

WHEN CIRCUMSTANCES PROVIDE A GUARANTEE OF GENUINENESS: PERMITTING RECOVERY FOR PRE-IMPACT EMOTIONAL DISTRESS†

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I. INTRODUCTION

"Uh-Oh!"¹

That fateful phrase was uttered by pilot Michael J. Smith at almost the same instant that the space shuttle "Challenger" exploded before the eyes of the unsuspecting NASA ground control crew, the families and friends of the astronauts invited to watch the launch, and television viewers who had just witnessed another apparently successful space launch. It was the last communication by a member of the crew,² and suggests that at least one of the astronauts was aware of an impending disaster.³ Evidence produced by an investigation of the explosion appears to support the conclusion that the crew survived the explosion in space only to find themselves trapped in the crew module as it fell toward earth and its ultimate destination deep in the Atlantic Ocean.⁴ While no one knows how long the crew members remained conscious after the explosion,⁵ three of the four recovered emergency breathing packs had been activated,⁶ suggesting a

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¹ Boffey, *Challenger Crew Knew of Problem, Data Now Suggests*, N.Y. Times, July 29, 1986, at 1, col. 6.

² *Id.*

³ Rear Admiral Richard H. Truly, NASA's associate administrator for space flight, was quoted as saying that the commander of the space craft, Francis R. Scobee, also may have been aware that something had gone wrong. *Id.* at C9, col. 2.

⁴ Dr. Joseph P. Kerwin, the NASA official who lead the investigation of the Challenger disaster, concluded that "the forces to which the crew were exposed during orbiter were probably not sufficient to cause death or injury . . ." *Id.* at C9, col. 1. This finding contradicts NASA's preliminary conclusion that the crew did not survive the explosion. *Id.*

⁵ *Id.* at C9, col. 3. Dr. Kerwin suggested that the crew members lost consciousness after the shuttle breakup because of a loss of pressure inside the crew module. *Id.* at C9, col. 1. The doctor could not rule out the possibility, however, that they remained conscious as the space craft fell to earth and plunged into the water. *Id.* at C9, col. 4. Dr. Kerwin also suggested that if a loss of pressure occurred, the astronauts may have been conscious for only about 10 seconds after the explosion and, thus, may have been unconscious upon impact with the ocean. *Id.* Furthermore, Dr. Kerwin stated that the crew probably did not suffer any personal injuries from the explosion. *Id.* at C9, col. 1.

⁶ *Id.* at C9, col. 3. Each member of the crew had a "personal egress air pack" attached to his or her helmet which contained an emergency air supply. *Id.* These packs could only be activated manually. *Id.* at C9, col. 4. The investigators ruled out the possibility that the impact with the water jolted the packs into operation. *Id.* One of the activated packs belonged to pilot Smith. *Id.* at C9, cols. 3-4. The investigation suggested that Smith could not have activated his own unit without unstrapping himself, which he did not do. *Id.* at C9, col. 4. Because Smith was found strapped to his seat, it is likely that another crew member activated his air pack. *Id.*

possibly substantial period of consciousness. This evidence should figure prominently in the lawsuit filed by Smith's family which, among other things, seeks damages for the pilot's knowledge of his "impending doom."⁷ Such a disaster ordinarily will spur actions by a decedent's dependents under a wrongful death statute⁸ or by a decedent's estate pursuant to a survival act⁹ for damages which accrued at the time of the death.¹⁰ Pain and suffering¹¹ experienced by the decedent due to physical injury often comprise a

⁷ Boffey, *Astronaut's Family Seeks \$15 Million from NASA*, N.Y. Times, July 16, 1986, at A1, col. 3.

The 1985 crash of a Japan Air Lines Boeing 747, in which 520 people were killed, provides another example of a frightening pre-death ordeal. In that instance, the plane banked and lurched for 30 minutes while the crew members worked desperately to keep it aloft. Throughout this period, the passengers were aware of their peril, according to messages later found in the debris. One of the messages written by a passenger indicated that after the explosion, smoke filtered into the cabin and the plane began a sharp descent. This description was corroborated by Yumi Ochiai, one of only four survivors, who also stated that she heard children screaming "Mommy" as the plane began its last vertical plunge. N.Y. Post, Aug. 19, 1985, at 13, col. 2; *What Went Wrong?*, NEWSWEEK, Aug. 26, 1985, at 14.

⁸ Wrongful death actions are creatures of statutes, enacted in response to the harshness of the common law which denied recovery to a tort victim if he or she were unfortunate enough to die. A cause of action for wrongful death or survival, discussed at note 9, *infra*, is now recognized in every American jurisdiction. 3 MINZER, DAMAGES IN TORT ACTIONS § 20.11 (1987).

The common law basis for denying recovery for wrongful death has been succinctly stated: "If the victim of a tort himself [or herself] died (from whatever cause) before he [or she] recovered in tort, the victim's right of action also died." W. KEETON, PROSSER & KEETON ON TORTS § 125A (5th ed. 1984) (footnote omitted). Lord Ellenborough stated: "[I]n a civil court the death of a human being could not be complained of as an injury." *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

Fortunately, this harshness has been altered by wrongful death statutes. Although the statutes vary from jurisdiction to jurisdiction, some general elements are common to most. The executor or administrator of the decedent's estate usually brings suit. Recovery is measured by the value of the support, services, and contributions which the beneficiary could have expected to receive had the victim lived. PROSSER & KEETON, *supra*, § 127, at 951. Moreover, a number of states expressly provide for nominal or punitive damages in wrongful death cases. MINZER, *supra*, § 20.11[2]. Damages for the survivors' grief, emotional distress, loss of society, or any other incidents of family association, however, are not permitted in most jurisdictions. PROSSER & KEETON, *supra*, § 127, at 951.

⁹ At common law, a tort victim could maintain an action against the tortfeasor for the damages sustained as a result of the injury. If the victim died, however, the cause of action died with him or her. Modern statutes in most states have altered this undesirable result by providing that the cause of action survives the victim's death. The measure of damages is the loss sustained by the decedent between the time of injury and the time of death, and the damages recoverable are generally the same as those recoverable in a personal injury action. MINZER, *supra* note 8, at § 20.14. Thus, the victim's estate may recover for the decedent's conscious pain and suffering between injury and death, lost earnings between the time of injury and death, medical and funeral expenses, and punitive damages. *See generally id.* §§ 21.10, 21.20, 21.30, 21.40. A minority of jurisdictions permit recovery for future earnings. *See id.* § 21.22.

¹⁰ *See, e.g., Delta Names F.A.A. in Crash Lawsuit*, N.Y. Times, Sept. 5, 1985, at B14, col. 1 (noting wife of passenger killed in airport crash filed suit against airline); Joyce, *\$140 Million MGM Fire Settlement*, N.Y. Times, May 11, 1983, at D5, col. 1 (settlement paid to families of fire victims).

¹¹ "Pain and suffering" traditionally refers not only to the physical pain resulting from the injury, but also to the mental suffering experienced because of the physical pain. MINZER, *supra* note 8, § 4.10. Some authorities include emotional injury unassociated with physical trauma within the definition of pain and suffering. *See Koskoff, The Nature of Pain and Suffering*, 13 Trial 21, 22 (July 1977). Some courts have also lumped damages for mental disturbance not associated with

significant portion of a personal injury claim.¹² Because recovery for pain and suffering generally has been limited to situations in which the decedent was conscious,¹³ plaintiffs frequently find such damages unavailable where the decedent either died on impact or, as apparently occurred in the Challenger accident, lost consciousness prior to sustaining physical injury. Recovery in such instances often has been limited to economic loss and, occasionally, the emotional trauma the survivors experienced.¹⁴

Traditional legal analysis rejected the notion that the victim's mental tranquility should be protected against intentional or negligent invasions.¹⁵ A liberalization of this attitude has since changed the focus of scholarly inquiry from whether emotional distress is compensable at all¹⁶ to a determination of the extent of protection which it should receive.¹⁷ As a result, some courts have permitted recovery for the emotional distress suffered by a victim upon his or her realization of the peril to which his or her personal security has been exposed by the defendant's negligence.¹⁸ Often called pre-impact distress,¹⁹ this cause of action has allowed significant recovery for often fleeting seconds of mental anguish. A plaintiff may, however, find the court reluctant to recognize pre-impact distress, either because of the traditional concerns that limited recovery for

physical injury under this type of heading. See *Shu-Tao Lin v. McDonnell Douglas Corp.*, 574 F. Supp. 1407, 1416-17 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 45 (2d Cir. 1984) (allowing damages for pre-impact emotional distress as "pain and suffering"); *Malacynski v. McDonnell Douglas Corp.*, 565 F. Supp. 105, 106 (S.D.N.Y. 1983) (same). For the purposes of clarity, this Article uses the term "pain and suffering" to describe mental and physical damage due to physical injury. When mental suffering exists apart from physical pain or injury the Article uses the terms, "emotional distress," "mental disturbance," "mental distress," or "mental anguish."

¹² *MINZER*, *supra* note 8, at § 4.01. See, e.g., *Brown v. United States*, 615 F. Supp. 391 (D. Mass. 1985) (finding reasonable \$50,000 award to lobsterman's estate for pain and suffering when the evidence showed he survived no longer than ten minutes in frigid waters); *Reed v. Union John Deere*, 569 F. Supp. 371 (M.D. La. 1983) (finding reasonable \$10,000 of a \$418,000 verdict allocated to pain and suffering sustained by decedent who lived not more than a few seconds after impact).

¹³ *MINZER*, *supra* note 8, at § 4.21[3]. The Iowa Supreme Court succinctly stated the basis for this requirement: "[A]n unconscious person does not suffer pain." *Hurtig v. Bjork*, 258 Iowa 155, 160, 138 N.W.2d 62, 65 (1965). Other courts have denied recovery for pain and suffering in death cases where the plaintiff was unable to establish the decedent's post-injury consciousness. See, e.g., *Nye v. Pennsylvania Dep't of Transp.*, 331 Pa. Super. 209, 214, 480 A.2d 318, 321 (1984) (no recovery for pain and suffering between the time of injury and death unless decedent was conscious); see also *MINZER*, *supra* note 8, at § 4.20; *Mpiliris v. Hellenic Lines, Ltd.*, 323 F. Supp. 865 (S.D. Tex. 1970) (no recovery for pain and suffering when decedent was rendered unconscious by the injuries); *Brooks v. United States*, 273 F. Supp. 619 (D.S.C. 1967) (barring recovery for unconscious pain and suffering).

¹⁴ See *supra* notes 8-9 and accompanying text. In addition, some jurisdictions permit recovery for the loss of society and comfort provided by the decedent to the plaintiff. *PROSSER & KEETON*, *supra* note 8, § 127, at 951-52.

¹⁵ See *infra* notes 31-33 and accompanying text.

¹⁶ See, e.g., *Bohlen, Right to Recover for Injury Resulting From Negligence Without Impact*, 41 AM. L. REG. N.S. 141 (1902).

¹⁷ See, e.g., *Miller, The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime"*, 1 U. HAW. L. REV. 1 (1979).

¹⁸ See, e.g., *Haley v. Pan American World Airways*, 746 F.2d 311 (5th Cir. 1984) (applying Louisiana law); *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45 (2d Cir. 1984) (applying New York law); *Malacynski v. McDonnell Douglas Corp.*, 565 F. Supp. 105 (S.D.N.Y. 1983) (applying New York law); *Platt v. McDonnell Douglas Corp.*, 554 F. Supp. 360 (E.D. Mich. 1983) (applying Michigan law).

¹⁹ See *Fuchsberg, Damages for Pre-Impact Terror*, 16 TRIAL LAW. Q. (No. 3) 29 (1984).

emotional distress,²⁰ or because such distress does not fit within the particular test adopted in that jurisdiction to separate lawful emotional distress claims from those for which recovery will be denied.²¹

This Article begins by tracing the evolution of judicial approaches to recovery for emotional distress.²² This is followed by a discussion of the manner in which federal and state courts have received recent claims for pre-impact distress,²³ with analysis of recent decisions in these jurisdictions.²⁴ Finally, this Article suggests that whatever its ultimate boundaries, emotional distress suffered by a person who realizes that he or she is about to sustain serious harm or death due to a defendant's negligence, and who, in fact, is harmed or dies as a proximate result of that negligence, should be compensable. Courts should allow recovery without regard to whether the plaintiff can establish the elements the law has required to guard against spurious claims in other actions for emotional distress. The circumstances inducing the emotional distress provide significant safeguards against this risk, thus making other tests for genuineness superfluous. Concerns that a defendant's potential liability may be unjustly disproportionate to his or her "mere negligence" are assuaged by limiting the defendant to the already recognized duty of not exposing a plaintiff to an unreasonable risk of physical harm.²⁵

The timeliness of the subject matter is clear. Judicial recognition of pre-impact distress as a compensable element of damages is relatively recent.²⁶ As word of its acceptance spreads to potential litigants,²⁷ accompanied by a realization that it may allow for a fairly substantial monetary award,²⁸ more such claims will be advanced. When presented with these claims as a matter of first impression, courts must consider whether to decide the case pursuant to their jurisdiction's rule for other emotional distress claims or adopt a new approach. This Article discusses how pre-impact emotional distress claims fare under the more traditional approaches²⁹ and how courts could award damages under a new test which comports with the rationale underlying the older rules.³⁰

II. JUDICIAL APPROACHES TO CLAIMS FOR EMOTIONAL DISTRESS

At early English and American common law, courts generally accepted the idea that emotional distress, standing alone, was not actionable.³¹ The common law recognized no

²⁰ See, e.g., *Fogarty v. Campbell 66 Express, Inc.*, 640 F. Supp. 953 (D. Kan. 1986).

²¹ See, e.g., *In re Air Crash Disaster Near Chicago, Ill.* on May 25, 1979, 507 F. Supp. 21 (N.D. Ill. 1980) (pre-impact distress claim dismissed because it did not fit within impact rule then existing in Illinois); *Fogarty v. Campbell 66 Express, Inc.*, 640 F. Supp. 953 (D. Kan. 1986) (plaintiff failed to show that pre-impact distress fit within the zone of danger approach to claims of emotional distress); *Nye v. Commonwealth*, 331 Pa. Super. 209, 480 A.2d 318 (1984) (same).

²² See *infra* notes 31-161 and accompanying text.

²³ See *infra* notes 163-285 and accompanying text.

²⁴ See *infra* notes 295-348 and accompanying text.

²⁵ See *infra* notes 350-58 and accompanying text.

²⁶ The first case to allow recovery for such damages was decided in 1970. See *Kozar v. Chesapeake & Ohio Ry.*, 320 F. Supp. 335 (W.D. Mich. 1970), *aff'd in part and vacated in part*, 449 F.2d 1238 (6th Cir. 1971).

²⁷ See *infra* notes 161-288 and accompanying text.

²⁸ See *infra* note 165.

²⁹ See *infra* notes 288-349 and accompanying text.

³⁰ See *infra* notes 350-62 and accompanying text.

³¹ F. HARPER & F. JAMES, *THE LAW OF TORTS* § 9.1 (1956); PROSSER & KEETON, *supra* note 8, at § 12 (5th ed. 1984); Magruder, *Mental and Emotional Distress in the Law of Torts*, 49 HARV. L. REV.

legal duty to refrain from negligent conduct which created an unreasonable risk of emotional distress, nor did it recognize a cause of action for intentional infliction of emotional distress.³² Thus, in 1861 Lord Wensleydale was able to state without fear of contradiction, "[m]ental pain and anxiety the law cannot value, and does not pretend to redress, when the lawful act complained of causes that alone . . ."³³

Judicial reluctance to award damages for mental distress stemmed from various concerns. Some courts felt that the subjective nature of the injury rendered impossible a precise measurement of the extent of the invasion.³⁴ Others believed that the proof necessary to establish a causal link between the distress and the allegedly responsible conduct was too speculative.³⁵ Some courts also feared that recognizing this cause of action would open the "floodgates of litigation,"³⁶ especially with respect to trivial slights

1033, 1035 (1936). See, e.g., *Summerfield v. Western Union Tel. Co.*, 87 Wis. 1, 8, 57 N.W. 973, 974 (1894).

³² See, e.g., *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 773, 15 S.E. 901, 904 (1892) ("The civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological injuries"); *Purcell v. St. Paul City Ry.*, 48 Minn. 134, 137, 50 N.W. 1034, 1034 (1892) ("it may be conceded that any effect of a wrongful act or neglect on the mind alone will not furnish a ground of action"). See also *Bohlen*, *supra* note 16, at 142 ("fright, mental suffering and nervous shock . . . do [not] constitute damage . . .").

RESTATEMENT (FIRST) OF TORTS § 46 comment c (1934) summarized this view: "The interest in mental and emotional tranquility and, therefore, in freedom from mental and emotional disturbances is not, as a thing itself, regarded as of sufficient importance to require others to refrain from conduct intended or recognizably likely to cause such a disturbance." *Id.*

³³ *Lynch v. Knight*, 9 H.L. Cas. 577, 598 (1861).

³⁴ *Southern Express Co. v. Byers*, 240 U.S. 612, 615 (1916) ("merely mental pain and anxiety are too vague for legal redress when no injury is done to person, property, health or reputation." (quoting authority omitted)); *Cleveland, C., C. & St. L. Ry. v. Stewart*, 24 Ind. App. 374, 390, 56 N.E. 917, 922-23 (1900) (mental distress without physical injury too speculative). See also *Brody*, *Negligently Inflicted Psychic Injuries: A Return to Reason*, 7 VILL. L. REV. 232, 232 (1962) ("[courts presumed that] psychic injuries were easy to feign and difficult to disprove"). One scholar attributes such problems of proof to an old evidentiary rule which prohibited the parties themselves from testifying. *Bohlen*, *supra* note 16, at 143.

But see *Kalen v. Terre Haute & I.R.R.*, 18 Ind. App. 202, 213, 47 N.E. 694, 697 (1897), where the court stated: "We think it cannot properly be said that such injuries are imaginary or conjectural, or that the sufferings described are not real." *Id.*

³⁵ *Bosley v. Andrews*, 393 Pa. 161, 167, 168-69, 142 A.2d 263, 266-67 (1958) (the courts are fearful that the plaintiff will not be able to prove — because of the illusory nature of the evidence — that the defendant's act was the proximate cause of the plaintiff's injury). See also *Leibson*, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAM. L. 163, 164 (1977) ("insanity and other emotional illnesses were considered to be the result of one's own sins"); *Comment*, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1259 (1971) [hereinafter *Comment*, *Independent Tort*] (recognizing that in some instances "proof of existence and causation of the injury may be extremely difficult . . .").

³⁶ *W.R. Harned v. E-Z Finance Co.*, 151 Tex. 641, 649, 254 S.W.2d 81, 86-87 (1953), *overruled*, *Fisher v. Carrousel Motor Hotel*, 424 S.W.2d 627 (Tex. 1967); *Koplin v. Louis K. Liggett Co.*, 322 Pa. 333, 335, 185 A. 744, 744-45 (1936); *Spade v. Lynn & B.R.R.*, 168 Mass. 285, 290, 47 N.E. 88, 89 (1897). *Sinn v. Burd*, 486 Pa. 146, 162-63, 404 A.2d 672, 678-79 (1974) (plurality). *But see* *Niederman v. Brodsky*, 436 Pa. 401, 412-13, 261 A.2d 84, 89 (1970). The *Niederman* court stated:

It is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation,' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the court too much work to do.

