impairment, or (c) is regarded as having such an impairment” (42 U.S.C.A. § 12102, 1990). With these standards the individual does not have to meet all three criteria, just one. The criteria must also limit an individual in a major life activity.

Thus, severe emotional distress claims that have developed from a traumatic experience often are accompanied by severe anxiety disorders such as Post Traumatic Stress Disorder. According to the ADA’s definition this is a disability because it is a mental impairment that has substantial impact on an individual's life. It impacts an individual's life preventing the person from performing ordinary tasks such as working or functioning properly. For example, Chris Kyle (a United States Navy SEAL, who was considered the most lethal sniper in history), suffered from PTSD after years in combat. His PTSD affected his family and his role as a spouse and father.

The American Disability Act and the legal definition of emotional distress form an apparent paradox for plaintiffs who are making claims of emotional distress, in which their emotional distress is a severe anxiety disorder such a post-traumatic stress
disorder. Currently under the ADA, a mental disability does not have to be associated with a physical injury. However, for a tort cause of action of emotional distress of emotional distress requires severe anxiety disorders that have occurred from traumatic events to be accompanied with a physical injury under the impact rule. For instance, let’s suppose Lisa, a college student, wakes up at the middle of the night to her roommate getting sexually abused and battered. Lisa is severely disturbed from the event and is clinically diagnosed with post-traumatic stress disorder, which is so severe that she is hesitant about being around men. Her father cannot give her a brief hug or talk to her for an extended period of time without her getting an anxiety attack. Lisa sues for emotional distress, but the court does not award her damages because there was no physical manifestation under the impact rule. In the ADA congress found that, …physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination (42 U.S.C.A. § 12101, 1990).

Post Traumatic Stress is a severe form of emotional distress that is classified as a mental disability under the ADA. Plaintiffs claiming damages for the disability are precluded bringing a cause of action because of an institutional barrier that the courts have imposed on society that requires plaintiffs suffering from severe anxiety disorders to prove physical impact—the impact rule. Thus, the impact rule and other thresholds to prove emotional distress in the United States are not only inconsistent with scientific
research, but also with the American Disability Act. Although, the example of Lisa is hypothetical, cases like the depicted occur. The main purpose of tort law is to compensate the individual and courts have a duty to right the wrong and provide compensation to plaintiffs suffering emotional distress that encompass mental disabilities.

Disabilities such as the ones in the example of Lisa, are common and can sometimes lead to future complications to a disabled man or woman when they are not compensated for the wrong done to them that has led to their disability. These complications include difficulties in the workforce. Fortunately, the Equal Employment Opportunity Act does set forth remedies for situations such as these, but unfortunately does not prevent them.

This inconsistency needs to be brought to the attention of the courts by eliminating the thresholds that create barriers for emotional distress claims that encompass severe anxiety disorders, such as PTSD. There are two options that courts can use: create exceptions to these thresholds or eliminate these thresholds altogether. The first option could be achieved by state supreme courts' finding that these thresholds for emotional distress are inconsistent with the ADA when the emotional distress endured by the plaintiff encompasses a severe anxiety disorder. Thus, creating another exception to the rule. The exception is that the rule would not be applied in cases concerning the emotional distress that consists of anxiety disorders, including post traumatic stress disorder.
Currently, there are no exceptions for a plaintiff suffering from emotional distress that encompasses severe anxiety due to the impact rule and other similar thresholds. However, there are currently alternatives that plaintiffs can pursue to claim damages for an unfortunate event that might have resulted in emotional distress. Such claims that a plaintiff could be compensated for in court are claims for lost earnings, claims of medical fees and expenses, and possibly claims of civil rights. The following paragraphs will discuss how and the reasons why a plaintiff can make these three claims as an alternative to the emotional distress

a.) Compensation of Lost Earnings

Compensation for lost earnings can apply to many claims for plaintiffs’ emotional distress when there are severe anxiety disorders. These plaintiffs might not have been able to perform their jobs to the best of their abilities; and hence, might have had to miss days of work or have taken a hiatus from their career. It might be beneficial for those affected by anxiety disorders to file a claim for compensation of loss earnings, in which the court would calculate the earnings lost prior to the hearing and calculate lost future earnings by using a