Id. (quoting *Prosser*, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 877 (1939)).

and indignities.³⁷ Finally, courts voiced concern that, at least where the plaintiff's cause of action sounded in negligence, a defendant's potential liability could be grossly disproportionate to his or her fault.³⁸

These concerns, however, did not inhibit an award of damages for mental distress which courts found "parasitic" to other previously recognized causes of action in tort.³⁹ An independently actionable claim which produced loss apart from the alleged mental anguish supposedly provided adequate protection against the abuses thought to accompany recognition of a separate right to emotional tranquility.⁴⁰ Plaintiffs appended mental suffering to actions for the wrongful invasion of a recognized right⁴¹ so that it became a compensable component in such causes of action as personal injury,⁴² false imprisonment,⁴³ trespass to land,⁴⁴ and wrongful interference with the plaintiff's trade

³⁷ Magruder, *supra* note 31, at 1035 (expressing concern that victims of trivial indignities would resort to litigation as opposed to a "toughening of the mental hide" as a remedy). See also Swanson v. Swanson, 121 Ill. App. 2d 182, 184-86, 257 N.E.2d 194, 196 (1970); Paxson v. Cass County Rds. Comm'n., 325 Mich. 276, 284, 38 N.W.2d 315, 318 (1949).

³⁸ See Spade v. Lynn & B.R.R., 168 Mass. 285, 290, 47 N.E. 88, 89 (1897) ("it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright"); Bohlen, *supra* note 16, at 160 ("Public policy and conveniences forbid the imposition of a duty to avoid acts likely to cause fright alone . . ."). See also Molien v. Kaiser Found. Hosp., 27 Cal. 916, 936, 616 P.2d 813, 825, 167 Cal. Rptr. 831, 843 (1980) (Clark, J., dissenting) (arguing against recognizing tort for emotional distress alone, finding "imposition of liability is far disproportionate to the degree of culpability" for negligently inflicting such damages).

The Hawaii and California courts recently addressed the concern that imposing liability for all causally related emotional distress may be disproportionate to mere negligence by the defendant. See Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970); Molien, 27 Cal. 916, 936, 616 P.2d 813, 825, 167 Cal. Rptr. 831, 843. Those courts were persuaded that such concerns justified limiting the defendant's duty to one of avoiding exposing plaintiff to a risk of serious mental distress. Rodrigues, 52 Hawaii at 172, 472 P.2d at 520; Molien, 27 Cal. at 928, 616 P.2d at 819-20, 167 Cal. Rptr. at 837-38. For a discussion of these decisions, see *infra* notes 141-56 and accompanying text.

³⁹ Where the plaintiff alleged and proved a tortious invasion other than the resulting emotional distress, the mental distress could then be considered in the computation of damages. See Langhenry, *Personal Injury Law and Emotional Distress*, 31 FED. INS. COUN. Q. 259, 260 (1981). Since the damages for emotional distress depended on the existence of another tort, they have been called "parasitic." F. HARPER, LAW OF TORTS § 67 (1933). See PROSSER & KEETON, *supra* note 8, at § 12.

Even Lord Wensleydale, after making his famous generalization that the law does not redress emotional harm alone, stated that, "though where a material damage occurs, and is connected with [mental pain or anxiety], it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested." Lynch v. Knight, 9 H.L. Cas. 577, 598 (1861).

⁴⁰ Langhenry, *supra* note 39, at 260.

⁴¹ The First Restatement of Torts took the position that "if the actor has by his or her tortious conduct become liable for an invasion of any legally protected interest of another, emotional distress caused by the invasion or by the tortious conduct which is the cause thereof is taken into account in assessing the damages recoverable by the other." RESTATEMENT (FIRST) OF TORTS § 47(b) (1934). Cf. Lewis v. Holmes, 109 La. 1030, 1034-35, 34 So. 66, 68 (1903), in which a claim for the anguish experienced by a bride due to the defendant's failure to deliver her trousseau gowns in timely fashion was attached to an action for breach of contract.

⁴² Mishoe v. Atlantic Coast Line & R.R. Co., 186 S.C. 402, 418-19, 197 S.E. 97, 104 (1938) (wrongful death); Williams v. Underhill, 63 App. Div. 223, 225-26, 71 N.Y.S. 291, 292-93 (1901) (assault).

⁴³ Fisher v. Rumler, 239 Mich. 224, 228, 214 N.W. 310, 311 (1927); Gadsen Gen. Hosp. v. McGinty, 212 Ala. 531, 533, 103 So. 553, 554 (1925) (conceding the general correctness of the verdict).

⁴⁴ Cactus Drilling Co. v. McGinty, 580 S.W.2d 609 (Tex. Civ. App. 1979) (evidence insufficient to support award for mental anguish); Sager v. Sisters of Mercy, 81 Colo. 498, 256 P. 8, 9 (1927).

or business.⁴⁵ As a result, plaintiffs with questionable emotional distress claims attached to a legally cognizable cause of action could recover for that distress.⁴⁶ Plaintiffs with possibly meritorious claims which lacked an underlying independent tortious invasion, however, were denied redress.⁴⁷

The first tentative step toward judicial recognition of an independent right to emotional tranquility occurred in the context of intentionally inflicted mental suffering.⁴⁸ Civil liability for assault — the intentional creation of an apprehension of an imminent battery⁴⁹ — was firmly established in the common law.⁵⁰ Nonetheless, courts were hesitant to accord legal status even to intentional invasions of peace of mind absent an assault.⁵¹ An English court, however, in the seminal case of *Wilkinson v. Downton*, recognized the intentional infliction of emotional distress as a distinct and independent tort.⁵² Although American courts originally were reluctant to follow the English precedent, by 1930 intentional infliction of emotional distress had achieved general acceptance as an independent cause of action.⁵³

Not all conduct designed to interfere with a plaintiff's peace of mind was actionable. Recovery was restricted to those instances in which the plaintiff could characterize the

⁴⁵ *Guillory v. Godfrey*, 134 Cal. App. 2d 628, 632-33, 286 P.2d 474, 477-78 (1955).

⁴⁶ See, e.g., *Croaker v. Chicago & N.W. Ry.*, 36 Wis. 657, 679, 17 Am. Rep. 504, 506 (1875) (school teacher uninvitedly kissed by train conductor awarded \$1000 in compensatory "damages" for her "terror and anxiety, her outraged feeling and insulted virtue, for all her mental humiliation and suffering"). See also *Magruder*, *supra* note 31, at 1054.

⁴⁷ See, e.g., *Chicago R.I. & P. Ry. v. Caple*, 207 Ark. 52, 58, 179 S.W.2d 151, 154 (1944) (in dicta, court noted that even if the train had stopped only inches before hitting the child whose foot was caught in a railroad tie there could be no recovery for mental anguish suffered).

⁴⁸ One observer had commented as early as 1906 that "[t]he treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is to-day recognized as parasitic will, forsooth, tomorrow be recognized as an independent basis of liability." T. STREET, *FOUNDATIONS OF LEGAL LIABILITY* 470 (1906).

⁴⁹ See RESTATEMENT (SECOND) OF TORTS § 21 (1965).

⁵⁰ See, e.g., *I de S et ux. v. W de S*, Y.B. Lib. Ass. 99, 60 (1348). Accord, *Alexander v. Blodgett*, 44 Vt. 476, (1872); *Handy v. Johnson*, 5 Md. 450 (1854). But see *Smith, Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 194 (1944) in which the author concludes that civil recovery for assault was due not to judicial solicitude for emotional tranquility but to the desire to deter breaches of the peace.

⁵¹ See, e.g., *Brooker v. Silverthorne*, 111 S.C. 553, 99 S.E. 350 (1919); *Kramer v. Ricksmeyer*, 159 Iowa 48, 139 N.W. 1091 (1913); *Hixson v. Sloum*, 156 Ky. 487, 161 S.W. 522 (1913); *State v. Daniels*, 136 N.C. 571, 48 S.E. 544 (1904); *Grayson v. St. Louis Transit Co.*, 100 Mo. App. 60, 71 S.W. 730 (1903).

⁵² 2 Q.B. 57, 61 (1897). The egregiousness of the conduct in this case may have caused the court to hold as it did. The defendant, a practical joker, falsely informed the plaintiff that her husband had sustained serious injuries in an accident. This tale caused the plaintiff to suffer a severe shock to her nervous system. *Id.* One early commentator concluded that the wrongfulness of the act in *Downton* stemmed not from the intent to frighten the plaintiff and injure her peace of mind, but because the act was calculated to cause her physical harm. *Bohlen*, *supra* note 16, at 147.

⁵³ See, e.g., *Great Atl. & Pac. Tea Co. v. Roch*, 160 Md. 189, 153 A. 22 (1931); *Johnson v. Sampson*, 167 Minn. 203, 208 N.W. 814 (1926). See generally *Prosser, Insult and Outrage*, 44 CALIF. L. REV. 40 (1956); *Prosser, Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1935).

Liability for this invasion has since been extended to conduct which is merely reckless as opposed to intentional. See *Beck v. Libraro*, 220 A. D. 547, 221 N.Y.S. 737 (1927). See generally *PROSSER & KEETON*, *supra* note 8, at § 12.

defendant's actions as outrageous.⁵⁴ It was this outrageousness, when considered in conjunction with the defendant's moral guilt and the lack of social utility associated with the conduct, that convinced the courts it was proper to protect the plaintiff's mental state.⁵⁵ The courts further extended liability to instances where a defendant's willful physical attack on a victim caused a spectator-plaintiff to experience emotional distress,⁵⁶ especially when the defendant was aware of the plaintiff's presence so that it could be said that he or she was at least reckless in causing the distress.⁵⁷ While the plaintiffs in many of these instances sustained physical illness as a result of the emotional distress,⁵⁸ the cause of action accrued where the plaintiff suffered *severe* mental disturbance even without accompanying physical ailments.⁵⁹

Encouraged by increasing judicial recognition of a right to mental tranquility, plaintiffs who suffered emotional distress as a result of a defendant's negligence, as opposed to his or her intentional or reckless conduct, began to seek legal redress for their injuries.⁶⁰ Nevertheless, even when the negligently inflicted emotional distress resulted

⁵⁴ This statement is summarized in the comments to the RESTATEMENT (SECOND) OF TORTS § 46 (1965). Comment d states:

It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he [or she] has intended to inflict emotional distress, or even that his [or her] conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

Id. One commentator has noted the danger of permitting recovery for merely insulting language: "No pressing social need requires that every abusive outburst be converted into a tort; upon the contrary, it would be unfortunate if the law closed all the safety valves through which irascible tempers might legally blow off steam." Magruder, *supra* note 31, at 1053.

The special duty owed by a common carrier to the public allowed courts to impose liability for mental distress where the conduct was less than outrageous. *See, e.g.,* *Bleecker v. Colorado & So. Ry.*, 50 Colo. 140, 114 P. 481 (1911); *Gulf, C. & S.F. Ry. v. Luther*, 40 Tex. Civ. App. 517, 523, 90 S.W. 44, 48 (1905) ("the liability of a common carrier for insults by its servants causing humiliation, a sense of disgrace, mental anguish or fear in a passenger, is independent of physical injury or bodily harm"). Even this "common carrier" doctrine did not, however, extend liability to encompass petty insults.

⁵⁵ *See Krierim v. Izzo*, 22 Ill. 2d 73, 174 N.E.2d 157 (1961) (allowing recovery for outrageous intentional conduct which is wholly lacking in social utility); *Amdursky, Interest in Mental Tranquility* [sic], 13 BUFFALO L. REV. 339, 345 (1964).

⁵⁶ *See Lambert v. Brewster*, 97 W. Va. 124, 125 S.E. 244 (1924).

⁵⁷ *Taylor v. Vallelunga*, 171 Cal. App. 2d 107, 339 P.2d 910 (1959). *See* cases cited in PROSSER & KEETON, *supra* note 8, at § 12.

⁵⁸ *See Price v. Yellow Pine Paper Mill Co.*, 240 S.W. 588 (Tex. Civ. App. 1922) (miscarriage); *Wilkinson v. Downtown*, 2 Q.B.D. 57, 58 (1897) (shock to nervous system caused permanent physical damage). *See generally* PROSSER & KEETON, *supra* note 8, at § 12.

⁵⁹ *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952) ("it is anomalous to deny recovery because the defendant's intentional misconduct fell short of producing some physical injury"). *See generally* cases cited in PROSSER & KEETON, *supra* note 8, at § 12. *See also* Magruder, *supra* note 31, at 1058. Magruder predicted the emergence of legal liability for infliction of mental distress upon another as "one who, without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance of another's mental and emotional tranquility of so acute a nature that harmful physical consequences might be not unlikely to result . . . even though no demonstrable physical consequences actually ensue." *Id.*

⁶⁰ *See infra* notes 62-90. *See also* L.S. CHARFOOS & D.W. CHRISTENSEN, PERSONAL INJURY PRACTICE: TECHNIQUE AND TECHNOLOGY § 21.4 (1986).

in serious physical illness, plaintiffs found the courts an unsympathetic forum.⁶¹ In *Victorian Railway Commission v. Coultas*, the Privy Council confronted the issue of whether a plaintiff could recover for physical injury arising from negligently inflicted fright in the absence of actual contact with the plaintiff's person.⁶² The defendant gatekeeper negligently had permitted a wagon to cross railroad tracks despite a fast-approaching train.⁶³ The wagon narrowly escaped a collision with the train. Mary Coultas, a passenger in the wagon, sued for damages for the physical injuries brought on by her fright.⁶⁴ The Privy Council denied recovery, holding that the damages were too "remote" because the defendant could not have anticipated that the plaintiff would suffer physical injury from her fright, proof of causation was too difficult, and recognition of such a cause of action would encourage spurious suits.⁶⁵ A New York court, expressing similar concerns, concluded that public policy demanded that even meritorious claims go uncompensated in order to protect the judicial system from baseless suits. It denied recovery, therefore, to a woman who suffered a miscarriage after defendant's runaway horses stopped perilously near her without actually touching her.⁶⁶

Confronted with increasing demands for recovery for negligently inflicted emotional distress, courts began to allow recovery where the plaintiff could prove some element in addition to the defendant's negligence and the resulting distress.⁶⁷ Courts required this element in order to provide a "guarantee" of the claim's genuineness.⁶⁸ In some jurisdictions the defendant's negligence had to include physical contact or "impact" with the plaintiff's person.⁶⁹ Courts and commentators thought this contact assuaged some of the traditional concerns associated with claims for mental distress.⁷⁰ Other jurisdictions

⁶¹ See *infra* notes 62-66 and accompanying text.

⁶² 13 App. Cas. 222 (P.C. 1888).

⁶³ *Id.*

⁶⁴ *Id.* at 223.

⁶⁵ *Id.* at 225-26.

⁶⁶ *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 109, 45 N.E. 354, 354 (1896), *overruled*, *Battalla v. State*, 110 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961).

⁶⁷ See *infra* notes 69-90 and accompanying text.

⁶⁸ See PROSSER & KEETON, *supra* note 8, § 54 at 363-64.

⁶⁹ See, e.g., *St. Louis I.M. & S.R.R. v. Bragg*, 69 Ark. 402, 64 S.W. 226 (1901); *Braun v. Craven*, 175 Ill. 401, 51 N.E. 657 (1898); *Kalen v. Terre Haute & I.R.R.*, 18 Ind. App. 202, 47 N.E. 694 (1897); *McGee v. Vanover*, 148 Ky. 737, 147 S.W. 742 (1912); *Herrick v. Evening Publishing Co.*, 120 Me. 138, 113 A. 16 (1921), *overruled*, *Wallace v. Coca Cola Bottling Co.*, 269 A.2d 117 (1970); *Spade v. Lynn & B.R.R.*, 168 Mass. 285, 47 N.E. 88 (1897), *overruled*, *Dziokonski v. Babineau*, 375 Mass. 555, 380 N.E.2d 1295 (1978); *Nelson v. Crawford*, 122 Mich. 466, 81 N.W. 335 (1899), *overruled*, *Daley v. LaCroix*, 384 Mich. 4, 179 N.W.2d 390 (1970); *McCardle v. Peck Dry Goods Co.*, 191 Mo. App. 263, 177 S.W. 1095 (1915); *Ward v. W. Jersey & S.R.R.*, 65 N.J.L. 383, 47 A. 561 (1900), *overruled*, *Falzone v. Busch*, 45 N.J. 559, 214 A.2d 12 (1965); *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896), *overruled*, *Battalla v. State*, 10 N.Y.2d 237, 219 N.Y.S. 34, 176 N.E.2d 729 (1961); *Miller v. Baltimore & O.S.W.*, 78 Ohio St. 309, 85 N.E. 499 (1908), *overruled*, *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983); *Ewing v. Pittsburgh C. & St. L.Ry.*, 147 Pa. 40, 23 A. 340 (1892).

⁷⁰ See, e.g., *Ward*, 65 N.J.L. at 385-86, 47 A. at 562 (impact necessary because physical injury is not a natural result of fright, making causation difficult to prove; no precedent for holding otherwise; flood of litigation involving easily feigned injuries); *Mitchell*, 151 N.Y. at 110, 45 N.E. at 354-55 (without impact, measure of damages too speculative). Some sources have suggested that the true value of requiring impact lies in the opportunity it provides for the defendant to testify that there was, in fact, no impact. Thus, a defendant may be able to swear that, within the statute of limitations, he has struck no one with his automobile, whereas he cannot be sure whom he may have frightened. PROSSER & KEETON, *supra* note 8, at § 54.

adopted the "zone-of-danger" test and concluded that proof that the defendant exposed the plaintiff to a risk of physical harm, and that mental distress manifested itself in physical symptoms,⁷¹ lent the necessary credence to the plaintiff's allegations.⁷²

Although the former test is referred to as the "impact" rule, in many early cases decided under this approach, physical contact with plaintiff's person alone was not sufficient. In addition, the contact had to cause actual injury to the plaintiff.⁷³ Thus, in *Spade v. Lynn & Boston R.R., Co.*, the Supreme Judicial Court of Massachusetts found that "there can be no recovery for such physical injuries as may be caused solely by such mental disturbance, where there is no injury to the person from without."⁷⁴ On a

⁷¹ See, e.g., *Alabama Fuel & Iron Co. v. Baladoni*, 15 Ala. App. 316, 321-24, 73 So. 205, 207-08 (1916); *Lindley v. Knowlton*, 179 Cal. 298, 300-01, 176 P. 440, 441 (1918); *Orlo v. Connecticut Co.*, 128 Conn. 231, 238, 21 A.2d 402, 405 (1941); *Goddard v. Waters*, 14 Ga. App. 722, 726, 82 S.E. 304, 305-06 (1914); *Watson v. Dils*, 116 Iowa 249, 252-53, 89 N.W. 1068, 1069-70 (1902); *Whitsel v. Watts*, 98 Kan. 508, 510, 159 P. 401 (1961); *Stewart v. Arkansas So. R.R.*, 112 La. 764, 768-69, 36 So. 676, 677-78 (1904); *Green v. Shoemaker*, 111 Md. 69, 82-83, 73 A. 688, 692-93 (1909); *Purcell v. St. Paul City R.R.*, 48 Minn. 134, 138-39, 50 N.W. 1034, 1034-35 (1892); *Cashin v. Northern P. R.R.*, 96 Mont. 92, 101, 102, 28 P.2d 862, 865-66 (1934); *Hanford v. Omaha & Council Bluffs Street Ry.*, 113 Neb. 423, 440, 203 N.W. 643, 650 (1925); *Chiuchiolio v. New England Wholesale Tailors*, 84 N.H. 329, 332, 150 A. 540, 542 (1930); *Kimberly v. Howland*, 143 N.C. 398, 404-05, 55 S.E. 778, 780-81 (1906); *Salmi v. Columbia N. R.R.*, 75 Ore. 200, 206-09, 146 P. 819, 821 (1915); *Simone v. Rhode Island Co.*, 28 R.I. 186, 204, 66 A. 202, 209 (1907); *Mack v. South-Bound R.R.*, 52 S.C. 323, 337, 29 S.E. 905, 910-11 (1897); *Sternhagen v. Kozel*, 40 S.D. 396, 398, 167 N.W. 398, 399 (1918); *Memphis St. R.R. v. Bernstein*, 137 Tenn. 637, 637, 194 S.W. 902, 903 (1917); *Hill v. Kimball*, 76 Tex. 210, 216, 13 S.W. 59, 59-60 (1890), *overruled*, *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983); *O'Meara v. Russell*, 90 Wash. 557, 562-63, 156 P. 550, 552 (1916); *Lambert v. Brewster*, 97 W. Va. 124, 138-40, 125 S.E. 244, 249-50 (1924); *Pankopf v. Hinkley*, 141 Wis. 146, 149, 123 N.W. 625, 627 (1909).