...basic strategy ... [by] calculating lost future earning capacity ... to compare the amount the plaintiff was capable of earning before the injury to the amount the plaintiff is or was capable of earning after the injury. Generally, the authorities agree that this element of damages is intended to compensate for loss of potential. By focusing on what the plaintiff could have earned, rather than what
the plaintiff would have earned, the courts developed a theory that authorizes awards for persons who perform unpaid labor in the home or whose work is not otherwise compensated in the market. The common starting point for calculating loss of earning capacity is the plaintiff’s established earnings record. When the plaintiff does not have an earnings record, or has only a very limited earnings record, it is necessary to turn to statistical data to determine the level of earnings the plaintiff could have recovered (Lamb, 1996, p. 302).

b.) Medical Fees

It is likely that when a plaintiff suffers from emotional distress with extreme anxiety disorders, the plaintiff will need to have their medical expenses covered by the defendant. Medical expenses are normally considered a type of damages by the court. The damages include the cost of past and future treatment A plaintiff who suffers from emotional distress could consult several psychologists and psychiatrists. The defendant in legitimate emotional distress cases should then cover the expenses for this medical and psychological treatment, specifically in cases where an individual’s insurance policy only compensates for a limited amount of the damages.

c.) Civil Rights

In rare circumstances a plaintiff who is suffering from emotional distress which includes severe anxiety disorders such as post traumatic stress disorder can file a civil rights lawsuit. The purpose of these lawsuits is to compensate victims for discrimination.
For these people claiming anxiety, civil rights actions can be filed when a victim’s personal rights and liberties have been violated. For example, the EPA has established procedures to resolve civil rights disputes within their federal agency.

The Title VI complaint process includes seven steps, all of which encourage the use of informal dispute resolution and voluntary compliance: the EPA will (1) acknowledge the complaint, (2) decide whether to accept, reject, or refer the complaint, (3) investigate the complaint, (4) make a preliminary finding of whether the recipient is in compliance following investigation, (5) if necessary, will issue a formal finding of noncompliance, (6) will allot a ten-day period, during which voluntary compliance or agreement with the EPA may occur, and (7) afford a hearing/appeal process to those who fail to voluntarily comply (Mckinney, 2006, p.119).

This civil rights’ procedural requirement is extensive, but could benefit victims of emotional distress that includes severe anxiety disorders. In certain cases that involve these claims a defendant may have violated the American Disability Acts. This is based upon the discrimination against the disabled and violating the plaintiff’s personal liberties and freedoms. This type of action is not subject to the impact rule, in which a plaintiff must prove physical manifestation of an emotional distress injury.
Chapter 4: The Alternative

Plaintiffs with emotional distress might be more successful in recovering damages from civil rights administrative proceedings. To understand how a civil rights action can present an advantage to plaintiffs who have suffered from emotional distress, it is imperative to analyze the differences and similarities of traditional lawsuits versus the civil rights action. It is also important to determine the types of cases, which can be presented in civil rights proceedings as well as whether the civil proceedings is a more lucrative approach for emotional distress victims.

The Civil Rights Act has eleven subsections or titles (i.e. Title I), which establish the basis for actions under the Act. The purpose of this legislation is to:

…enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes (Civil Rights Act of 1964, 1964).

The eleven titles protect voting rights (Title I), provide injunctive relief against discrimination in places of public accommodation (Title II), require desegregation of
public facilities (Title III), desegregation of public education (Title IV), establishes a commission of civil rights (Title V), prohibit discrimination in federally assisted programs (Title VI), provide equal employment opportunity (Title VII), provide for registration and voting statistics (Title VIII), provide for intervention and procedure after removal in civil rights cases (Title IX), establish community relations service (Title X), and miscellaneous concerns of Americans’ civil rights (Title XI). In this section, I will only briefly explain a few titles that are relevant for the purpose of understanding the Act and how damages for emotional distress are not as limited.

Title V establishes the co-commission on Civil Rights and the rules of procedure for these hearings. The duties that the commission is obligated to do include:

(1) investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin…;

(2) study and collect information concerning legal developments constituting a denial of equal protection…;

(3) appraise the laws and policies of the Federal Government with respect to denials of equal protection of the laws under the Constitution…;

(4) serve as a national clearinghouse for information in respect to denials of equal protection of the laws … (Civil Rights Act of 1964, 1964).
Title VI of the Act prevents discrimination by a Federal financial assistance program; if such discrimination does occur, the federal department or agency can be subject to judicial review.

Title VII enforces the Equal Employment Opportunity Act, which makes discrimination because of race, color, sex, or national origin in employer practices, labor organizations, joint labor-management committees etc. unlawful. A five-member commission known as the Equal Employment Opportunity Commission is empowered to enforce the Act, while having the power to:

1) …cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) …pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) …furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

…

(6) … refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 706, or for the institution of
a civil action by the Attorney General under section 707, and
to advise, consult, and assist the Attorney General on such

Potential Plaintiffs of Civil Rights actions follow a distinct procedural process
when filing a suit. They must file the Discrimination Complaint Form through the Office
of Civil Rights within 180 days since the last incident of discrimination. The Office of
Civil Rights has jurisdiction over three general areas: Title VI of the Civil Rights Act, Age
Discrimination Act, and Rehabilitation Act. The Office of Civil Rights will determine if
there is a valid a complaint according to the act.

Emotional distress lawsuits and civil rights claims have similarities. They are both
considered civil actions that utilize the same burden of proof, the preponderance of
evidence standard, which means that it is more than likely that the incident has
happened. There are also lawsuits that can be filed in both state and federal
jurisdictions. Another important similarity is that both actions require the plaintiff to
satisfy a threshold to sue.

Civil rights lawsuits and emotional distress lawsuits have one major aspect in
common—they both require that a plaintiff have certain requirements for the case to be
litigated. Civil rights actions have a procedural requirement the plaintiff to go through the
Office of Civil Rights and there must be an approval of the discrimination complaint form
prior to the lawsuit. Cases of emotional distress, on the other hand, usually have a
substantive legal requirement, that is to satisfy the impact rule. The impact must be
specifically alleged, unless the jurisdiction of the lawsuit requires a different standard.
Although civil rights and emotional distress proceedings have certain requirements prior or during litigation, it would be useful to know if one choice of remedies is easier to pursue than the other. In 2004 a study on civil litigation cases from 1962 to 2002, the results were surprising. As seen in Figure 2 the number of civil trials in federal courts has decreased throughout the years. However, as seen in Figure 3 the dismissals of cases has decreased substantially. After calculations there were roughly the same number of cases in 2002 and in 1962; but when the peak of civil litigation cases hit in 1985 the number of civil trials completed was substantially higher than in 2002 (Galanter, 2004, p.464).

Figure 2: Number of Civil Trial, U.S. District Courts, by Bench or Jury, 1962-2002


(Galanter, 2004, p.464).
When analyzing the statistics it is important to recognize where the decline is coming from and for our purposes it is imperative to especially analyze civil rights cases and torts cases in relation to these statistics.

According to the American Bar Association's findings on Tort Trials from 1962 to 2002, federal tort trials had dropped from 55% of total trials to 23.4% of total trials. According to the American Bar Association this is largely due to an increase of tort trials being settled and not going to court. From the examination of the statistics gathered from the American Bar Association it could be hypothesized that the decrease in federal actions may be the result of these cases being filed in state courts rather than the federal courts. Specifically looking at tort law, state courts tend to be more lenient especially in emotional distress cases in which the state might not implement the impact doctrine (Galanter, 2004, p.468).
Civil Rights Trials from 1962 to 2002 were remarkable. In 1962 roughly 1% of cases were Civil Rights and by 2002 Civil Rights consisted of a third of all litigation (see Figure 4). “For 30 years, even as the portion of cases tried has fallen, civil rights has been the type of case most likely to reach trial: trials were 19.7 percent of all civil rights dispositions in 1970 and 3.8 in 2002” (Galanter, 2004, p.468).

Figure 4: Civil Rights Trials, U.S. District Courts, 1962-2002

Thus, civil rights actions are more likely than torts lawsuits (including emotional distress lawsuits) to go to trial in the federal court system. In contrast, tort lawsuits are more likely to go through alternate dispute resolution than go to litigation. However, civil rights actions that do go to trial are not likely to be successful. There are pros and cons
to cases being settled through alternate dispute resolution versus litigation. While litigation is more time consuming and costly, if there is a strong case, the plaintiff is more likely to recover and also receive more compensation. Hence, it is wiser for a plaintiff to go to trial for civil rights violations, which are more lucrative (Galanter, 2004, p.469).