At the same time that various state courts were wrestling with the problem of when, if ever, to permit recovery for emotional distress, the English courts were also moving away from the proposition that emotional distress was not compensable. In *Dulieu v. White & Sons*, 2 K.B. 669, 671 (1901), the court allowed recovery for subsequently manifested physical injuries that the plaintiff experienced as a result of emotional distress. In *Dulieu*, the plaintiff prematurely gave birth to a severely handicapped child two months after defendant negligently drove his horsedrawn carriage into her place of employment. *Id.* at 670. The court took issue with the proposition that such physical injuries were "too remote" from the defendant's negligent act to allow recovery even though they were not experienced contemporaneously with the negligence, noting that death by poison is not considered too remote from the act of administering the poison although the injury is not suffered contemporaneously. *Id.* at 677-78 (Kennedy, J.). Addressing concerns that causation was difficult to establish, the judge stated that such problems could be avoided by careful consideration of the proffered medical evidence and the requirement that the jury be satisfied that such evidence supports the conclusion that the physical injury was a "direct and natural" effect of the distress. *Id.* at 677 (Kennedy, J.).

⁷² See Smith, *supra*, note 50, at 207.

⁷³ The impact initially had to be accompanied by actual injury. In *Davis v. Cleveland Railway Co.*, where the plaintiff passenger was caught in the doors of the defendant's bus, recovery was denied because the plaintiff was not physically injured. 135 Ohio St. 401, 407-08, 21 N.E.2d 169, 172-73 (1939). The court stated that where recovery for fright depended upon sustaining contemporaneous physical injury, "such injury should be of sufficient gravity to bear some causal relation or proximate relevancy to the fright and its consequences." *Id.* at 405, 21 N.E.2d at 171.

⁷⁴ *Spade v. Lynn & B.R.R.*, 168 Mass. 285, 290, 47 N.E. 88, 89 (1897) (*Spade I*). The plaintiff, a passenger on the defendant's train, claimed that the conductor's negligence in removing a passenger from the train caused a disturbance which frightened the plaintiff and caused her to suffer continuing "great mental and physical pain and anguish . . ." *Id.* at 285-86, 47 N.E. at 88.

subsequent appeal, the court refused to permit the plaintiff to proceed with her claim despite an alleged slight impact.⁷⁵

Notwithstanding judicial pronouncements that the impact rule would guarantee the genuineness of the emotional distress claim,⁷⁶ it also served to exclude meritorious actions. Thus, a plaintiff who sought damages for a miscarriage allegedly caused by her fear that she would be crushed to death by defendant's truck which careened toward her, was denied recovery because of the merely fortuitous absence of physical contact.⁷⁷ Some jurisdictions, however, modified the impact with resulting physical injury rule to permit claims for emotional distress after mere contact with the plaintiff, and thus opened the courts to a broader class of litigants.⁷⁸ Thus, in *Zelinsky v. Chemics*, a Pennsylvania court permitted plaintiffs to proceed with their claims for emotional distress upon evidence that they had been "jostled and jarred" in a collision between their automobile and defendant's, although they suffered no physical injuries in the accident.⁷⁹

Even the "mere impact" requirement was diluted, however, as the courts, while paying lip service to the rule, strained to find some impact in order to permit recovery.⁸⁰ Courts sustained awards despite often inconsequential contact which had no causal relation to the emotional distress.⁸¹ Such judicial fictions became commonplace, leading one court to conclude that "[f]raudulent claims are not likely to be eliminated by application of the rule, since the slightest impact . . . [has] been found sufficient to satisfy the

The court admitted that its holding was an arbitrary one, but reasoned that it was based on what was practicable for the great majority of cases. *Id.* at 288, 47 N.E. at 89.

⁷⁵ 172 Mass. 488, 52 N.E. 747 (1899) (*Spade II*). In the subsequent appeal, the plaintiff claimed that a slight contact between her person and that of an inebriated fellow passenger, which occurred as the conductor ejected another inebriated passenger, caused her to become emotionally upset and seriously ill. *Id.* at 488, 52 N.E. at 747.

⁷⁶ See *supra* note 70.

⁷⁷ O'Brien v. Moss, 220 A.D. 464, 464-66, 221 N.Y.S. 621, 622-23 (1926). The court concluded that where physical injury resulting from emotional distress is "neither preceded, accompanied, nor followed by any sort of actual physical molestation," there can be no recovery. *Id.* at 465, 221 N.Y.S. at 623. See also *Ward*, 65 N.J.L. at 384, 47 A. at 562 (mere apprehension of personal injuries which are not in fact sustained will not support a cause of action even where the mental disturbance results in physical illness); *Ewing v. Pittsburgh C. & St. L. R.R.*, 147 Pa. 40, 23 A. 340 (1891) (no recovery for plaintiff's fright, which caused physical pain and disability, where collision threw railroad cars into plaintiff's home but did not actually touch her).

⁷⁸ See, e.g., *Interstate Life & Accident Co. v. Brewer*, 56 Ga. App. 599, 193 S.E. 458 (1937) (plaintiff hit by tossed coin); *Deutsch v. Shein*, 597 S.W.2d 141 (Ky. 1980) (negligent exposure of pregnant plaintiff to x-rays constituted sufficient contact to support a claim for mental suffering); *Chesapeake & O. Ry. v. Robinett*, 151 Ky. 778, 152 S.W. 976 (1913) (conductor pushed father against plaintiff daughter); *McGee v. Vanover*, 148 Ky. 737, 147 S.W. 742 (1912) (defendant brushed up against plaintiff's body); *Porter v. Delaware, L. & W. R.R.*, 73 N.J.L. 405, 63 A. 860 (1906) (dust in eyes).

⁷⁹ 196 Pa. Super. 312, 175 A.2d 351 (1961).

⁸⁰ See *infra* note 81.

⁸¹ See, e.g., *Petition of United States*, 418 F.2d 264 (1st Cir. 1969) (physical consequences of mental disturbance recoverable where impact shown even if impact is neither substantial nor causally related to mental disturbance); *Sam Finley, Inc. v. Russell*, 75 Ga. App. 112, 42 S.E.2d 452 (1947) (dust inhalation); *Deutsch*, 597 S.E.2d at 146 (slight or trivial contact sufficient impact when mental distress results from contact); *Philadelphia B. & W.R.R. v. Mitchell*, 107 Md. 600, 69 A. 422 (1908) (contact with plaintiff's umbrella); *Morton v. Stack*, 122 Ohio St. 115, 170 N.E. 869 (1906) (smoke inhalation), *overruled*, *Schultz v. Barberton Glass*, 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983); *Hess v. Philadelphia Transp. Co.*, 358 Pa. 144, 56 A.2d 89 (1948) (falling electrical wire struck automobile).

rule's requirement."⁸² Furthermore, regardless of whether impact occurred prior to the plaintiff's exposure to the psychic stimulus⁸³ or afterwards,⁸⁴ courts compensated the physical consequences resulting from emotional distress.

Many jurisdictions, after initially adopting the rule, abandoned the impact requirement⁸⁵ while others rejected it immediately.⁸⁶ Instead, courts began to permit recovery for negligent invasions of mental tranquility by requiring that the plaintiff be within the "zone of physical danger" created by defendant's negligence⁸⁷ and that the

⁸² *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App. 3d 917, 933, 122 Cal. Rptr. 470, 481-82 (1975), *overruled*, *Quezada v. Hart*, 67 Cal. App. 3d 754, 136 Cal. Rptr. 815 (1977). Other criticisms abounded. Justice Musmanno of the Pennsylvania Supreme Court stated:

The impact rule presupposes that there can be no damage done to a person's physical structure unless a material object dashes against it. Yet we know that people die of fright, persons faint from shock, and individuals collapse from grief, without any of these unfortunates having been touched by the event which precipitated the disastrous result.

Knaub v. Gotwalt, 422 Pa. 267, 275, 220 A.2d 646, 649 (1966) (Musmanno, J., dissenting). Addressing the concern that the absence of impact would open the floodgates of litigation, the New Jersey Supreme Court noted that "there is no indication of an excessive number of actions of this type in other states which do not require an impact as a basis for recovery." *Falzone v. Busch*, 45 N.J. 559, 567, 214 A.2d 12, 16 (1965). See also *Lambert, Tort Liability for Psychic Injuries*, 41 B.U.L. REV. 584, 592 (1961). Lambert observes that "[t]he truth of the matter is that the feared flood tide of litigation has simply not appeared in states following the majority rule allowing recovery of psychic injuries without impact." *Id.*

But see Stewart v. Gilliam, where Chief Justice Reed dissented, stating:

I take it that there is more underlying the impact doctrine than simply problems of proof, fraudulent claims, and excessive litigation. The impact doctrine gives practical recognition to the thought that not every injury which one person may by his [or her] negligence inflict upon another should be compensated in money damages. There must be some level of harm which one should absorb without recompense as the price he [or she] pays for living in an organized society.

271 So. 2d 466, 477 (Fla. Dist. Ct. App. 1972).

⁸³ See, e.g., *Caspermeyer v. Florsheim Shoe Store Co.*, 313 S.W.2d 198 (Mo. App. 1958); *Brisboise v. Kansas City Pub. Serv. Co.*, 303 S.W.2d 619 (Mo. 1957); *Miller v. Baltimore & O.S.W.R.R.*, 78 Ohio St. 309, 85 N.E. 499 (1908).

⁸⁴ *Block v. Pascucci*, 111 Conn. 58, 149 A. 210 (1930); *Conley v. United Drug Co.*, 218 Mass. 238, 105 N.E. 975 (1914); *Driscoll v. Gaffey*, 207 Mass. 102, 92 N.E. 1010 (1910); *Cameron v. New England Tel. & Tel. Co.*, 182 Mass. 310, 65 N.E. 385 (1902). See also *Solomon v. Warren*, 540 F.2d 777 (5th Cir. 1976), *reh. den. en banc*, 545 F.2d 1298 (1977), *cert. dismissed sub nom. Warren v. Serody*, 434 U.S. 801 (1977). *Cf. Cohn v. Ansonia Realty Co.*, 162 A.D. 791, 148 N.Y.S. 39 (1914) (plaintiff observed her children riding in defendant's elevator with the doors open; she fainted and fell into elevator shaft).

⁸⁵ See, e.g., *Towns v. Anderson*, 195 Col. 517, 579 P.2d 1169 (1978) (overruling the impact test); *Falzone v. Busch*, 45 N.J. 559, 214 A.2d 12 (1960) (same); *Niederman v. Brodsky*, 436 Pa. 392, 261 A.2d 84 (1970). In fact, as of this writing, only a few jurisdictions continue to adhere to the impact rule. See 1 MINZER, *supra* note 8, at § 5.13.

⁸⁶ See, e.g., *Purcell v. St. Paul City Ry.*, 48 Minn. 134, 50 N.W. 1034 (1892) (sustaining action for injuries caused by fright when they are the natural consequence of a wrongful act or omission). See also *Green v. T.A. Shoemaker & Co.*, 111 Md. 69, 73 A. 688 (1909); *Watkins v. Kaolin Mfg. Co.*, 131 N.C. 536, 42 S.E. 983 (1902).

⁸⁷ The "zone of physical danger" refers to the area of unreasonable risk of physical harm created by the defendant's negligence. The test has its origins in the opinion authored by then Judge Cardozo in *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928). Noting that liability for negligence required a demonstration that the defendant owed a duty to the plaintiff and that the defendant breached that duty, Judge Cardozo held that a defendant's duty extended

plaintiff's emotional distress be manifested in physical consequences.⁸⁸ Courts determined that the plaintiff's presence within the zone of physical danger was necessary to prevent unlimited liability.⁸⁹ The second prong — resulting physical manifestations — was necessary in order to provide adequate proof of the claim's validity.⁹⁰

The zone-of-danger rule, with its physical manifestation requirement, has created problems as well. First, there are many plaintiffs outside the zone of physical danger for whom the defendant's conduct poses an unreasonable risk of emotional harm.⁹¹ Also, it is unclear what sort of physical manifestations of the emotional distress must be proven in order to recover.⁹² Furthermore, this latter requirement excludes those plaintiffs who experience genuine mental distress which does not manifest itself in physical consequences.⁹³

only to those within the foreseeable zone-of-danger created by the defendant's negligence. *Id.* at 343, 192 N.E. at 100. Thus, only a plaintiff who is put in danger of actual physical harm by the defendant's negligence can recover. This zone of danger encompasses a smaller area than the zone of risk of foreseeable mental distress, consequently depriving a significant group of plaintiffs of legal redress. Langhenry, *supra* note 39, at 264.

⁸⁸ See, e.g., *Keck v. Jackson*, 122 Ariz. 114, 593 P.2d 668 (1979) (holding actions for recovery for emotional distress limited to instances where the plaintiff suffered physical manifestations). Under this test, a plaintiff who is unable to demonstrate that the emotional distress caused a physical injury has no cause of action. RESTATEMENT (SECOND) OF TORTS § 436A (1965) states: "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance." *Id.*

⁸⁹ Thus, a bystander has no cause of action for emotional distress sustained as a result of witnessing the defendant negligently endanger another unless the bystander was also physically imperiled by the negligence. RESTATEMENT (SECOND) OF TORTS § 436 comment f (1965).

⁹⁰ See RESTATEMENT (SECOND) OF TORTS § 436A comment b (1965), which notes that, in the absence of the guarantee of genuineness provided by resulting bodily harm, such emotional disturbance may be too easily feigned, depending, as it must, very largely upon the plaintiff's subjective testimony and that to allow recovery for it might open too wide a door for false claims by those who have suffered no real harm at all. *Id.*

⁹¹ See *infra* notes 94-103 and accompanying text.

⁹² RESTATEMENT (SECOND) OF TORTS provides that bodily harm must constitute both the unreasonable risk and the result of the emotional disturbance. RESTATEMENT (SECOND) OF TORTS § 436 (1965). Section 436A makes it clear that not all physical manifestations guarantee a cause of action and the difference between mere emotional harm and bodily harm may be one of degree only. *Id.* at 436A. For example, comment c provides:

The rule stated in this Section applies to all forms of emotional disturbance, including temporary fright, nervous shock, nausea, grief, rage, and humiliation. The fact that these are accompanied by transitory, non-recurring physical phenomena, harmless in themselves, such as dizziness, vomiting, and the like, does not make the actor liable where such phenomena are in themselves inconsequential and do not amount to any substantial bodily harm. On the other hand, long continued nausea or headaches may amount to physical illness, which is bodily harm; and even long continued mental disturbance, as for example in the case of repeated hysterical attacks, or mental aberration, may be classified by the courts as illness, notwithstanding their mental character. This becomes a medical or psychiatric problem, rather than one of law.

Id. See, e.g., *Allen v. Jones*, 104 Cal. App. 3d 207, 216, 163 Cal. Rptr. 445, 451 (1980) (Gardner, J., concurring) ("In no other area are the vagaries of our law more apparent than in the distinction between mental and emotional distress accompanied by physical manifestation and such discomfort unaccompanied by physical manifestation.").

⁹³ See *infra* notes 116-20 and accompanying text.

The first problem has been the subject of much scholarly⁹⁴ and judicial consideration⁹⁵ under the rubric of "bystander recovery" — that is, whether a third party can recover for emotional distress suffered as a result of physical harm negligently inflicted by a defendant upon another. Early cases uniformly denied recovery to a bystander who was not himself or herself within the zone of physical danger.⁹⁶ In the 1968 case of *Dillon v. Legg*,⁹⁷ however, the California Supreme Court held that a bystander's foreseeable emotional distress, which ultimately caused physical injury, was compensable even when the bystander was not in any direct peril from the defendant's negligence.⁹⁸ The court limited the defendant's liability to bystanders by defining fore-

⁹⁴ Literally hundreds of articles discuss this issue. See, e.g., Diamond, *Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477 (1984); Nolan & Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583 (1982); Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm — A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477 (1982); Leibson, *Emotional Distress*, *supra* note 35; Note, *The Negligent Infliction of Mental Distress: The Scope of Duty and Foreseeability of Injury*, 57 N.D. L. REV. 577 (1981); Comment, *The Development of Recovery for Negligently Inflicted Mental Distress Arising from Peril or Injury to Another: An Analysis of the American and Australian Approaches*, 26 EMORY L.J. 647 (1977); Comment, *Negligence — Infliction of Emotional Harm — A Suggested Analysis*, 54 IOWA L. REV. 914 (1969).

⁹⁵ See *infra* notes 96–104 and accompanying text.

⁹⁶ See, e.g., *Jelley v. Laflame*, 108 N.H. 471, 238 A.2d 728 (1968) (because she was not in the zone of danger, mother unable to recover for emotional distress when she witnessed her daughter crushed to death); *Lessard v. Tarca*, 20 Conn. Supp. 295, 133 A.2d 625 (Super. Ct. 1957) (because they were not in peril, parents and surviving siblings denied recovery for emotional distress sustained after viewing another child burn to death in automobile fire); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1934) (because she was not in danger, mother who suffered serious emotional distress after witnessing defendant run over her children denied recovery).

Interestingly enough, bystander recovery is compatible with the Restatement's approach so long as the witness was within the zone of physical danger created by the defendant's negligence and suffered physical harm as a result of the emotional distress. The comment to the RESTATEMENT (SECOND) OF TORTS (which, incidentally, permits recovery only where the direct victim is a member of the bystander's immediate family) explains:

The reason for this exception to the general rule that there cannot be recovery for emotional disturbance, or its consequences, arising from the peril of a third person lies in the fact that the defendant, by his [or her] negligence, has endangered the plaintiff's own safety and threatened him [or her] with bodily harm, so that the defendant is in breach of an original duty to the plaintiff to exercise care for his [or her] protection. When such a duty is violated, the defendant is not relieved of liability for the bodily harm to the plaintiff which in fact results, by reason of the unusual and unforeseeable manner in which it is brought about.

RESTATEMENT (SECOND) OF TORTS § 436 comment f (1965). See also 1 MINZER, *supra* note 8, at § 5.23.

Action for bystander recovery, however, when the emotional distress is due only to witnessing the personal injury of another cannot be successfully maintained under the impact doctrines. Cf. *Cohn v. Ansonia Realty Co.*, 162 A.D. 791, 148 N.Y.S. 39 (1914).

⁹⁷ 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). In *Dillon*, a mother and daughter sued to recover damages for the emotional distress they suffered after witnessing the defendant's automobile strike a sibling. *Id.* at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74. Only the surviving daughter was arguably within the zone-of-danger and, therefore, able to recover under the Restatement approach. *Id.* at 732, 441 P.2d at 915, 69 Cal. Rptr. at 75. The court, however, did not have to decide whether emotional distress alone was compensable, as both plaintiffs alleged resulting physical injury. *Id.* at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.

⁹⁸ *Id.* at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81. The court expressed dismay that a "few

seeability in terms of the plaintiff's physical proximity to the incident, the plaintiff's relationship to the victim, and whether the emotional distress resulted from a contemporaneous sensory perception of the incident as opposed to hearing of it later.⁹⁹

Like other tests governing recovery for emotional distress, the *Dillon* rule has generated much criticism.¹⁰⁰ It has, moreover, resulted in some incongruous holdings. For example, in different cases the inflexible application of *Dillon* has precluded recovery by a man who, upon receiving news by telephone of the death of his daughter and grandchild, died of a heart attack,¹⁰¹ by the live-in lover of the victim,¹⁰² and by the parent of accident victims who arrived at the scene only seconds after the accident occurred.¹⁰³ The courts presently are considering whether a bystander-plaintiff may recover for resulting emotional distress when the direct victim suffered only minimal injury.¹⁰⁴

yards" difference would deny the mother recovery for the physical manifestation of her emotional distress, yet allow the daughter's action for the same damages. *Id.* at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75. It rebuffed the argument that the potential for fraudulent claims justified the denial of liability, reasoning that such a possibility did not justify rejection of meritorious claims. *Id.* at 736, 441 P.2d at 917-18, 69 Cal. Rptr. at 77-78.

⁹⁹ *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. By emphasizing the importance of the foreseeability of the risk, the court attempted to assuage fears that bystander recovery would result in unlimited liability for the defendant. *Id.* at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74.

In *D'Ambra v. United Shoe*, the court also sought to limit a defendant's potential liability for a bystander's distress by resorting to the foreseeability test. 354 F. Supp. 810, 820 (D.R.I. 1973). The *D'Ambra* court, however, rejected the *Dillon* foreseeability factors in favor of the following considerations: (1) the age of the child; (2) the type of neighborhood; (3) the tortfeasor's familiarity with the neighborhood; (4) the time of day; and (5) any other circumstances which put the tortfeasor on notice of likelihood of the parent's presence. *Id.*

¹⁰⁰ See, e.g., *Diamond*, *supra* note 94, at 478 (*Dillon* criteria an inappropriate guide to question of foreseeability); *Pearson*, *supra* note 94, at 478 (*Dillon* rule as arbitrary as zone of danger test it replaced); *PROSSER & KEETON*, *supra* note 8, at § 54. See also *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678, 684-85 (N.D. 1972) (*Dillon* places undue burden on one who is merely negligent).

¹⁰¹ *Kelley v. Kokua Sales & Supply, Ltd.*, 56 Hawaii 204, 206, 209, 532 P.2d 673, 675, 676 (1975) (decendent located at unreasonable distance from accident excluded from defendant's duty of due care, as liability is otherwise "unmanageable, unbearable, and totally unpredictable").

¹⁰² *Drew v. Drake*, 110 Cal. App. 3d 555, 558-59, 168 Cal. Rptr. 65, 65-66 (1980). Cf. *Mobaldi v. Regents of Univ. of Cal.*, 55 Cal. App. 3d 573, 586, 127 Cal. Rptr. 720, 728 (1976), cited with disapproval by *Baxter v. Superior Court*, 19 Cal. 3d 461, 466, 563 P.2d 871, 874, 138 Cal. Rptr. 315, 318 (1977); *Leong v. Takasaki*, 55 Hawaii 398, 411, 520 P.2d 758, 766 (1974) (absence of blood relationship between victim and plaintiff-witness not determinative; plaintiff, step-grandson of victim, entitled to prove nature of relationship and extent of damages suffered due to relationship); *Eyrich v. Dam*, 193 N.J. Super. 244, 255, 473 A.2d 539, 545 (1984) (close family friend who acted as surrogate father to young victim permitted recovery).

¹⁰³ *Parsons v. Superior Court*, 81 Cal. App. 3d 506, 510, 513, 146 Cal. Rptr. 495, 406, 409, (1978) (plaintiff reached accident scene "before dust had settled" but in absence of evidence that plaintiff "saw, heard, or otherwise sensorily perceived the injury-producing event," no recovery permitted) (emphasis in original). But compare *Dziokonski v. Babineau*, 375 Mass. 555, 380 N.E.2d 1295 (1978) (parent who arrived at accident scene while injured child still present entitled to recover despite not being there when accident occurred).

¹⁰⁴ See *Versland v. Caron Transp.*, 671 P.2d 583, 588 (1983) (bystander's serious emotional distress foreseeable only when defendant's negligence caused serious injury or death to direct victim); *Ramirez v. Armstrong*, 673 P.2d 822, 825-26, 100 N.M. 538, 541-42 (N.M. 1983) (same); *Porter v. Jaffee*, 84 N.J. 88, 100-01, 417 A.2d 521, 527-28 (1980) (harm which does not cause grievous bodily injury or result in the death of a direct victim does not ordinarily result in serious emotional distress of a bystander; therefore, minimal harm does not present an "unreasonable" risk of emotional distress to a witness).

The zone-of-danger test also requires the physical manifestation of emotional distress.¹⁰⁵ The extent of physical manifestation required, however, is the source of much dispute,¹⁰⁶ as all emotional distress has some physical effect on the sufferer.¹⁰⁷ Thus, recovery depends not upon the existence of physical consequences but, rather, upon policy choices concerning the degree of these consequences.¹⁰⁸ In part, this disagreement arises from phraseology. The *Restatement of Torts* requires that physical or bodily harm result from the emotional distress,¹⁰⁹ but the *Restatement's* comments suggest that brief periods of dizziness, nervousness, and vomiting are "inconsequential" and insufficient to prove emotional distress because they do not constitute "substantial" bodily harm.¹¹⁰ Whereas some zone-of-danger jurisdictions have adopted the *Restatement's* "physical harm" language,¹¹¹ others have allowed recovery when the emotional distress results in "physical consequences,"¹¹² "objective symptomatology,"¹¹³ or "physical manifestations."¹¹⁴ Furthermore, manifestations of emotional distress that one court finds sufficiently physical another court finds purely mental.¹¹⁵ This suggests that even once decided upon, courts often apply the criteria arbitrarily.

¹⁰⁵ This requirement also surfaces in cases involving bystander recovery. See *Dillon v. Legg*, 68 Cal. 2d 728, 740, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968) (in addition to meeting foreseeability test, plaintiff's mother also suffered physical manifestations of her severe emotional distress). See *supra* notes 97-99 and accompanying text.

¹⁰⁶ See *infra* notes 111-15 and accompanying text.

¹⁰⁷ Schwartz, *Neurosis Following Trauma*, TRAUMA, Dec. 1959, at 32. See *infra* note 117.

¹⁰⁸ Comment, *Independent Tort*, *supra* note 35, at 1241 n.24 (1971) (discussing courts' difficulties in formulating standards by which to examine "mental" and "physical" injuries for purposes of allowing recovery).

¹⁰⁹ RESTATEMENT (SECOND) OF TORTS § 436A (1965).

¹¹⁰ *Id.* at comment c. The comments do note that continuing attacks of these otherwise harmless physical phenomena may constitute a physical illness. *Id.* Similarly, repeated attacks of hysteria, which individually might be classified as a mental disturbance, may also amount to a physical illness. *Id.*

¹¹¹ See, e.g., *Robb v. Pennsylvania R.R.*, 58 Del. 454, 465, 210 A.2d 709, 715 (1965); *Keck v. Jackson*, 122 Ariz. 114, 115, 593 P.2d 668, 669 (1979); *M.B.M. Co. v. Counce*, 268 Ark. 269, 278, 596 S.W.2d 681, 686 (1980); *Payton v. Abbott Labs*, 386 Mass. 540, 547, 437 N.E.2d 171, 176 (1982); see also *Falzone v. Busch*, 45 N.J. 559, 569, 214 A.2d 12, 17 (1965) (substantial bodily injury or sickness). Compare *Bowman v. Williams*, 164 Md. 397, 404, 165 A. 182, 184 (1933) (clear and substantial physical injury) with *Rickey v. Chicago Transit Auth.*, 98 Ill. 2d 546, 555, 457 N.E.2d 1, 5 (1983) (physical injury or illness).

¹¹² See *Barnhill v. Davies*, 300 N.W.2d 104, 107 (Iowa 1981) (although recognizing that mental distress can occur absent physical symptoms, court suggested compensation only when distress results in physical injury); *Falzone v. Busch*, 45 N.J. 559, 569, 214 A.2d 12, 17 (1965) (substantial bodily injury or sickness); *Chisum v. Gehrens*, 283 N.W.2d 235, 240 (S.D. 1979) (physical injury).

¹¹³ *Corso v. Merrill*, 119 N.H. 647, 659, 406 A.2d 300, 308 (1979) ("objective physical symptoms"); *Corrigan v. Ball & Dodd Funeral Home*, 89 Wash. 2d 959, 962, 577 P.2d 580, 582 (1978) ("objective symptoms"); *Hunsley v. Giard*, 87 Wash. 2d 424, 436, 553 P.2d 1096, 1102 (1976).

¹¹⁴ *Towns v. Anderson*, 195 Colo. 517, 519, 579 P.2d 1163, 1165 (1978) (physical manifestations of mental illness); cf. *D'Ambra v. United States*, 114 R.I. 643, 657, 338 A.2d 524, 531 (1975) (bystander recovery permitted only when emotional harm results in "physical symptoms"); *Langeland v. Farmers State Bank*, 319 N.W.2d 25, 31 (Minn. 1982) ("physical symptoms").

In *Ricky v. Chicago Transit Auth.*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983), the court alternatively, and perhaps indiscriminately, referred to a requirement of "physical injury or illness" and "physical manifestations."

¹¹⁵ See, e.g., *Daley v. LaCroix*, 384 Mich. 4, 15, 179 N.W.2d 390, 396 (1970) (lay testimony that

The physical consequences requirement has one final problem. Because it does not permit recovery for genuine emotional distress claims which do not manifest themselves physically,¹¹⁶ this element perhaps encourages extravagant pleading by plaintiffs so as to bring their cases within the rule.¹¹⁷ Emotional distress — the victim's mental response to traumatic stimuli¹¹⁸ — may prompt psychic reactions which doctors can ascertain and

minor plaintiff was nervous sufficient to create jury question on issue of "definite and objective physical injury"; dissent felt only indefinite and subjective injury involved). *Cf. Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979) (plurality held plaintiff's complaint of "severe depression" and "acute nervous condition" resulting from watching defendant negligently run over and kill her child was sufficient for "physical and mental injuries"; dissent found "emotional injury" only).

In Michigan, withdrawal from society, combined with continued depression and an inability to function normally, was sufficient to constitute a "definite physical injury." *Toms v. McConnell*, 45 Mich. App. 647, 657, 207 N.W.2d 140, 145 (1973). California courts have found the required physical injury where plaintiff alleged gastric disturbance, loss of sleep, and nervous disorder; *Krouse v. Graham*, 19 Cal. 3d 59, 77, 562 P.2d 1022, 1031, 137 Cal. Rptr. 863, 872 (1977); *Espinosa v. Beverly Hosp.*, 114 Cal. App. 2d 232, 236, 249 P.2d 843, 845 (1952); anxiety, grief, shock, worry, distress, mortification, indignity, and humiliation; *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 433, 426 P.2d 173, 178, 58 Cal. Rptr. 13, 18 (1967); nausea; *Medeiros v. Coca-Cola Bottling Co.*, 57 Cal. App. 2d 707, 714, 135 P.2d 676, 680 (1943); and nervousness; *Taylor v. Pole*, 16 Cal. 2d 668, 671, 107 P.2d 614, 616 (1940). *But see Cosgrove v. Beymer*, 244 F. Supp. 824, 826 (D.Del. 1965) (dizziness, mild headaches, and nervousness insufficient symptoms of bodily harm).

Judge McEntree of the First Circuit commented upon the confusion generated by the requirement of physical consequences:

The term "physical" is not used in its ordinary sense for purposes of applying the "physical consequences" rule. Rather, the word is used to indicate that the condition or illness for which recovery is sought must be one susceptible of objective determination. Hence, a definite nervous disorder is a "physical injury" sufficient to support an action for damages for negligence.

Petition of United States, 418 F.2d 264, 269 (1st Cir. 1969).

One scholar has noted that the requirement of physical injury is a concept capable of manipulation by the plaintiff: "In the hands of a creative and sympathetic judge, very little in the way of emotional reaction would escape being characterized as physical harm." Pearson, *supra* note 94, at 509-10 & n.179.

¹¹⁶ See *infra* notes 198-213 and accompanying text. *Leong v. Takasaki*, 55 Hawaii 398, 413, 520 P.2d 758, 767 (1974) (concluding that some mental responses, though painful to the individual, are not accompanied by physical injury).

¹¹⁷ See *Molien v. Kaiser Found. Hosp.*, 27 Cal. 3d 916, 929, 616 P.2d 813, 820, 167 Cal. Rptr. 831, 838 (1980) (physical injury requirement "encourages extravagant pleading and distorted testimony"). Annotation, *Right to Recover for Emotional Disturbance or its Physical Consequences, in the Absence of Impact or Other Actionable Wrong*, 64 A.L.R.2d 100, 117 n.18 (1959) ("[I]n most instances of severe mental disturbance some deleterious physical consequences can, with a little ingenuity, be found . . .").

¹¹⁸ Psychic trauma is "an emotional shock that makes a lasting impression on the mind . . ." Cantor, *Psychosomatic Injury, Traumatic Psychoneurosis and Law*, 6 CLEV. MARSHALL L. REV. 428, 430 (1957). The stimulation can be physical, in the sense that it involves some impact with the plaintiff's person, purely psychic, or a combination of the two. *Id.* Laughlin, *Neuroses Following Trauma*, in 6 TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY 76 (P. Cantor ed. 1962).

Traumatic stimuli may induce either primary or secondary reactions, or both. Comment, *Independent Tort*, *supra* note 35, at 1249. Primary responses, such as "fear, anger, grief, shock, humiliation, or embarrassment," are an individual's first reactions to the stimulus. *Id.* They are immediate and automatic, designed to protect the person from harm or unpleasantness, and produce only fleeting disturbances. *Id.* The victim experiences both biological and psychological attempts to restore equilibrium after exposure to the stimulus. *Id.* n.68. See also Smith & Solomon,

evaluate.¹¹⁹ But emotional distress may also consist of more fleeting unpleasant responses not easily subject to such measurement and proof.¹²⁰

In two types of recurring fact patterns, some courts have allowed a plaintiff to recover for emotional distress without showing impact, placement within the zone of physical danger, or physical consequences resulting from the distress.¹²¹ The first fact pattern concerns the negligent transmission of a message informing the plaintiff of a relative's death.¹²² Courts have characterized this emotional distress as the "natural consequence" of the failure to relay promptly or, in some cases, accurately, such messages.¹²³ Some jurisdictions have recognized a similar exception for the family of a decedent whose corpse has been mistreated.¹²⁴ One court explained judicial willingness to recognize these exceptions by noting that the surviving relatives' mental distress "is not only the natural and probable consequence of the character of the wrong committed,

Traumatic Neuroses in Court, VA. L. REV. 97, 123-25 (1944), for a discussion of the difference between nervous shock and traumatic neurosis.

Secondary reactions to a stimulus represent a more severe response termed "traumatic neurosis." Comment, *Independent Tort*, *supra* note 35, at 1250. "Neurosis" is defined as "a severe emotional disorder characterized by disturbances of thought, feeling or behavior which vary significantly from that common to the patient's culture . . ." *Id.* Although these neuroses are not always demonstrated by physical symptoms, they are subject to medical proof with reasonable certainty as to their existence and extent. Amdursky, *supra* note 55, at 351. Examples of traumatic neuroses include phobic reactions, conversion reactions, obsessive-compulsive reactions, and depression. Comment, *Independent Tort*, *supra* note 35, at 1205-51 & n.82.

¹¹⁹ See *Molien*, 27 Cal. 3d at 931, 616 P.2d at 821, 167 Cal. Rptr. at 839 (suggesting that plaintiffs will be able to prove some types of emotional distress through medical testimony). See also *Leong*, 55 Hawaii at 413, 520 P.2d at 767.

¹²⁰ The Hawaii Supreme Court has noted that more transient emotional responses — the primary responses — while producing considerable suffering for the individual, are often incapable of precise determination because of their subjective nature and possibly short duration, and because physical injury does not always accompany them. *Leong*, 55 Hawaii at 413, 520 P.2d at 767. See also, Comment, *Independent Tort*, *supra* note 35, at 1252.

¹²¹ MINZER, *supra* note 8, § 7.30; PROSSER & KEETON, *supra* note 8, § 54.

¹²² *Western United Tel. Co. v. Thomas*, 209 Ala. 657, 96 So. 873 (1923) (failure to deliver telegram promptly caused plaintiff to reach home after father's death); *Russ v. Western Union Tel. Co.*, 222 N.C. 504, 23 S.E.2d 681 (1943) (failure to deliver telegram resulted in plaintiff's learning of brother's death subsequent to burial); *Relle v. Western United Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805 (1881) (failure to deliver timely message of mother's death prevented plaintiff from being present at funeral services). See PROSSER & KEETON, *supra* note 8, at § 54. But see *Western Union Tel. Co. v. Choteau*, 28 Okla. 664, 115 P. 879 (1911) (when emotional distress due to delayed delivery of telegram advising plaintiff of father's death resulted in no physical injuries, recovery denied). In New York, this exception has been extended to the negligent transmission of any type of message advising plaintiff of a relative's death. See *Johnson v. State*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975) (hospital erroneously told plaintiff her mother had died); *Jenkins v. State*, 119 Misc. 2d 144, 146, 462 N.Y.S.2d 766, 768 (1983) (hospital erroneously informed family that their son had died).

¹²³ *Relle v. Western Union Tel. Co.*, 55 Tex. 308, 313, 40 Am. Rep. 805, 807 (1881).

¹²⁴ See e.g., *Allen v. Jones*, 104 Cal. App. 3d 207, 214, 163 Cal. Rptr. 445, 450 (1980) (recovery for emotional distress permitted when defendant-morticians negligently lost cremated remains of plaintiff's brother). See also RESTATEMENT (SECOND) OF TORTS § 868 (1965).