Apart from successful civil rights actions having a more lucrative outcome than successful emotional distress lawsuits civil rights complaints are less burdensome than filing a complaint of emotional distress because the procedural requirement needs to be achieved before litigation. If the impact doctrine is not met it can still go to trial. This can make a civil rights action less financially and timely burdensome on the plaintiff and their attorney (Galanter, 2004, p.469).

As early as 1997 there was evidence that harassment can lead to post traumatic stress disorder. For instance, the National Women’s Study has indicated that women who experience sexual harassment are more likely to experience anxiety disorders (Dansky and Kilpatrick, 1997). Anxiety disorders are a form of emotional distress in neurology. However, harassment does not have a physical manifestation. Thus, if harassment does produce emotional harm, a plaintiff may not recover damages of emotional distress. Many times harassment that is not accompanied by physical harm causes emotional harm. In such cases, if the harassment is accompanied with discrimination, the plaintiff can file an action for violation of his or her civil rights. In the following section the passage will discuss where harassment in the workforce, police brutality, sexual harassment, and harassment in the LGBT community are areas where
potential plaintiffs have been emotionally harmed and can benefit from filing a civil rights action, instead of an emotional distress claim in state court.

Sexual harassment is broadly defined as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature…” (29 C.F.R. § 1604.11, 1999). Sexual harassment is usually grouped into two categories: quid pro quo sexual harassment (requests for sexual behavior in exchange for a benefit) and hostile environment sexual harassment (unwelcomed verbal and nonverbal contents that are sexual). In these cases the primary injury that results from sexual harassment is emotional distress. From a psychological perspective

[v]ictims of sexual harassment have reported a variety of psychological reactions consistent with fear reactions including emotional numbing, constriction of affect, repeated re-experiencing of the trauma by intrusive waking images or dreams, anxiety, and depression (Koss, 1990). These initial psychological shock reactions can result in longer-term responses such as fear/avoidance, further affective constriction, disturbances in self-esteem and sexual dysfunction (Koss, 1990). The trauma associated with sexual harassment and the fear reactions due to this trauma can be of sufficient intensity and duration to meet these final diagnostic criteria of PTSD (Avina, C., & O’Donohue, W., 2002).
This is enough for sexual harassment to potentially satisfy DSM-IV-TR PTSD Criteria A2 through F without the court considering it as emotional harm in spite of there being no external physical harm. Furthermore, sexual harassment has the capacity to damage the amygdala causing physical manifestation. However, as previously mentioned, presently this is not sufficient for a plaintiff of sexual harassment to file an emotional distress claim in the courts.

It is not explicitly included, but sexual harassment is considered gender discrimination under Title VII, and thus is not just an emotional distress claim but also a civil rights claim. Plaintiffs that have been sexually harassed can typically have their claims are typically handled in civil rights courts. Under the Equal Employment Opportunity Commission, the same is true for people that are discriminated and harassed in the workforce. However, there are many cases of harassment and discrimination that can potentially lead to emotional harm as classified by psychologists and neurologists that should have the opportunity to file in civil rights courts, but the laws do not explicitly include civil rights claims.

The LGBT (lesbian, gay, bisexual, and transsexual) community is currently a community that is facing much harassment. The harassment and discrimination that this community faces can be remedied through the civil rights act or through more traditional lawsuits if the courts allow recovery to be expanded. However, the harassment and discrimination that the LGBT community faces is often accompanied with emotional distress, especially among the community’s younger members.
Every biennial year GLSEN (Gay, Lesbian, and Straight Education Network) does a national study to document and examine the challenges the LGBT community faces in The National School Climate Survey. In 2013 the National School Climate Survey was conducted online by outreaching to the LGBT youth through national, regional, and local organizations that provide services to or advocate on behalf of LGBT youth...

The final sample consisted of a total of 7,898 students between the ages of 13 and 21. Students were from all 50 states and the District of Columbia and from 2,770 unique school districts. About two thirds of the sample (68.1%) was White, slightly less than half (43.6%) was cisgender female, and over half identified as gay or lesbian (58.8%). Students were in grades 6 to 12, with the largest numbers in grades 10 and 11 (The 2013 National School Climate Survey, 2014).