While courts initially justified damage awards for emotional distress caused by the mishandling of a corpse as parasitic to the invasion of a property right, see RESTATEMENT (SECOND) OF TORTS § 868 (1965), comment a, the modern approach recognizes the cause of action as one exclusively for emotional distress. *Johnson v. State*, 37 N.Y.2d 378, 382, 334 N.E.2d 590, 592, 372 N.Y.S.2d 638, 641-42 (1975) (disputing argument that award for emotional distress resulting from corpse mishandling arose from plaintiff's property right in the bodies).

but indeed is frequently the only injurious consequence to follow from it."¹²⁵ Dean Prosser has concluded that these two exceptions share an "especial likelihood of genuine and serious emotional distress" and that the unusual facts provide a safeguard against spurious claims which obviate the need for other tests of the claim's validity.¹²⁶ He has further suggested that whenever the facts giving rise to the distress include a similar assurance of the genuineness of the alleged mental distress, recovery for emotional distress alone should be permitted.¹²⁷

Following Dean Prosser's suggestion, two jurisdictions have, in fact, extended the exceptions allowing recovery for mental distress, despite the lack of impact or resultant physical injuries, to those situations where the circumstances giving rise to the claim attest to the genuineness of the distress.¹²⁸ The New York courts have concluded that when a plaintiff is placed in unreasonable risk of physical harm as a direct result of the defendant's negligence, but experiences only emotional distress, the facts giving rise to the claim provide sufficient proof of its genuineness and the plaintiff need not demonstrate resulting physical manifestations.¹²⁹ The defendant's duty under this rule, as under

¹²⁵ *Crenshaw v. O'Connell*, 235 Mo. App. 1085, 1093, 150 S.W.2d 489, 493 (1941).

¹²⁶ PROSSER & KEETON, *supra* note 8, at § 54.

¹²⁷ *Id.* Dean Prosser stated that "[t]here may perhaps be other such cases. Where the guarantee can be found, and the mental distress is undoubtedly real and serious, there may be no good reason to deny recovery." *Id.* (footnote omitted). See also *Jenkins v. State*, 119 Misc. 2d at 146, 462 N.Y.S.2d at 768 (hospital mistakenly told parents that patient son was dead; court found this the type of unordinary situation where it is readily apparent that some emotional distress would be caused by the subject events); *Allen v. Jones*, 104 Cal. App. 3d 207, 214-15, 163 Cal. Rptr. 445, 450 (1980) (damages recoverable for mental distress without evidence of physical harm for defendant's negligent mishandling of corpse; "the nature of wrongful conduct . . . provides sufficient assurance of genuineness of a claim for emotional distress").

Dean Prosser did not define what he meant by a "guarantee of genuineness" arising from the facts. See PROSSER & KEETON, *supra* note 8, § 54. It seems obvious, however, that he was referring to the idea that reasonable persons viewing the defendant's conduct would find that it exposed the plaintiff to an unreasonable risk of genuine mental distress. Where reasonable persons are capable of discerning the presence of such a risk in the facts of the case, other "tests" of genuineness present an unnecessary hurdle to recovery. Cf. *Quill v. Trans World Airlines*, 361 N.W.2d 438, 443 (Minn. App. 1985) (discussing Dean Prosser's approach and concluding that it applied where the "unusually disturbing facts" of the case "assure that [the plaintiff's] claim is real").

¹²⁸ See *infra* notes 129-40 and accompanying text.

¹²⁹ *Green v. Liebowitz*, 118 A.D.2d 756, 757-58, 500 N.Y.S.2d 146, 148-49 (1986) (recovery denied); *Kennedy v. McKesson Co.*, 58 N.Y.2d 500, 504, 506, 448 N.E.2d 1332, 1334, 1335, 462 N.Y.S.2d 421, 423, 424 (1983). See also *Young v. Robertshaw Controls Co.*, 123 Misc. 2d 580, 474 N.Y.S.2d 886 (1983), *modified*, 104 A.D.2d 84, 481 N.Y.S.2d 891 (plaintiff permitted to recover for emotional distress experienced as a result of an explosion allegedly caused by defendant's negligence); *Ford v. Village Imports*, 92 A.D.2d 717, 461 N.Y.S.2d 108 (1983) (claim dismissed where emotional distress resulted from driving in negligently manufactured automobile which malfunctioned; no proof that plaintiff feared for her own safety).

Initially, New York followed the impact rule. Thus, claims of emotional distress, even if accompanied by resulting injuries, were denied. The court justified the denial of recovery on the grounds that such claims were susceptible to fraud and could potentially become a source of much spurious litigation. See, e.g., *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 110, 45 N.E. 354, 354-55 (1896). In 1961, the New York Court of Appeals, professing reliance on the ability of the medical profession and the jury to distinguish between spurious and genuine claims, overruled *Mitchell* and permitted recovery by a plaintiff who had been placed in danger of physical injury by defendant's negligence, but suffered only emotional distress with consequential injuries. *Battalla v. State*, 10 N.Y.2d 237, 239, 242, 176 N.E.2d 729, 730, 731-32, 219 N.Y.S.2d 34, 35, 38 (1961).

New York courts later recognized exceptions to the resulting physical injury requirement. See, e.g., *Lando v. State*, 39 N.Y.2d 803, 803-04, 351 N.E.2d 426, 426-27, 385 N.Y.S.2d 759, 759-60

the zone-of-danger test, however, is only to avoid exposing the plaintiff to the unreasonable risk of physical harm.¹³⁰ When the defendant's negligence has created only a

(1976) (court affirmed a father's recovery for emotional distress despite no resulting physical injury when the defendant hospital lost his deceased daughter's body for eleven days). *Johnson v. State* presented the Court of Appeals with a claim for emotional harm suffered by the daughter of patient in a state hospital who was falsely informed that the patient had died. 37 N.Y.2d 378, 379-80, 334 N.E.2d 590, 590-91, 372 N.Y.S.2d 638, 639 (1975). Although the plaintiff produced evidence of resulting physical symptoms, the court devoted much of its discussion to the death message and negligent mishandling of corpse exceptions to the physical injury rule, suggesting that other exceptions would be recognized where the circumstances create "an especial likelihood of genuine and serious mental distress" and "a guarantee that the claim is not spurious." *Id.* at 382, 334 N.E.2d at 592, 372 N.Y.S.2d at 642 (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54 (4th ed. 1971)).

New York courts later recognized an additional exception to the resulting physical injury requirement. In *Kennedy v. McKesson Co.*, the New York Court of Appeals reviewed past cases regarding claims for emotional distress. 58 N.Y.2d 500, 448 N.E.2d 1332, 462 N.Y.S.2d 421 (1983). The *Kennedy* court read *Battalla* and *Johnson* as supporting its conclusion that "when there is a duty owed by defendant to plaintiff, breach of that duty resulting directly in emotional harm is compensable even though no physical injury occurred." *Id.* at 504, 448 N.E.2d at 1334, 462 N.Y.S.2d at 423. The *Kennedy* court characterized those cases as involving situations where evidence of physical harm was unnecessary to establish liability due to the "sophistication of the medical profession and the likelihood of genuine and serious mental distress arising from the circumstances of the case." *Kennedy*, 58 N.Y.2d at 504-05, 448 N.E.2d at 1334, 462 N.Y.S.2d at 423.

The "duty owed," however, is apparently to avoid putting the plaintiff in an unreasonable risk of physical danger. Merely creating an unreasonable risk of causing emotional distress constitutes a cause of action only when it falls within a recognized exception. Thus, the Supreme Court of New York recently concluded that New York recognizes an exception to the physical injury rule when emotional harm results from the mishandling of a corpse, the transmission of a false death message, and where the defendant's breach of duty has "unreasonably endanger[ed] the plaintiff's physical safety." *Green v. Liebowitz*, 118 A.D.2d at 757, 500 N.Y.S.2d at 148-49 (quoting *Bovsun v. Sanperi*, 61 N.Y.2d 219, 229, 461 N.E.2d 843, 847, 473 N.Y.S.2d 357, 361 (1984)).

¹³⁰ In *Johnson v. Jamaica Hosp.*, 62 N.Y.2d 523, 467 N.E.2d 502, 478 N.Y.S.2d 838 (1984), the court denied recovery for emotional distress by the parents of an infant who had been abducted from defendant hospital's nursery, concluding that the hospital owed no direct duty to the parents to prevent such distress. The Supreme Court, Appellate Division, permitted recovery despite the lack of physical injury, holding that the circumstances provided a guarantee of the claim's genuineness. 95 A.D.2d 598, 600, 467 N.Y.S.2d 634, 636 (citing *Johnson v. State*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975)). The Court of Appeals, however, focused upon the fact that despite the foreseeability of the parent's psychic injury, the only direct duty breached was one owed by the hospital to the abducted child. *Jamaica Hospital*, 62 N.Y.2d at 528, 467 N.E.2d at 504, 473 N.Y.S.2d at 840.

Similarly, in *Fusco v. G.M. Corp.*, 126 Misc. 2d 998, 485 N.Y.S.2d 431 (1984), the plaintiffs' claim for emotional distress, unaccompanied by physical manifestations, was dismissed, although it arose when the Cadillac in which they were driving malfunctioned, "was thrown out of control," and came to a sudden stop. *Id.* at 998, 485 N.Y.S.2d at 432. The *Fusco* court agreed that the defendant manufacturer owed a direct duty to the plaintiffs, but concluded that the case lacked a "guarantee of genuineness." It was not "readily apparent to a lay[person]" that emotional distress would accompany this event, in the court's view, as cars malfunction all the time without resulting mental injury. *Id.* at 1003, 485 N.Y.S.2d at 436 (citation omitted). The court was careful to note, however, that circumstances may exist in which the malfunction of a vehicle could result in compensable mental harm. *Cf. Ford v. Village Imports*, 92 A.D.2d 717, 461 N.Y.S.2d 1088 (1983) (court dismissed claim for emotional distress resulting from driving in negligently manufactured automobile which malfunctioned; court found no proof that plaintiff feared for her own safety).

risk of emotional as opposed to physical distress, recovery is not available unless the facts bring the case within another recognized exception.¹³¹

Similarly, the Minnesota Court of Appeals has seized upon Dean Prosser's "guarantee of genuineness from the circumstances" approach to allow recovery for emotional distress which manifested itself in comparatively slight physical symptoms.¹³² In *Quill v. Trans World Airlines, Inc.*,¹³³ a passenger brought an action for negligent infliction of recurring emotional distress brought about when the defendant's plane, which had been cruising at 39,000 feet, suddenly rolled over and dove 34,000 feet in an uncontrolled tailspin for approximately forty seconds.¹³⁴ While the pilots were able to regain control of the plane and land it safely, the plaintiff, who did not suffer any physical injury in the ordeal, testified that on as many as half of his subsequent air travels, he experienced anxiety which manifested itself in "adrenaline surges, sweaty hands, elevated pulse and blood pressure."¹³⁵ The court phrased the issue before it as "whether plaintiff has satisfied the physical injury or symptom requirement" so as to permit recovery in a jurisdiction which adhered to the zone-of-danger test.¹³⁶ The court agreed that the *Quill* plaintiff's symptoms were "less severe" than those found in prior decisions which ordered recovery for emotional distress.¹³⁷ The court noted, however, that limited exceptions to the resulting physical injuries requirement had been recognized and that Dean Prosser had suggested the possibility of additional exceptions when the facts suggest that the claim is meritorious.¹³⁸ The appellate court agreed with the trial court's statement that the "unique nature of the accident in this case [resolves] all doubts of the genuineness

¹³¹ See *Lando*, 39 N.Y.2d 803, 351 N.E.2d 426, 385 N.Y.S.2d 759 (1976); *Johnson*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975).

¹³² *Quill v. Trans World Airlines*, 361 N.W.2d 438, 443 (Minn. App. 1985).

¹³³ *Id.* at 438.

¹³⁴ *Id.* at 440. The gravitational force on the passengers was so great that the plaintiff could not lift his arm to reach the oxygen mask that had fallen from the compartment above his seat. At approximately 5000 feet, five seconds before the plane would have struck the ground, the pilots regained control. However, for the next 40 minutes, until the plane landed safely, the plane continued to shake and make unusual noises. The pilot informed the passengers that they had experienced some problems and would have to make an emergency landing. Flight attendants instructed the passengers on the emergency landing position, and the plaintiff was able to see emergency vehicles near the runway awaiting the plane's landing. *Id.*

¹³⁵ *Id.* at 441. The plaintiff, a trained medical doctor, had not sought professional attention for these symptoms as, in his professional judgment, nothing could be done medically to alleviate his fears. His work as a doctor, teacher, and consultant necessitated air travel on about sixty flights a year. *Id.* at 440, 441.

¹³⁶ *Id.* at 443. The *Quill* court reviewed state case law on emotional distress and noted a recent case in which the state supreme court stated that a plaintiff must establish "physical symptoms" in order to recover for defendant's negligence. *Id.* at 441-42 (quoting *Langeland v. Farmers State Bank*, 319 N.W.2d 26, 31 (Minn. 1982)).

¹³⁷ *Id.* at 443 (citing *Purcell v. St. Paul City Ry.*, 48 Minn. 134, 50 N.W. 1034 (1892)) (severe stress experienced by pregnant passenger due to defendant's negligence in nearly causing collision with another cable car caused plaintiff to miscarry); *Okrina v. Midwestern Corp.*, 282 Minn. 400, 165 N.W.2d 259 (1969) (although plaintiff received no physical injuries when wall in defendant's store collapsed, her fear that the whole building would collapse resulted in severe pain in her head, back, and leg, required hospital care and brought about a change in her personality).

¹³⁸ *Id.* at 443 (quoting PROSSER & KEETON, *supra* note 8, § 54).

of the claim,"¹³⁹ and concluded that despite minimal physical consequences, the plaintiff's recurring distress was genuine and warranted legal recognition.¹⁴⁰

In contrast to the New York and Minnesota holdings, the Hawaii Supreme Court concluded, in *Rodriguez v. State*, that it is unnecessarily stringent to limit the guarantee of genuineness test to simply an exception to the rule requiring resultant physical injury.¹⁴¹ The court found that the "better view" was to test all claims for emotional distress pursuant to this standard.¹⁴² Noting that one reason for the general rule requiring physical injury was concern about fraudulent claims, the court expressed its confidence that a court or jury's consideration of the specific claim's circumstances would distinguish the spurious from the genuine.¹⁴³ Anticipating the criticism that such a test

¹³⁹ *Id.* The court quoted with approval the opinion of the trial court in which the verdict of the jury was upheld. *Id.*

¹⁴⁰ *Id.* The court believed that the plaintiff established a prima facie case for negligent infliction of emotional distress under the zone-of-danger test. *Id.*

Defendant TWA argued that the court should apply the standard of "severe emotional distress," recently adopted in Minnesota as a requirement for recovery for intentionally inflicted emotional distress, to claims of mental distress resulting from negligence. *Id.* at 442. The *Quill* court indicated that it doubted that the plaintiff could meet such a standard, especially in view of the state supreme court's emphasis on the need to show receipt of medical treatment. *Id.* (citing *Hubbard v. United Press Int'l*, 330 N.W.2d 428 (Minn. 1983) and *Langeland v. Farmers State Bank*, 319 N.W.2d 26 (Minn. 1982)). The appellate court, however, was not persuaded that this standard was appropriate for claims for negligent infliction of emotional distress, noting that the two torts had been treated separately by the state courts for 90 years and that the state supreme court had given no indication that such separation was to be abolished. *Id.* at 443. It is interesting to note, and it is indicative of the confusion that exists regarding claims for emotional distress, that, at least in Minnesota, a plaintiff must plead and prove more severe resulting physical consequences when the defendant intentionally caused emotional distress than when he or she did so merely negligently.

¹⁴¹ *Rodriguez v. State*, 52 Hawaii 156, 172, 472 P.2d 509, 519 (1970).

¹⁴² See *id.* at 171, 472 P.2d at 519. The plaintiffs in *Rodriguez* were homeowners who sought recovery for flood damage to their new home. The flood allegedly resulted from the state highway department's failure to drain surface water after a culvert became obstructed by sand and other material. The plaintiffs were "heartbroken" upon discovering the extensive damage to the house and furnishings. *Id.* at 159, 472 P.2d at 513. Although the trial court awarded damages for the plaintiffs' mental distress, the state supreme court remanded the case for a determination of whether the state breached any duty owed to the plaintiffs pursuant to the new standard formulated by the court. *Id.* at 176, 472 P.2d at 522. The court noted that, despite a general rule against recovery for mental distress, the interest in freedom from the negligent infliction of mental distress had in fact received protection whenever the courts were persuaded that the dangers of fraudulent claims and undue liability on the part of the defendant were outweighed by assurance of "genuine and serious" mental distress. *Id.* at 170, 472 P.2d at 519 (citing W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 55 (3d ed. 1964)). It then characterized parasitic damages, impact resulting in physical injury, mishandling of corpse, and negligent transmission of death messages as all providing the necessary assurance. *Id.* at 171, 472 P.2d at 519. The supreme court concluded that such "exceptions" should not be used to restrict a plaintiff's right to recovery when the fact pattern did not fall within the specific requirements of these approaches. *Id.* Instead, the situations above should simply serve as examples of "trustworthy" claims, and that whenever the plaintiff's case presented guarantees of genuineness, recovery should not be thwarted. *Id.*

¹⁴³ *Id.* at 172, 472 P.2d at 519-20 (citation omitted). The court found the concern that fraudulent claims would flood the courts held "little weight." *Id.* at 172, 472 P.2d at 519. It stated that courts have competently administered claims for mental distress appended to independent causes of action for many years. *Id.* The court also noted that many emotional distress claims would be susceptible to medical proof, but even those claims not subject to medical evaluation could still be judged by the court and jury by other proofs of genuineness. *Id.* at 172, 472 P.2d at 519-20.

would expose an actor to potentially unlimited liability for any mental disturbance, the court determined that an actor's duty was to refrain only from the negligent infliction of "serious" mental distress.¹⁴⁴ The court stated, however, that the "seriousness" requirement means only that the "reasonable [person], normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."¹⁴⁵ Thus, the Hawaii Supreme Court's definition is more a description of the circumstances giving rise to the mental distress claim than a characterization of the extent or depth of the distress which the plaintiff must suffer.¹⁴⁶

In *Molien v. Kaiser Foundation Hospitals*, California similarly recognized a cause of action for negligently inflicted emotional injury in the absence of physical consequences, and found the defendant liable when the plaintiff was a direct victim of the defendant's negligence as opposed to a percipient bystander-witness.¹⁴⁷ The California Supreme Court determined that, in light of the underlying rationale for the physical manifestation rule — to guard against false claims — the rule was both overinclusive and underinclusive.¹⁴⁸ The California court reasoned that the rule permitted recovery where trivial

¹⁴⁴ *Id.* at 174, 472 P.2d at 520.

¹⁴⁵ *Id.* at 173, 472 P.2d at 520. The defendant advanced several arguments to persuade the court not to extend liability for mental distress beyond its then existing boundaries: (1) trivial mental distress is "part and parcel" of community life; (2) social controls may better handle claims of emotional distress than litigation; (3) some mental distress may actually be beneficial; and (4) an especially sensitive person should not be coddled by penalizing those who serve the community. *Id.* While the court recognized that these were legitimate concerns, the court felt that they were more appropriately considered by the court and jury under a "reasonable person" test. *Id.* According to the court, this test required that in any emotional distress claim, the plaintiff must establish the elements of a cause of action for negligence, i.e., that the plaintiff was foreseeably at risk from the defendant's conduct, and that the defendant's negligence created the risk in the first place. *Id.* at 174, 472 P.2d at 521.