The results for school safety are as follows:

- 55.5% of LGBT students felt unsafe at school because of their sexual orientation, and 37.8% because of their gender expression.
- 30.3% of LGBT students missed at least one entire day of school in the past month because they felt unsafe or
uncomfortable, and over a tenth (10.6%) missed four or more days in the past month.

- Over a third avoided gender-segregated spaces in school because they felt unsafe or uncomfortable (bathrooms: 35.4%, locker rooms: 35.3%).
- Most reported avoiding school functions and extracurricular activities (68.1% and 61.2%, respectively) because they felt unsafe or uncomfortable (The 2013 National School Climate Survey, 2014).

The results for harassment and Assault in school that pertain to this discussion are as follows:

- 74.1% of LGBT students were verbally harassed (e.g., called names or threatened) in the past year because of their sexual orientation and 55.2% because of their gender expression.
- 49.0% of LGBT students experienced electronic harassment in the past year (e.g., via text messages or postings on Facebook), often known as cyberbullying.
- 56.7% of LGBT students who were harassed or assaulted in school did not report the incident to school staff, most commonly because they doubted that effective intervention would occur or the situation could become worse if reported.
• 61.6% of the students who did report an incident said that school staff did nothing in response (The 2013 National School Climate Survey, 2014).

The LGBT (lesbian, gay, bisexual, and transgender) community suffers constantly from harassment, much of which takes the form of bullying. However, what happens when the younger members of this community face with this discrimination that results in severe emotional distress? Recent studies have shown us that the result of this are quite drastic; the emotional distress that the younger LGBT community often leads them to commit suicide. The Center of Disease Control and Prevention did a study among students in Grades 9-12 from 2001- 2009 to identify suicide rates amongst the younger LGBT community. The study was released in 2011. In their study they found that:

…the prevalence of having seriously considered attempting suicide ranged from 9.9% to 13.2% (median: 11.7%) among heterosexual students, from 18.8% to 43.4% (median: 29.6%) among gay or It also provides a tangible example of the affects of discrimination. lesbian students, from 35.4% to 46.2% (median: 40.3%) among bisexual students, and from 17.5% to 40.4% (median: 23.7%) among unsure students…

[T]he prevalence of having attempted suicide ranged from 3.8% to 9.6% (median: 6.4%) among heterosexual students, from 15.1% to 34.3% (median: 25.8%) among gay or lesbian
students, from 20.6% to 32.0% (median: 28.0%) among bisexual students, and from 13.0% to 26.7% (median: 18.5%) among unsure students (Kann et al., 2001).

The data shows that the young LGBT community is over twice as likely to commit suicide. These statistics are probably an outcome of the discrimination that this community faces daily. These discriminatory practices then lead an alleged victim to suffer from severe emotional distress that can lead one to commit suicide. The courts have an obligation to promote justice and it is evident that justice needs to be made for this community (Kann et al., 2001).

Suicide is a significant sign that one suffered from emotional distress before they committed it. Neuroimaging once again has proven that emotional distress endured is legitimate and has physiological elements, along with its emotional elements. In 2003, neurologists reported a study that used neuroimaging to study suicidal patients and compared them to patients that were not suicidal. More specifically, the researchers in this experiment analyzed the serotonergic system by studying the binding index of serotonin 5-HT\textsubscript{2a} receptors in the frontal cortex. The results showed that suicidal patients had significantly lower levels of 5-HT\textsubscript{2a} receptors, and thus a lower level of serotonin in their frontal cortex of the brain (Van Heeringen et al., 2003, p. 151). More specifically,

Table [1]… shows the means and standard deviations for binding potential, scores on personality dimensions and levels of hopelessness for attempted suicide patients and
normal controls. Attempted suicide patients showed a significantly lower prefrontal cortex binding potential of the 5-HT$_{2a}$ receptor ligand and a significantly higher score on the personality dimensions harm avoidance and self-transcendence. Patients scored significantly lower on the character dimensions self-directedness and cooperativeness (Van Heeringen et al., 2003, p. 151).

Table 1: Comparison Between Attempted Suicide Patients and Normal Controls for Prefrontal Cortex 5-HT$_{2}$ Receptor Binding Index, Hopelessness, and Personality Characteristics

<table>
<thead>
<tr>
<th></th>
<th>Attempted suicide patients ($n = 9$)</th>
<th>Healthy volunteers ($n = 13$)</th>
<th>$t$-statistics</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mean (S.D.)</td>
<td>Mean (S.D.)</td>
<td></td>
</tr>
<tr>
<td>Binding index</td>
<td>140.7 (22.2)</td>
<td>168.0 (13.6)</td>
<td>3.59**</td>
</tr>
<tr>
<td>Novelty seeking</td>
<td>21.3 (9.1)</td>
<td>19.5 (4.9)</td>
<td>-0.53</td>
</tr>
<tr>
<td>Harm avoidance</td>
<td>22.6 (4.4)</td>
<td>11.0 (3.7)</td>
<td>-6.38**</td>
</tr>
<tr>
<td>Reward dependence</td>
<td>14.1 (3.6)</td>
<td>16.9 (3.5)</td>
<td>1.69</td>
</tr>
<tr>
<td>Persistence</td>
<td>3.8 (1.8)</td>
<td>4.6 (1.9)</td>
<td>-1.18</td>
</tr>
<tr>
<td>Self-directedness</td>
<td>18.1 (7.3)</td>
<td>32.6 (9.2)</td>
<td>3.93**</td>
</tr>
<tr>
<td>Cooperativeness</td>
<td>28.8 (5.8)</td>
<td>34.5 (2.4)</td>
<td>3.19**</td>
</tr>
<tr>
<td>Self-transcendence</td>
<td>14.0 (8.4)</td>
<td>7.9 (3.7)</td>
<td>-2.32*</td>
</tr>
<tr>
<td>Hopelessness</td>
<td>10.3 (3.1)</td>
<td>2.3 (1.3)</td>
<td>-3.58**</td>
</tr>
</tbody>
</table>

Frontal binding index is given relative to cerebellar activity. *$P < 0.05$; **$P < 0.01$.

(Van Heeringen et al., 2003, p. 153).

After examining these facts the neurologists conducting the study concluded that the severe emotional states that suicidal patients were in caused a decrease in their serotonin levels; which in response caused them to attempt suicide. This is insightful because it provides proof that severe anxiety disorders are not the only types of
emotional distress that causes physiological damages that are not foreseeable to a layperson. For instance, decrease in serotonin levels can be normal for some people; however in some cases they can be considered and could manifest emotional distress in an alleged victim. However, this physical manifestation is not explicitly seen without using neuroimaging. The findings also provide insightful information regarding what can happen to an alleged victim if he or she does not seek help, in this case suicide.

These findings are also significant when studying the LGBT (lesbian, gay, bisexual, and transgender) community and emotional distress. As previously mentioned, from analyzing several studies conducted, there is a great deal of discrimination, some which is manifested in bullying, among the young LGBT community. Most of it happens in school. There is also a strong correlation within the young LGBT community between the discrimination and harassment that these students face, and the suicide rates among the young LGBT community. The harassment faced in school is most likely a cause of these students’ suicide attempts.

The spike of suicide among the young LGBT community indicates that the law is not currently acting effectively and promoting justice amongst this community. A change in the law could benefit the community if the impact rule was eliminated or if the decrease in serotonin levels was recognized as sufficient proof of physical manifestation. For this reason, it will be more beneficial for this community that constantly faces emotional trauma to bring a civil rights action.

As discussed, discrimination against one’s gender or orientation is considered to violate one’s civil rights laws (29 C.F.R. § 1604.11, 1999). In 2015, the Supreme Court
ruled that Title VII of the Civil Rights Act implicitly banned employment discrimination against the LGBT community. This is a breakthrough. The court recognized that sexual discrimination is a violation of one’s constitutional rights. Thus, even though the emotional distress should be considered legitimate, there might have a stronger response in a civil rights proceeding.
Chapter 5: Conclusion and Recommendations

This research on the requirements for emotional distress causes of action has opened the doors to the awareness of flaws of the impact doctrine. These causes of actions generally require an alleged victim to prove physical harm to claim emotional distress damages. The impact doctrine currently is not implemented in every state. However, every state has imposed a legal barrier for emotional distress victims that limit recovery for damages. In addition to the impact doctrine, other states use the zone of danger rule and the foreseeability standard. Currently, these barriers are imposed mainly because of public opinion and politics. It is commonly believed that what cannot be seen must not be real. There is also fear that allowing recovery for emotional damages without the use of one of these doctrines could open the door to a flood of fraudulent claims. The irony of the prescribed rule is that mental instability usually doesn’t accompany physical injuries. Public opinion heavily shapes politics, and politics have heavily shaped legislation. Thus, the reasoning behind the barriers for alleged victims of emotional distress. Florida has not eradicated or even modified the impact rule, but through analysis of case law, it can be concluded that the “impact doctrine is too restrictive to allow recovery for valid claims of emotional distress. This is evident from the number of exceptions that have been recognized by other states. Thus, Florida needs to adopt less restrictive requirements to allow valid claims for emotional distress to be compensated.