¹⁴⁶ The Hawaii Supreme Court has extended *Rodrigues* to instances in which the plaintiff suffers emotional distress as a result of witnessing a defendant's negligence injure another, so long as the distress was foreseeable. See *Leong v. Takasaki*, 55 Hawaii 398, 520 P.2d 758 (1974). The *Leong* court called the requirement that a witness sustain physical injury from the emotional distress "another of the artificial devices to guarantee the genuineness of the claim, which may actually foreclose relief to a serious claim." *Id.* at 404, 520 P.2d at 763. Thus, "[w]here serious mental distress to plaintiff was a reasonably foreseeable consequence of defendant's act, defendant's liability could be imposed by the application of general tort principles." *Id.* at 408, 520 P.2d at 764-65 (quoting *Rodrigues*, 52 Hawaii at 174, 472 P.2d at 520).

Foreseeability, however, is an amorphous concept. The Hawaiian Supreme Court denied recovery to the estate of a man who suffered a heart attack and died upon learning by telephone of the deaths of his daughter and grandchild in an automobile accident in another state after concluding that the decedent's distant location from the accident scene made his mental distress unforeseeable. *Kelley v. Kokua Sales & Supply Ltd.*, 56 Hawaii 204, 207, 532 P.2d 673, 676. More important, the *Kelley* court retreated from its position in *Rodrigues* that requiring proof of serious mental distress was a sufficient limit on the defendant's liability. *Id.*

¹⁴⁷ *Molien v. Kaiser Found. Hosp.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

¹⁴⁸ *Id.* at 929, 616 P.2d at 820, 167 Cal. Rptr. at 838. In *Molien*, the plaintiff's wife was advised by a member of defendant hospital's staff that she had contracted syphilis. The hospital instructed the wife to tell her husband, the plaintiff, of the diagnosis. The plaintiff was then forced to undergo blood tests to ascertain whether he had contracted the disease and infected his wife. Although the hospital ultimately discovered that the wife's diagnosis was erroneous, the plaintiff's wife accused the plaintiff of infidelity and the ensuing hostility and tension resulted in the dissolution of the marriage — all of which caused the plaintiff to experience emotional distress, albeit without physical consequences. *Id.* at 919-20, 616 P.2d at 814-15, 167 Cal. Rptr. at 823-33.

physical injury had occurred, yet denied a cause of action for potentially valid claims unaccompanied by such manifestations.¹⁴⁹ Furthermore, the rule encouraged both extravagant pleading and exaggerated testimony regarding the existence of physical symptoms.¹⁵⁰ The court also emphasized that the lack of a clear distinction between physical and emotional harm made it difficult to predict how a court would characterize a particular injury.¹⁵¹ Therefore, the court held that reference to the "artificial and arbitrary" factor of resultant physical manifestations would no longer decide the issue of whether the direct victim in fact suffered compensable emotional distress.¹⁵² Instead, the trier of fact was to resolve the claim on the basis of the proof introduced at trial, so long as such proof included a "guarantee of genuineness in the circumstances of the case."¹⁵³

¹⁴⁹ *Id.* at 928, 616 P.2d at 820, 167 Cal. Rptr. at 838. The court also reasoned that the physical manifestation rule failed to satisfy the concerns of those fearing that claims for emotional distress would open the floodgates of litigation, as it noted that the slightest physical injury became the claimant's ticket for admission to the courthouse. *Id.*

¹⁵⁰ *Id.* at 929, 616 P.2d at 820, 167 Cal. Rptr. at 838. The court noted that other observers urged compensation for serious emotional distress because "otherwise the tendency would be for the victim to exaggerate symptoms of sick headaches, nausea, insomnia, etc., to make out a technical basis of bodily injury, upon which to predicate a parasitic recovery for the more grievous disturbance, the mental and emotional distress . . . endured." *Id.* at 929, 616 P.2d at 820, 167 Cal. Rptr. at 838 (quoting Magruder, *supra* note 31, at 1059).

¹⁵¹ *Id.* at 929-30, 616 P.2d at 821, 167 Cal. Rptr. at 839. The court noted that even the Restatement had difficulty distinguishing between "mere" emotional disturbance which resulted in dizziness or nausea, and prolonged bouts with both which constitutes bodily harm. *Id.* at 929, 616 P.2d at 820-21, 167 Cal. Rptr. at 838-39. The court also discussed an early California decision in which the court considered whether a plaintiff's nervous disorder constituted a physical or mental injury. *Id.* at 929, 616 P.2d at 820, 167 Cal. Rptr. at 838. That early case was *Sloane v. Southern Cal. Ry.*, 111 Cal. 668, 44 P. 320 (1896). The *Sloane* court stated:

It is a matter of general knowledge that an attack of sudden fright or an exposure to imminent peril has produced in individuals a complete change in their nervous systems, and rendered one who was physically strong and vigorous weak and timid. Such a result must be regarded as an injury to the body rather than to the mind . . .

Id. at 680, 44 P. at 322. The *Molien* court interpreted this passage to mean that mental disturbance could be classified as either psychological or physical injury, but not both. The court also noted that this belief persisted in the law despite advances in medical science which suggested that the distinction was no longer valid. *Molien*, 27 Cal. 3d at 929, 616 P.2d at 817-18, 167 Cal. Rptr. at 838.

¹⁵² The *Molien* court stated that "emotional injury may be fully as severe and debilitating as physical harm, and is no less deserving of redress . . ." 27 Cal. 3d at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.

¹⁵³ *Id.* at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839 (citation omitted). The court recognized that emotional injury occasionally is "susceptible of objective ascertainment by expert medical testimony . . ." *Id.* The court agreed, however, with the approach advocated by the Hawaii Supreme Court in *Rodrigues* that the circumstances giving rise to the alleged mental distress could also provide evidence of the claim's genuineness. *Id.* at 928, 616 P.2d at 819-20, 167 Cal. Rptr. at 837-38. The court noted that in a prior case involving recovery for intentionally inflicted mental injury, it had rejected the principle that physical injury is necessary to ensure that serious mental distress actually occurred, and concluded that the jurors could best decide the existence and extent of the emotional distress based on their own experience. *Id.* at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839 (citing *State Rubbish Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952)). The *Molien* court indicated that the facts of the case at bar created a foreseeable risk of serious emotional distress to the plaintiff and thus served as a "measure of the validity of plaintiff's claim for emotional distress." *Id.* at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839. A further factor supporting plaintiff's claim that the court found persuasive of its genuineness was the fact that the false imputation of venereal disease was slander *per se* at common law. *Id.* See also *La Fleur by Blackey v. Mosher*, 109 Wis. 2d 112, 119, 325

The court imposed two limitations on the newly-recognized cause of action. First, it applied only to claims brought by direct victims of a defendant's negligence; courts would still decide percipient witness's claims under the *Dillon* test.¹⁵⁴ Second, as in Hawaii, the court determined that the defendant's duty is only to avoid exposing a plaintiff to a risk of serious emotional distress.¹⁵⁵ As these cases demonstrate, the common law of some jurisdictions has evolved to the point that the notion that a defendant may be liable for negligently causing emotional harm, alone, is no longer considered revolutionary.¹⁵⁶

N.W.2d 314, 317 (1982) (court held that in appropriate circumstances tort of negligent confinement "by its very nature has special likelihood of causing real and severe emotional distress").

¹⁵⁴ *Molien*, 27 Cal. 3d at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834. The defendant claimed that the plaintiff was only a bystander witness to the defendant's negligent action against the direct victim, the plaintiff's wife; therefore, any claim for emotional injury had to be tested against the *Dillon* foreseeability factors. See *supra* note 99. The defendant further contended that because the plaintiff was not present when his wife was informed of the erroneous venereal disease diagnosis, his cause of action did not satisfy the *Dillon* requirement of proximity to the incident. The court, however, concluded that the plaintiff was a direct victim of the defendant's negligence, reasoning that the nature of the disease made it "rational to anticipate that both husband and wife would experience anxiety, suspicion and hostility" when informed of the diagnosis. *Id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835. Thus, the court found that because the risk of emotional harm to the plaintiff was foreseeable, the defendant, through its conduct, breached a duty to both the husband and the wife. *Id.*

Using the foreseeability requirement to distinguish between direct victims and peripheral witnesses for the purpose of limiting recovery for emotional distress has generated some controversy among commentators. See Nolan & Ursin, *supra* note 94, at 603-04 (court creates potentially enormous class of plaintiffs); Comment, *Negligent Infliction of Emotional Distress: New Horizons After Molien v. Kaiser Foundation Hospitals*, 13 PAC. L.J. 179, 189-95 (1981); Comment, *Negligent Infliction of Emotional Distress as an Independent Cause of Action in California: Do Defendants Face Unlimited Liability?*, 22 SANTA CLARA L. REV. 181, 193-95 (1982) ("unqualified use of foreseeability of the risk is a difficult standard to apply and even harder to limit . . .").

¹⁵⁵ *Molien*, 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839. By restricting recovery to cases of serious emotional distress, the court sought to limit defendant's liability for trivial and transient invasions of mental tranquility. The court adopted the Hawaii Supreme Court's definition of serious emotional distress. This requirement refers *not* to the extent of the emotional damage but to the characterization of the situation giving rise to the distress. *Id.* at 927-28, 616 P.2d at 819-20, 167 Cal. Rptr. at 837-38. The California courts, however, have declined to follow Hawaii's lead and apply the "genuineness of the circumstances" test to cases where a bystander suffers the emotional distress. Such claims, in California, continue to be tested under the *Dillon* "foreseeability" approach. Cf. *supra* notes 146, 154 and accompanying text.

¹⁵⁶ Other jurisdictions continue to move away from the impact and zone-of-danger rules toward recognizing a separate duty to avoid inflicting emotional distress. In *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983), the Ohio Supreme Court rejected both rules, reasoning, like the California Supreme Court, that the rationales underlying the rules did not justify their adoption. First, the court rejected the idea that allowing emotional distress claims would lead to a flood of litigation, citing no evidence that this had occurred in jurisdictions without an impact requirement. *Id.* at 133, 447 N.E.2d at 111. The court concluded, however, that even if litigation increased, this was not a valid reason to deny recovery in meritorious actions. *Id.* Second, the court rejected the physical injury requirement as a filter for screening fraudulent claims, noting that the danger of false claims exists wherever slight physical injury provides a sufficient basis for a cause of action. *Id.* at 135, 447 N.E.2d at 111-12. Finally, the court remained unpersuaded that emotional distress awards would be based on conjecture or speculation in the absence of physical injury. *Id.* at 135, 447 N.E.2d at 112. Instead, the court expressed confidence in the ability of the judicial process to evaluate such claims, and recognized that, as a practical matter, the complainant would often use medical testimony to establish his or her case. *Id.* at 135, 447 N.E.2d at 112. See also Paugh v. Hanks, 6 Ohio St. 3d 72, 80, 451 N.E.2d 759, 767 (1983) (cause of action for negligent infliction

Louisiana courts have avoided both the impact and the zone-of-danger rules by holding that a plaintiff may recover for fright, fear or mental anguish experienced while an ordeal is in progress.¹⁵⁷ The courts treat this type of emotional distress as an independent element of damages, separate from any physical injury or emotional distress manifested after the incident.¹⁵⁸ One court, explaining its rejection of the physical injury or manifestation requirement, acknowledged the "legitimate fear" that plaintiff might file fake or frivolous claims for emotional distress alone.¹⁵⁹ It concluded, however, that requiring a plaintiff to prove emotional distress by a preponderance of the evidence made the risk of frivolous suits no more likely than the risk inherent in any physical injury claim.¹⁶⁰ The court's refusal to deny compensation for purely emotional harm is in keeping with the dictates of the Louisiana Civil Code, which requires that one at fault for causing damage compensate the injured party.¹⁶¹

III. HOW PRE-IMPACT DISTRESS CLAIMS HAVE FARED IN THE COURTS

In a spate of recent cases, plaintiffs have sought recovery for the emotional distress experienced by one after realizing that a defendant's negligence has placed him or her

of emotional distress can be maintained absent resulting physical injury, but medical testimony is admissible as evidence of degree of emotional distress suffered); *Taylor v. Baptist Medical Center, Inc.*, 400 So. 2d 369, 374 (Ala. 1981) ("to continue to require physical injury caused by culpable tortious conduct, when mental suffering may be equally recognizable standing alone, would be an adherence to procrustean principles which have little or no resemblance to medical realities"); *Vance v. Vance*, 41 Md. App. 130, 138, 396 A.2d 296, 301 (1979). The *Vance* court stated:

We believe it is time that courts unbind themselves from the outmoded belief that there can be no injury to the mind without overt manifestations of bodily harm. We should recognize what the health professionals already know, that the psyche is as susceptible of injury as the body, and that the absence of apparent physical damage does not serve to lessen the extent of the mental injury.

Id. (footnote and citations omitted).

¹⁵⁷ See, e.g., *Dawson v. James H. Stuart & Deaton, Inc.*, 437 So. 2d 974 (La. Ct. App. 1983); *Butler v. Pardue*, 415 So. 2d 249 (La. Ct. App. 1982); *Hoffman v. All Star Ins. Corp.*, 288 So. 2d 388 (La. Ct. App.), *cert. denied*, 290 So. 2d 909 (La. 1974).

Similarly, Louisiana courts permit recovery for emotional distress arising after the precipitating incident has ended without proof of physical injury or proof that the plaintiff was within the zone of physical danger. *Chappetta v. Bowman Transp., Inc.*, 415 So. 2d 1019 (La. Ct. App. 1982).

For a discussion of Louisiana law regarding negligent infliction of emotional distress, see generally Comment, *Mental Anguish — The Law of Compensation in Louisiana*, 31 LOY. L. REV. 965, 969-72 (1986).

¹⁵⁸ For example, in *Dawson* the plaintiff was injured in a collision between defendant's tractor trailer and his own. The court awarded damages for the pain he suffered as a result of his physical injury, the terror he experienced during the incident when he believed he would die, and the emotional distress he suffered after the accident. *Dawson*, 437 So. 2d at 976.

¹⁵⁹ *Chappetta*, 415 So. 2d at 1022. The defendant's tractor trailer collided with the plaintiff's car, causing property damage but no physical injury to plaintiff. *Id.* at 1020. While still at the accident scene, the plaintiff became hysterical and afterwards suffered headaches and nightmares. *Id.* at 1020, 1022. Her doctor diagnosed her condition as acute severe anxiety complex arising from the accident. *Id.* at 1020. On appeal, the defendants contended that recovery for such distress was unavailable because it did not cause any bodily injury or illness. *Id.* at 1022.

¹⁶⁰ *Id.* at 1022. The *Chappetta* court characterized the real problem as one of proving emotional injury in the absence of physical manifestations, but concluded that where the plaintiff could meet her burden, no distinction would be made between claims for damages due to physical injury and those for emotional injury only. *Id.*

¹⁶¹ "Every act whatever, of man that causes damage to another obliges him by whose fault it happened to repair it." LA. CIV. CODE ANN. art. 2315 (West Supp. 1987).

in imminent danger of death or serious bodily harm.¹⁶² Claims for "pre-impact" distress have faced not only the traditional judicial reluctance to protect emotional tranquility,¹⁶³ but also evidentiary problems peculiar to the circumstances which give rise to the claim.¹⁶⁴ In those jurisdictions where actions for pre-impact distress have been recognized as viable, however, compensation can be significant for the relatively short duration of the mental stress.¹⁶⁵

The following section focuses on how pre-impact distress claims have fared in those jurisdictions which have addressed the issue.¹⁶⁶ Courts have considered these cases under both traditional approaches to mental distress claims¹⁶⁷ and tests invoked only for this specific type of mental distress.¹⁶⁸ In order to provide a foundation for the critical analysis in the next section, this section examines, in detail, the rationale advanced by these courts.¹⁶⁹

¹⁶² See *infra* notes 170-288 and accompanying text.

¹⁶³ For a discussion of judicial reluctance to recognize a protectable interest in one's mental tranquility, see *supra* notes 31-161 and accompanying text.

¹⁶⁴ One commentator has concluded that one reason more pre-impact cases have not surfaced is the difficulty of proving the cause of action. Fuchsberg, *supra* note 19, at 33. Fuchsberg notes that in "pre-impact" cases, the nature of the case itself often deprives the fact finder of direct evidence:

Death has sealed the lips of the victim. Often there are no survivors. Thus, there will be no direct evidence of the decedent's pain and suffering, with no direct evidence of awareness of the danger, or that the danger was perceived as so extreme that it would cause apprehension of impending death.

Id. Thus, the plaintiff is forced to rely on circumstantial evidence, evidence that the defendant will argue is too minimal to warrant recovery. *Id. Compare* Shu-Tao Lin v. McDonnell Douglas Corp., 742 F.2d 45 (2d Cir. 1984) (court permitted recovery for pre-impact distress on evidence that decedent was assigned a window seat on side of plane from which engine piece broke away, or from fact that sudden change in plane's altitude would have made him aware of risk) and Malacynski v. McDonnell-Douglas Corp., 565 F. Supp. 105 (S.D.N.Y. 1983) (court denied defendant's motion to dismiss, stating that a trial can best determine whether plaintiff's evidence, eyewitnesses to crash, documents filed with the National Transportation Safety Board and decedent's seat assignment, support inference of decedent's fear) with Shatkin v. McDonnell-Douglas Corp., 727 F.2d 202 (2d Cir. 1984) (in action arising out of same plane crash as *Lin*, court found evidence that decedent was seated on right side of plane which lost engine pieces from left side insufficient to support inference of pre-impact distress) and Feldman v. Allegheny Airlines, Inc., 382 F. Supp. 1271, 1300-01 (D. Conn. 1974) (court found one survivor's testimony that he was aware of impending crash provided no evidence to support inference that decedent passenger was similarly aware).

While recognizing that problems of proof are of major significance to the litigants, this Article focuses on the issue of the standard that should be used to determine whether such claims should be recognized and not what proof will be considered sufficient to meet the standard.

¹⁶⁵ *Lin*, 742 F.2d 45 (affirming \$10,000 award for decedent's pre-impact fear on flight which lasted total of 30 seconds); Solomon v. Warren, 540 F.2d 777, 792 (5th Cir. 1976), *cert. dismissed sub nom.*, Warren v. Serody, 434 U.S. 801 (1977) (awarding \$10,000 to estates of two deceased passengers for stress suffered prior to plane crash despite no evidence as to length of time decedents were aware of the impending disaster); Furumizo v. United States, 245 F. Supp. 981 (D. Hawaii 1965), *aff'd*, 381 F.2d 965 (9th Cir. 1967) (awarding \$15,000 for decedent's pain and suffering during brief descent of plane which crashed and burned decedent to death); Green v. Hale, 590 S.W.2d 231 (Tex. Civ. App. 1979) (awarding \$5,000 for 13-year-old boy's mental anguish as defendant negligently backed his truck over him).

¹⁶⁶ See *infra* notes 170-288.

¹⁶⁷ See *infra* cases cited at notes 165-84, 193-213, 240-49, 266-73 and accompanying text.