The legal barrier of the impact doctrine is outdated and inconsistent with science. Through neuroimaging, neuroscientists have found that anxiety disorders are
accompanied by physical manifestations. However, the physical injury that is manifested with anxiety disorders is not evident to a reasonable layperson because the physiological injury that accompanies events that trigger anxiety disorders is in the brain. The only way for the brain’s physiological injuries to be seeable is through neuroimaging. There is a dilemma because judges and jurors are not likely to know about this research, and thus base whether an alleged victim suffers from emotional distress from what is physically seen in the courtroom. Through neurology, it has also been proven that there can be a delay in the physiological impact that occurs in the brain and it does not occur at the time that an anxiety disorder has been triggered. This is another dilemma to the courts because according to the impact rule, physical impact must occur at the time of the traumatic event. The legal definition of emotional distress is inconsistent with neurology because the legal definition does not take into account physical injuries that are not visible to the human eye, and it does not also take into account delayed physical injuries.

The research conducted has also found that neurology is not the only field in science that is inconsistent with the impact rule—psychologists also do not believe that emotional distress is manifested with seeable physical injury. Anxiety and depressive disorders are classified under the DSM-V model and psychologists note that a disorder is sparked by a traumatic event and can gradually appear. Psychologists do not require physical injury for a person to be classified as having an anxiety or depressive disorder.

Although it is clear the impact rule is inconsistent with science and psychology, the zone of danger rule and the foreseeability standard do not rectify the gap between
science and tort law. It is recommended that Florida rectify this gap, while also adhering to the public’s concern of the slippery slopes of increased litigation. There are two recommendations that can rectify this gap. The first recommendation that is to eliminate the impact rule by statute and allow expert witnesses, neurologists, and/or psychologists to substantiate impact that is seen or recognized through diagnosis of emotional distress. This would eliminate judges and jurors making a decision in a field without expertise, while also only allowing those who have truly suffered from emotional distress to be successful in filing a lawsuit. Although this is a viable alternative, there are always skeptics that are hesitant in accepting new scientific discoveries. Another alternative that is proposed is to have Florida Supreme Court create an exception for plaintiffs that have proven physiological impact of the brain through neuroimaging. The drawback from the latter recommendation is that it does not take into account plaintiffs whose physiological impact on the brain is not immediate. This would probably not bar recovery since the statute of limitations would not begin running until the injury is discovered.

A limited number of plaintiffs may be able to currently recover for emotional distress under The American Disability Act. The American Disability Act recognizes these severe anxiety disorders discussed by neurologists and psychologists. The barriers of the impact rule eliminate recovery through traditional tort litigation for those disabled due to a traumatic event. A disability should qualify an alleged victim for compensation, however the impact rule does not compensate victims where the onset is caused by a traumatic event without physical injury. Thus, there is another gap but this
time between the impact rule and the American Disability Act. If a plaintiff could prove that a traumatic event caused a disability, it could be possible for plaintiffs to recover for loss wages and medical expenses.

In extraordinary cases it could even be possible for a plaintiff to file a civil rights claim when a disability can be proven. Through the analysis of civil rights laws, tort law, and neuroscience the research shows that many victims, specifically in the LGBT community, might file civil rights claims rather than filing traditional tort suits based upon emotional distress.

In the future states will gradually override the impact rule by either making more exceptions to it or by implementing a more lenient standard of proof. However, what would best fulfill the purpose of tort law is to implement the favored recommendation mentioned earlier—to have expert witnesses testify whether the plaintiff suffers from emotional distress.

In the future, states will essentially overturn the impact rule by either making more exceptions to it or by implementing a more lenient standard. The purpose of tort law is to compensate victims. Implementing the recommendations by allowing expert witnesses testimony to help prove emotional distress would allow the courts to compensate legitimate claims, where there is causation and wrongful conduct.
References


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