¹⁶⁸ See *infra* cases cited at notes 214-36, 248-65, and 274-88 and accompanying text.

¹⁶⁹ See *infra* notes 289-349 and accompanying text.

A. *Pre-Impact Distress in the Impact Jurisdictions*

The impact rule, as previously discussed, requires that before the plaintiff may recover damages for mental distress, he or she must demonstrate some physical contact.¹⁷⁰ The two impact jurisdiction courts that have considered whether claims for pre-impact distress are compatible with this approach have reached opposing conclusions.¹⁷¹ In *Solomon v. Warren*, the United States Court of Appeals for the Fifth Circuit considered whether Florida recognized a cause of action for pre-impact emotional distress.¹⁷² The appellate court upheld a \$10,000 award to the estates of two passengers in a small plane that disappeared and was presumably lost at sea, despite the lack of any evidence concerning the passengers' distress.¹⁷³ The Fifth Circuit concluded that it was unable to discover any reason in "law or logic" why a jurisdiction which permitted recovery for post-impact mental anguish would preclude recovery when the sequence was reversed.¹⁷⁴ Instead, the court reasoned that mental injury accompanied by physical impact satisfied the rule.¹⁷⁵

The dissenting judge in *Solomon* vigorously disagreed that sequence was irrelevant under the impact rule.¹⁷⁶ He asserted that causation was the rationale for the rule, observing that the decedents would have experienced the same mental anguish had the pilot been able to avoid the crash at the last moment, but these injuries would not have been compensable under the impact rule.¹⁷⁷ Because impact, in his view, served as the

¹⁷⁰ For a discussion of the impact rule, see *supra* notes 59-74 and accompanying text.

¹⁷¹ Cf. *infra* notes 172-75, 180-84 and accompanying text.

¹⁷² 540 F.2d 777 (5th Cir. 1976).

¹⁷³ *Id.* at 792-93. Plaintiffs brought an action against the deceased pilot's estate and his insurer under the Death on the High Seas Act and the Florida Survival Act for the deaths of the two passengers, who were survived by three minor children, and also for the passengers' mental suffering before their deaths. The district court, after trial without a jury, found the pilot's negligence a cause of the passengers' deaths. The plaintiffs introduced into evidence a transcript of the radio contact between the pilot and an air traffic control station, in which the pilot stated that the fuel gauge was on empty and that he would attempt to ditch the aircraft near a merchant vessel. Despite the absence of any evidence that the decedents knew of their plight or the duration of their knowledge, the trial court awarded pre-impact damages, stating:

[This court is] convinced that both of the deceased knew of the impending crash landing at sea, knew of the immediate dangers involved and are certain to have experienced the most excruciating type of pain and suffering (the knowledge that one is about to die, leaving three cherished children alone).

Id. at 792. The court affirmed the \$10,000 awards, stating that it considered this amount "on the very low side." *Id.* at 793.

¹⁷⁴ *Id.* The court noted that in typical claims brought under a survival act, damages for pain and suffering are usually awarded for the period during which the victim was conscious prior to death, but it saw no reason not to allow recovery in the situation at bar. *Id.* at n.21.

¹⁷⁵ *Id.* While recognizing that Florida courts embraced the impact rule, the court concluded that, in effect, the Florida precedent provided that "no recovery can be had for mental pain and suffering *unaccompanied* by any physical impact." *Id.* (emphasis in original).

¹⁷⁶ *Id.* at 796-97 (Gee, J., dissenting).

¹⁷⁷ *Id.* at 796-97. In his dissenting opinion, Judge Gee argued that Florida law compensated only mental suffering "occasioned" by physical trauma, when impact provides a "but for" cause of any mental suffering. *Id.* Judge Gee also noted the absence of any cases directly on point and concluded that because Florida law was "unsettled," the Fifth Circuit should have certified the question for resolution by the Florida courts. *Id.* at 797.

causal link that proved the mental pain, reversing the sequence undermined the rule's rationale.¹⁷⁸ In his opinion, any damages award for mental distress experienced prior to impact is based on nothing more than "sheer speculation."¹⁷⁹

Although Illinois recently adopted the zone-of-danger test,¹⁸⁰ a pre-impact distress claim did not fare well under its former approach, the impact rule. In *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*,¹⁸¹ the District Court for the Northern District of Illinois, applying Illinois law, granted the defendant's motion to strike the plaintiff's claims for emotional distress suffered prior to impact.¹⁸² Rejecting the plaintiff's argument that the court should extend emotional distress recovery to include the time period immediately preceding an inevitable physical injury,¹⁸³ the court stated that Illinois law allowed recovery for emotional distress only when actual physical impact caused the distress.¹⁸⁴

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* Stating that the approach favored by the majority "open[s] the door to . . . uncertainties," *id.*, Judge Gee described affirming the award for pre-impact distress in this case "presumptuous." *Id.* Without evidence about what actually occurred before the plane crashed, the dissenting judge appeared uncomfortable with inferring pre-impact distress.

¹⁸⁰ See *infra* note 191 and accompanying text.

¹⁸¹ 507 F. Supp. 21 (N.D. Ill. 1980), *rev'd on reconsideration*, 18 Av. Cas. (CCH) 17,215 (N.D. Ill. 1983). This case involved a wrongful death and survival action brought by the mother of one of the passengers killed in the May 25, 1979 plane crash. *Id.* The plaintiff also sought damages for any terror or fright the decedent experienced as the plane began its final "roll" toward the ground. *Id.*

¹⁸² *In re Air Crash Disaster Near Chicago*, 507 F. Supp. at 24. In its original decision to dismiss the claim for pre-impact distress, the court held that the plaintiff was entitled to recover for her daughter's pain and suffering endured after the crash but before her death despite the defendant's claim that the interval for any such pain was so short as to preclude recovery as a matter of law. *Id.* The court also rejected the defendant's contention that the plaintiff's products liability theory provided no basis for pain and suffering recovery. *Id.* at 24-25.

¹⁸³ *Id.* at 23-24. The plaintiff, recognizing that Illinois was an "impact" jurisdiction, argued that so long as impact occurred, it was irrelevant whether the distress preceded impact; thus, recovery for pre-impact distress was compatible with the impact rule. *Id.* at 23. The plaintiff relied on *Solomon v. Warren*, which had allowed such damages in an impact jurisdiction. *Id.* at 23-24 (discussing *Solomon v. Warren*, 540 F.2d 777 (5th Cir. 1976), *cert. dismissed sub nom.*, *Warren v. Serody*, 434 U.S. 801 (1977)). The district court was unpersuaded, however, citing Judge Gee's conclusion in his *Solomon* dissent that only those fears actually caused by impact are compensable in an impact jurisdiction. *Id.* at 24 (citing *Solomon*, 540 F.2d at 797 (Gee, J., dissenting)).

¹⁸⁴ *Id.* at 23. The district court noted that where a defendant's negligence caused fear but not physical injury, recovery was denied under the impact approach. *Id.* The district court, however, erred in concluding that physical injury was a prerequisite to recovery for emotional distress. The cases on which the court relied may be read to reach a different conclusion. For instance, in *Carlinville National Bank v. Rhoads*, the court stated that Illinois had long adhered to the view that "no liability exists for negligent acts which occasion fright or terror where there has been no accompanying physical impact, even if nervous shock, which constitutes a physical injury, follows." 63 Ill. App. 3d 502, 503, 380 N.E.2d 63, 65 (1978) (emphasis added). In that case, the plaintiff, the widow of a man struck and killed by defendant's truck, sought damages for emotional distress suffered after she witnessed the collision. *Id.* at 502, 380 N.E.2d at 64. In *Rosenberg v. Packerland Packing Co.*, the court denied recovery for emotional distress suffered by the driver and passengers in a car tailgated by defendant's truck at a speed between 70 and 80 miles per hour over a "long span of time," because the plaintiffs did not allege any impact between the vehicles or with the plaintiffs' persons. 55 Ill. App. 3d 959, 961-62, 370 N.E.2d 1235, 1237-38. Similarly, in *Benza v. Schulman Air Freight*, the court declined an invitation to allow recovery for emotional distress which resulted

B. Pre-Impact Distress in the Zone-of-Danger Jurisdictions

The zone-of-danger rule conditions recovery on two elements: the defendant must negligently place the victim in peril of physical harm or death, and the victim's resulting emotional distress must manifest itself in physical symptoms.¹⁸⁵ While some courts have recognized exceptions, most courts continue to demand objective symptoms of distress as a guarantee of the claim's merit.¹⁸⁶ Some courts in zone-of-danger jurisdictions which have addressed the issue of pre-impact distress have allowed any physical change experienced by the victim to suffice.¹⁸⁷ Where, however, the plaintiff could not demonstrate any physical manifestation of distress, other courts have dismissed the claims.¹⁸⁸ Still other courts have permitted recovery for emotional distress by analyzing the claims under precedent dealing with damages for pain and suffering, rather than for emotional distress.¹⁸⁹

The District Court for the Northern District of Illinois initially rejected a pre-impact distress claim, concluding that the state's "impact rule" precluded such recovery.¹⁹⁰ Three years after this decision, however, the Illinois Supreme Court, in *Rickey v. Chicago Transit Authority*, abandoned the impact rule and adopted the zone-of-danger test.¹⁹¹ The *Rickey* court stated that its decision would give a bystander a cause of action for "physical injury or illness" suffered as a result of experiencing emotional distress.¹⁹² In light of the

in physical injury even in the absence of impact, preferring to adhere to the impact rule. 46 Ill. App. 3d 521, 525, 361 N.E.2d 91, 93 (1977).

Thus, it appears that the district court in *In re Air Crash Disaster Near Chicago* was mistaken in holding that Illinois plaintiffs could recover only for emotional distress caused by a physical injury. Nevertheless, although the court improperly stated the Illinois rule, it correctly used the impact rule in reaching its conclusion.

¹⁸⁵ See *supra* notes 87-120 and accompanying text.

¹⁸⁶ Compare *infra* notes 237-47 and accompanying text with notes 190-213 and 227-36 and accompanying text.

¹⁸⁷ See *infra* notes 190-97 and accompanying text.

¹⁸⁸ See *infra* notes 198-213 and accompanying text.

¹⁸⁹ See *infra* notes 214-26 and accompanying text.

¹⁹⁰ See discussion of *In re Air Crash Disaster Near Chicago* under the impact rule, *supra* notes 181-84 and accompanying text.

¹⁹¹ *Rickey v. Chicago Transit Auth.*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983). In *Rickey*, an older brother witnessed his younger brother's strangulation when the boy's clothing became tangled in an escalator. *Id.* at 548, 457 N.E.2d at 1. The older sibling later experienced serious emotional damage, including extreme depression and prolonged mental disturbance. *Id.* at 549-50, 457 N.E.2d at 2. Under the impact rule, a bystander's recovery would have been precluded. See *id.* at 553, 457 N.E.2d at 4. Noting that the impact rule barred legitimate claims from being heard, the Illinois Supreme Court held that a bystander could recover if he or she were within the zone-of-danger created by the defendant's negligence, was concerned for his or her own safety, and could show physical injury resulting from that mental distress. *Id.* at 555-56, 457 N.E.2d at 5.

It is important to note that the *Rickey* court explicitly declined to adopt an approach, like that in *Molien v. Kaiser Foundation Hospital*, which would have allowed recovery for emotional distress alone, stating that the standard was "too vaguely defined to apply . . . and one that is excessively broad." *Id.* at 554, 457 N.E.2d at 4. In so doing, the *Rickey* court required some showing that physical injury resulted from the mental distress.

¹⁹² *Id.* at 555, 457 N.E.2d at 5. Although the court stated that the *Rickey* plaintiff had met this standard by pleading "physical manifestations," *id.* at 556, 457 N.E.2d at 5, those physical manifestations included "definite functional, emotional, psychiatric and behavioral disorders, extreme depression, prolonged and continuing mental disturbances, inability to attend school and engage in gainful employment and to engage in his usual and customary affairs." *Id.* at 449-50, 457 N.E.2d at 2.

change in Illinois law, the *Air Crash* plaintiffs asked the district court to reconsider its earlier refusal to recognize pre-impact emotional distress claims.¹⁹³ On reconsideration, the court held that the Illinois Supreme Court's adoption of the zone-of-danger test permitted recovery for pre-impact emotional distress by plaintiffs who could show physical manifestations of their emotional distress.¹⁹⁴ Although the court rejected the defendant's contention that the short duration of any pre-impact distress precluded recovery as a matter of law,¹⁹⁵ it also disagreed with the plaintiffs' assertion that physical manifestations were unnecessary where the plaintiff's decedent suffered a direct physical injury.¹⁹⁶ The district court concluded that if the plaintiffs could prove the alleged physical symptoms — "increased heart rate, sweating, pupil dilation, bladder and bowel incontinence, muscular tremors, increased respiration, restriction of coronary arteries, hyperirritability of the nervous system and shock" — they could recover damages for pre-impact distress.¹⁹⁷

In another zone-of-danger jurisdiction, inability to prove resulting physical manifestations was fatal to the plaintiff's cause of action for pre-impact distress.¹⁹⁸ According to the Pennsylvania Superior Court in *Nye v. Commonwealth*,¹⁹⁹ that jurisdiction's rule

¹⁹³ *In re Air Crash Disaster Near Chicago*, 507 F. Supp. at 21.

¹⁹⁴ *In re Air Crash Disaster Near Chicago*, 18 Av. Cas. (CCH) 17,215, 17,217 (1983). The court permitted the plaintiffs to amend their complaints to allow such damages as follows: "As a proximate result of his or her reasonable fear for his/her own safety, plaintiff's decedent, _____, suffered fright, terror, emotional distress and physical pain and emotional suffering during the 30 seconds of the flight and until the moment of his/her death following impact with the ground." *Id.*

¹⁹⁵ *Id.* The court noted that the defendant's argument with respect to the duration of the emotional injury was directly analogous to that presented to, and rejected by, the district court in its ruling on post-impact pain and suffering. *Id.* The court held that the "necessarily short duration" of the passengers' emotional distress would not preclude recovery for an otherwise compensable loss. *Id.*

¹⁹⁶ *Id.* The plaintiffs argued that the Illinois Supreme Court's concern in *Rickey*, that physical manifestations were necessary to prevent an onslaught of frivolous claims, was not implicated in cases where the plaintiff suffered a direct physical injury. *Id.* The court, nevertheless, concluded that *Rickey* would allow compensation only for emotional distress that produced physical manifestations. *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Nye v. Commonwealth*, 331 Pa. Super. 209, 480 A.2d 318 (1984).

¹⁹⁹ *Id.* The plaintiff, the father and husband of the decedents, brought wrongful death and survival actions against the Pennsylvania Department of Transportation and the driver of the vehicle that forced the decedent's car off the road. *Id.* at 211, 480 A.2d at 320. The plaintiff did not introduce any evidence that the decedents were conscious during the period between injury and death, but the trial court instructed the jury that it could award damages for the pain and suffering the decedent experienced during this period. *Id.* at 213, 480 A.2d at 321. The court, however, rejected a proposed jury charge for damages for pre-impact fright. *Id.* at 213 n.3, 480 A.2d at 321 n.3. After the jury returned with an award of approximately \$75,000 for the decedent's pain and suffering, the court ordered a new trial. *Id.* at 213, 480 A.2d at 320. On appeal, the plaintiff argued that the verdict for pain and suffering should stand because the jury believed that the decedent suffered emotional distress as she attempted to bring her car back under control. *Id.* at 215, 480 A.2d at 321. The court cited a prior case which held that in survival actions in Pennsylvania, "the measure of damages is the decedent's pain and suffering and loss of gross earning power from the date of injury until death . . ." *Id.* at 215, 480 A.2d at 321 (quoting *Slaseman v. Myers*, 309 Pa. Super. 537, 544-45, 455 A.2d 1213, 1217 (1983)) (emphasis in original). The court noted the lack of precedent for an award for pre-impact fright in Pennsylvania, and stated "we have always limited recovery to damages for pain and suffering and emotional distress occurring after the time of injury." *Id.* at 215, 480 A.2d at 321 (emphasis in original).

governing recovery for negligently inflicted emotional distress required resultant physical harm.²⁰⁰ Although noting the lack of precedent supporting recovery for pre-impact fright,²⁰¹ the *Nye* court maintained that even if such fright were compensable, the court would require proof that the decedent suffered physical harm as a result of his or her fear of impending death.²⁰² Thus, the court affirmed dismissal of the claim despite testimony by witnesses that, after the defendant driver recklessly forced the decedent's vehicle off the road into a median barrier, the decedent driver unsuccessfully struggled to bring the car back under control before it crashed into an oncoming vehicle.²⁰³

A plaintiff's claim for pre-impact distress met a similar fate in Kansas, another jurisdiction that follows the zone-of-danger test.²⁰⁴ In *Fogarty v. Campbell 66 Express, Inc.*, the plaintiffs' failure to demonstrate that their decedent's emotional distress was manifested in physical symptoms prior to his death caused the United States District Court for the District of Kansas to direct a verdict for the defendant on the pre-impact distress claim.²⁰⁵ In *Fogarty*, the court reviewed Kansas case law concerning recovery for emo-

²⁰⁰ *Id.* (citing *Banyas v. Lower Bucks Hosp.*, 293 Pa. Super. 122, 437 A.2d 1236 (1981)). It should be noted, however, that the *Nye* court ignored a line of cases that suggest that physical manifestations are not necessary. In the 1979 decision of *Sinn v. Bird*, 486 Pa. 146, 404 A.2d 672 (1979), a plurality of the Pennsylvania Supreme Court held that a mother who saw her child struck and killed due to defendant's negligent driving would have a cause of action for her resulting emotional distress, even though the mother was outside the zone of physical danger. Although the plaintiff apparently alleged physical injury due to the distress, the plurality called the physical injury requirement "another synthetic device to guarantee the genuineness of the claim," and concluded that advancements in modern science, when combined with the fact finder's ability to discern between valid and fraudulent claims, made such a requirement unnecessary. *Id.* at 160-61, 404 A.2d at 679-80. Cases decided after *Sinn*, however, have revealed confusion among the Pennsylvania appellate courts as to whether resulting physical symptoms are still necessary for a viable cause of action for negligently inflicted emotional distress. Compare *Scott v. Kopp*, 494 Pa. 487, 490 n.2, 431 A.2d 959, 961 n.2 (1981) (*Sinn* allows recovery for emotional distress even in absence of physical injury) with *Tackett v. Encke*, 353 Pa. Super. 349, 350 n.1, 509 A.2d 1310, 1312 n.1 (1986) (bodily harm required), and *Cathcart v. Keene Indus. Insulation*, 324 Pa. Super. 123, 151-52, 471 A.2d 493, 508 (1984) (relying on RESTATEMENT (SECOND) OF TORTS § 436 A, court requires physical manifestations) and *Banyas v. Lower Bucks Hosp.*, 293 Pa. Super. 122, 129, 437 A.2d 1236, 1239-40 (1981) (physical symptoms required). See also *Commonwealth v. Balisteri*, 329 Pa. Super. 148, 154 n.7, 478 A.2d 5, 8 n.7 (1984) (noting inconsistency between *Sinn* and subsequent cases).

²⁰¹ 331 Pa. Super. at 215, 480 A.2d at 321. The court stated that "we have always limited recovery to damages for pain and suffering and emotional distress occurring after the time of injury." *Id.* (emphasis in original).

²⁰² *Id.* at 215-16, 480 A.2d at 321.

²⁰³ *Id.* at 214, 480 A.2d at 320.

²⁰⁴ See *infra* note 206.

²⁰⁵ *Fogarty v. Campbell 66 Express, Inc.*, 640 F. Supp. 953 (D. Kan. 1986). The plaintiff's husband was killed while driving one of two tractor-trailers that collided at an intersection where the defendant driver, a Campbell 66 Express employee, allegedly ignored a stop sign. *Id.* at 955. After the collision, the decedent's truck crashed through a six-foot concrete wall. *Id.* The decedent was killed when the load of steel he was hauling came through the cab, crushing his head and thorax. *Id.* The defendants asserted that the plaintiff's claim for pre-impact emotional distress was not cognizable under Kansas law. See *id.* at 957. The plaintiff, however, not only claimed that the defendant's conduct was negligent, but alternatively claimed that the defendant driver's conduct was wanton (*i.e.*, reckless). *Id.* at 956. Because Kansas law did not require proof of physical symptoms for emotional distress resulting from wanton conduct, the court denied the defendant's motion for partial summary judgment. *Id.*

tional distress,²⁰⁶ as well as decisions in other jurisdictions which addressed the issue.²⁰⁷ It found no persuasive precedent permitting recovery for negligently induced emotional distress absent physical manifestations in a jurisdiction which had long adhered to the zone-of-danger test.²⁰⁸ The court, however, expressly refrained from endorsing the "resulting physical injury" component of the zone-of-danger test,²⁰⁹ noting that this requirement had developed as a response to concerns that plaintiffs could easily feign emotional distress before advances in medical science made the requirement "unjust, illogical and unenlightened."²¹⁰ The court instead proposed a rule that imposed liability

²⁰⁶ The court initially determined that the Kansas rule regarding recovery for emotional distress was "functionally equivalent" to the "zone of danger" rule with its requisite resultant physical symptoms language. *Id.* at 957-58. Although recognizing that some of the reasons for the rule — preventing trivial claims, providing a guarantee of genuineness against claims otherwise easily feigned, and guarding against liability out of proportion to mere negligent conduct — may now be obsolete, the court concluded that the Kansas Supreme Court would move away from the rule only if it were convinced that these reasons were no longer valid. *Id.* at 958.

²⁰⁷ *Id.* at 958-61. The court noted that five states and the Federal Employer's Liability Act (FELA) seemed to permit such a claim even in the absence of physical symptoms. *Id.* at 957. The court immediately rejected the reasoning supporting the Louisiana and FELA decisions on the ground that they were based on controlling statutes which reflected especially "broad compensatory principle[s]" that did not exist in Kansas law. *Id.* at 958. The court also found unpersuasive suggestions by Connecticut and New York courts that mental distress alone was compensable, finding no judicial analysis of why such a rule should prevail in the face of the concerns articulated in the Restatement as reasons for requiring physical symptoms. *Id.* at 959. It further attacked *Platt v. McDonnell-Douglas Corp.*, 554 F. Supp. 360 (E.D. Mich. 1983), where the federal district court determined that Michigan law would permit recovery for pre-impact fright alone, finding that the state's case law was consistent with the rule permitting recovery only where the emotional distress accompanied physical injury. *Fogarty*, 640 F. Supp. at 960. Finally, the court found that the Fifth Circuit's award of such damages in *Solomon v. Warren*, 540 F.2d 777 (5th Cir. 1976), *cert. denied sub nom. Warren v. Serody*, 434 U.S. 801 (1978), did not apply, as *Solomon* was decided under the impact rule and Kansas was a zone-of-danger jurisdiction. *Fogarty*, 640 F. Supp. at 960-61. Thus, the *Fogarty* court concluded that "no court . . . has cogently explained why the Restatement factors ought now to be discounted." *Id.* at 961-62.

²⁰⁸ *Id.* at 962. As recently as 1983 the Kansas Supreme Court had reiterated the requirement that negligently induced emotional distress must be accompanied by or result in physical injury. *Hoard v. Shawnee Mission Medical Center*, 233 Kan. 267, 662 P.2d 1214 (1983). The *Fogarty* court also found support for its interpretation of Kansas law in that state's "stringent" attitude toward claims involving intentional infliction of emotional distress. *Fogarty*, 640 F. Supp. at 962. Kansas law permits recovery for this tort only when the defendant's conduct is found "outrageous to the point that it goes beyond the bounds of decency and is utterly intolerable in a civilized society." *Id.* (quoting *Roberts v. Saylor*, 230 Kan. 289, 293, 637 P.2d 1175, 1179 (1981)). The court concluded that to recognize a claim for negligently inflicted emotional distress without resulting physical consequences "would fly in the face" of Kansas' restrictive approach to claims for damages due to intentional conduct. *Id.*

²⁰⁹ *Fogarty*, 640 F. Supp. at 962. The court was careful to distinguish between endorsing the physical symptoms requirement and holding that injury was a necessary element for recovery for negligently induced emotional distress. *Id.*

²¹⁰ *Id.* at 962-63. The court stressed that the rule originated in attempts by courts to distinguish fraudulent claims from genuine ones without the assistance of medical knowledge. *Id.* at 962. It noted that recent advances in medical science had reduced the potential for fraud to "tolerable" levels. *Id.* Furthermore, the court was persuaded that not all emotional distress is manifested in physical symptoms. *Id.* Finally, the court was troubled by the proposition that serious emotional distress not manifesting itself in physical injury would go uncompensated, while a less compelling claim would be recognized if there were physical injury. *Id.* at 963.

on a negligent defendant for any emotional distress that a plaintiff could prove the defendant caused.²¹¹ In the case at bar, the court suggested that the plaintiff's evidence of a fifty-six foot long pre-collision skid mark would support a jury's conclusion that the decedent knew of the impending crash and suffered emotional distress during the interval before impact.²¹² Whatever its own belief, however, the court stated that it was bound by Kansas law to dismiss this and similar claims until that state Supreme Court changed the rule.²¹³

When two early pre-impact emotional distress claims came before the Texas courts, that state firmly adhered to the zone-of-danger rule.²¹⁴ In ruling on the pre-impact distress claims, however, the courts ignored the zone-of-danger test and treated the claims as ones for pain and suffering, thus avoiding the need to test the viability of such distress under this rule.²¹⁵ In a 1979 decision, *Green v. Hale*, the Texas Court of Civil Appeals affirmed a jury award of \$5,000 for the mental anguish of a thirteen-year old boy killed when he fell out of, and was run over by, the defendant's truck.²¹⁶ The court rejected the defendant's contention that the evidence failed to support the award, noting that the jury could presume suffering in those cases where it was the natural consequence of the plaintiff's injury.²¹⁷ The court noted that under state law, "consciousness of

²¹¹ *Id.* The court did note that the absence of physical injury may diminish the credibility of the plaintiff's claim, but the availability of advanced diagnostic techniques could help the genuinely distressed plaintiff to recover. *Id.* Recognizing that its proposition could be labeled "bold," the court suggested that an unexpressed judicial desire to adopt such a liberal approach might explain the willingness of federal courts and other jurisdictions to strain to permit recovery for pre-impact distress despite a lack of state precedent justifying the result. *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Houston Elec. Co. v. Dorsett*, 145 Tex. 95, 194 S.W.2d 546 (1946) (plaintiff suffered extreme nervousness, severe headaches, lapse of memory, and brain deterioration due to fright after defendant's bus narrowly missed striking plaintiff but ran into her mother); *Gulf C. & S.F. Ry. v. Hayton*, 93 Tex. 239, 54 S.W. 944 (1900) (plaintiff recovered for emotional distress manifested in nervous condition diagnosed as traumatic neurasthenia after witnessing the impending collision between the train on which he was a passenger and another train).

In a more recent Texas Supreme Court decision, involving a plaintiff's claim for emotional distress which caused her to experience despondency, disorientation, neurosis, neck and shoulder pain, and headaches, the court intimated that physical manifestations may no longer be necessary to establish a claim. *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983). Texas courts disagree about whether *Sanchez* has, in fact, abrogated the physical injury requirement. Compare *Baptist Hosp. v. Baben*, 672 S.W.2d 296 (Tex. Civ. App. 1984) (physical manifestation no longer necessary) with *Air Florida v. Zondler*, 683 S.W.2d 769 (Tex. Ct. App. 1984) (proof of physical injury still required). See also, Cantor, *Negligent Infliction of Emotional Distress: Expanding the Rule Evolved Since Dillon*, 17 TEX. TECH L. REV., 1557, 1573 (1986) (characterizing the *Zondler* interpretation of *Sanchez* as "better").

²¹⁵ See *infra* notes 216-26.

²¹⁶ 590 S.W.2d 231, 238 (Tex. Civ. App. 1979). The boy's father brought wrongful death and survival actions against the truck driver and his company. *Id.* at 233-34. The company employed the decedent and other youths to gather melons for market. *Id.* at 234. The accident occurred when the employer loaded the boys into his pickup truck to take them into town for lunch. *Id.* When one of the boys lost his hat, the defendant driver stopped the truck. *Id.* The decedent was in the process of getting off the truck to retrieve the hat when the defendant unexpectedly began to back up. *Id.* The decedent fell off and was run over by the rear wheels of the truck. *Id.* The driver stopped after he felt a "bump." *Id.*

²¹⁷ *Id.* at 237. The defendant asserted that there was no evidence that the decedent suffered any mental distress between the time he fell off the truck and the time he was struck. *Id.*

approaching death is a proper element to consider in evaluating mental suffering,"²¹⁸ and that, even where such anguish was brief, "a tremendous amount of fear can be inferred."²¹⁹

In *Hurst Aviation v. Junell*,²²⁰ the plaintiffs brought wrongful death and survival actions against the pilot of a small propeller airplane and his employer after the defendant's plane collided with the rear of a second plane, causing it to crash seconds later and killing the pilot of the second aircraft and two passengers.²²¹ On appeal, the defendants argued that there was no evidence — or alternatively, insufficient evidence — that the decedent pilot experienced mental anguish in that short interval,²²² and, in any case, the award of \$20,000 for such distress was excessive.²²³ The court concluded that the jury properly could infer that the pilot "suffered the horror of his impending doom" as he was unable to regain control of the falling plane,²²⁴ and held that consciousness of approaching death is a proper element for consideration in determining an award for mental suffering.²²⁵ In sustaining the award, the court also noted that despite the brief duration of the pilot's distress, the jury could also consider the amount of the decedent's fear in determining the appropriate damages.²²⁶

In the more recent case of *Air Florida, Inc. v. Zondler*,²²⁷ however, the Texas Court of Civil Appeals approached a claim for pre-impact distress as one for mental anguish.²²⁸ The court stated that the Texas rule permitted recovery "only" for negligently inflicted emotional distress which results in physical injury.²²⁹ The court, however, did not have

²¹⁸ *Id.* (quoting *Jenkins v. Hennigan*, 298 S.W.2d 905, 911 (Tex. Civ. App. 1957)).

²¹⁹ *Id.* at 238.

²²⁰ 642 S.W.2d 856 (Tex. Civ. App. 1982).

²²¹ *Id.* at 858. The accident occurred as the defendant pilot, an employee of the defendant Hurst Aviation, began his descent in preparation for landing. *Id.* The planes were approximately 60 feet above the ground when the "tip-to-tail" collision occurred. *Id.* The defendant landed safely at the airport. *Id.* The decedent's plane was discovered in a field adjacent to the airport, with the pilot and one passenger dead inside. *Id.* The remaining passenger was found alive but succumbed three hours later to injuries she sustained in the crash. *Id.*

²²² *Id.*

²²³ *Id.* at 859. The defendants argued that "momentary" mental anguish could not sustain the \$20,000 award. *Id.*

²²⁴ *Id.* The court noted that under Texas law, the jury could consider the decedent's consciousness of his or her approaching death as compensable mental suffering. *Id.* (citing *Jenkins v. Hennigan*, 298 S.W.2d 905, 911 (Tex. Civ. App. 1957) and *Green v. Hale*, 590 S.W.2d 231, 237 (Tex. Civ. App. 1979)).

²²⁵ *Id.* (citing *Jenkins*, 298 S.W.2d at 911). The decedent in *Jenkins* was a passenger in a car struck by the defendant. *Id.* at 908. Her heirs brought an action to recover for the pain and suffering the decedent experienced from the time of the accident until her death. *See id.* at 913. Thus, the statement upon which the *Green* and *Junell* courts relied — that a victim's awareness of his or her impending death may be included in a claim for mental suffering — came from a case seeking compensation for mental anguish arising from physical injury, and not for emotional distress suffered prior to injury.

²²⁶ *See Junell*, 642 S.W.2d at 859 (quoting *Green v. Hale*, 590 S.W.2d 231, 239 (Tex. Civ. App. 1979)). The court found that the defendants failed to meet their burden of showing that the award was the result of passion or prejudice, or that the amount shocked the conscience of the court. *Id.*

²²⁷ 683 S.W.2d 769 (Tex. Civ. App. 1984).

²²⁸ 683 S.W.2d at 774.

²²⁹ 683 S.W.2d at 773. The *Air Florida* court noted that the case of *Sanchez v. Schindler*, 651 S.W.2d 249 (1983), raised the issue of whether Texas still required physical injuries to establish distress. 683 S.W.2d at 773. For a discussion of *Sanchez*, see *supra* note 214.

to decide whether claims for pre-impact distress were subject to the same requirement because the plaintiff failed to establish that the decedent, in fact, experienced mental anguish prior to the crash.²³⁰ In *Air Florida, Inc.*, the decedent was a passenger in a plane which crashed into a bridge shortly after takeoff and sank into the icy Potomac River.²³¹ The court upheld a jury's finding that the decedent suffered no mental anguish before his death against a challenge that the finding was against the great weight and preponderance of the evidence.²³² The only evidence the plaintiff offered on the mental anguish issue was the statement of a survivor, an experienced air traveler who testified that he knew from the plane's abnormal vibrations upon takeoff that "something was wrong," that other passengers "were looking around after take-off," and that he observed that the plane would soon crash, and, therefore, prepared himself for the impact.²³³ The court noted that the plaintiff offered no direct testimony concerning the decedent's reactions during this interval.²³⁴ Furthermore, the plaintiff failed to present evidence that the decedent was seated where he was likely to have been aware of the crash.²³⁵ Despite the *Air Florida, Inc.* court's assertion that claims for mental distress, including pre-impact distress, must meet the zone-of-danger test,²³⁶ in *Green and Hurst Aviation* the Texas courts managed to circumvent this rule.

C. *Pre-Impact Distress and the Genuineness Arising from the Circumstances Exception*

In two zone-of-danger jurisdictions, courts have extended the exception abrogating the physical manifestation requirement²³⁷ to encompass other situations where the facts

²³⁰ 683 S.W.2d at 775.

²³¹ *Id.* at 770.

²³² *Id.* at 775. The decedent was killed in the highly publicized crash of an Air Florida jet liner. *Id.* at 770. His family brought a wrongful death action seeking recovery for their own mental anguish in addition to the pecuniary losses they sustained as a result of the decedent's death. *See id.* at 770.

²³³ *Id.* at 774.

²³⁴ *Id.* The witness did not know the decedent, nor did he testify as to any personal observations about the decedent during the moments before the crash or immediately thereafter. *Id.*

²³⁵ *Id.* The court concluded that the jury finding was not against the evidence, noting that after considering the evidence presented, the jury might have found it difficult to uphold a contrary conclusion. *Id.* at 775.

It is interesting to note that the court also struck down the damages awarded to the decedent's family members for their mental anguish, despite its conclusion that Texas law allowed recovery of nonpecuniary losses to beneficiaries in a wrongful death action. *Id.* at 772-74. The court reviewed recent Texas case law and determined that, when the cause of action was premised upon negligence, "proof of accompanying physical injury is a necessary predicate to recover damages for mental anguish." *Id.* at 773. The court found no evidence that the decedent's sons suffered physical symptoms. *Id.* at 774. Even evidence that, upon learning of the tragedy, the decedent's wife "collapsed against a wall" and later suffered severe depression and anxiety attacks the court found insufficient. *Id.* The court noted that the plaintiffs failed to make explicit whether the wife's fall was a "physical collapse" or simply a "natural emotional reaction," and whether her depression was a psychological affliction as opposed to a physical one. *Id.* The court found that the plaintiffs failed to establish that the wife's anxiety attacks were accompanied by physical symptoms. *Id.* The dissenting judge urged the majority to repeal the physical injury requirement, arguing that had the decedent's wife fallen to her knees, and bruised them, upon learning of her husband's death, she could recover for her mental anguish. *Id.* at 775-77 (Guillot, J., dissenting).

²³⁶ *Id.* at 773

²³⁷ For a discussion of the two fact patterns meriting a recognized exception, see *supra* notes 122-27 and accompanying text.

assure the claim's genuineness.²³⁸ In *Quill v. Trans World Airlines, Inc.*, the Minnesota Court of Appeals permitted recovery for recurring emotional distress despite evidence that the plaintiff suffered only slight physical symptoms.²³⁹ The court concluded that the "unusually disturbing experience" of being a passenger in a plane which almost crashes and then continues to shake and vibrate until landing 40 minutes later provided a guarantee of the claim's genuineness.²⁴⁰ The plaintiff also sought recovery for the emotional distress he suffered during the interval when the air craft plunged to earth and he believed a crash was imminent;²⁴¹ he did not, however, allege any simultaneous physical manifestations of his distress.²⁴² The court noted that these facts did not conform to the recognized physical manifestation exceptions,²⁴³ but concluded that the rationale for those exceptions applied to and supported recovery in the case at bar.²⁴⁴ The fact that the plaintiff was subjected to such a "terrifying" experience²⁴⁵ provided a guarantee of genuineness²⁴⁶ which meant that there was no essential reason to deny recovery.²⁴⁷ Thus, the court permitted recovery for the pre-impact distress despite the absence of objective physical symptoms.

New York, which generally follows the zone-of-danger test, also abolished the resulting physical injury requirement when the circumstances provide a guarantee of the claim's genuineness.²⁴⁸ When presented with pre-impact distress claims under New York law, however, the United States Court of Appeals for the Second Circuit and the Federal District Court for the Southern District of New York did not test the claims under either the zone-of-danger rule or its exceptions. Instead, they advanced different reasons why such claims are compensable under New York law.²⁴⁹

The two cases arose out of the same 1979 airplane crash of American Airlines Flight 191.²⁵⁰ Flight 191 crashed in a field a few thousand feet away from the runway just after take-off, killing all 271 passengers and crew members.²⁵¹ Although the plane lost an

²³⁸ For a discussion of the jurisdictions that have extended this exception, see *supra* notes 129-40 and accompanying text.

²³⁹ 361 N.W.2d 438 (1985).

²⁴⁰ *Id.* at 443.

²⁴¹ *Id.*

²⁴² The plaintiff's physical manifestation of distress occurred during subsequent plane flights. See *supra* at note 135.

²⁴³ *Id.* The court first noted that the underlying purpose of the zone-of-danger rule was to ensure the genuineness of the distress, but that the rule had generated considerable controversy over the issue of what constituted a physical injury. *Id.*

²⁴⁴ The *Quill* court agreed with Dean Prosser's explanation that certain cases merited an exception to the physical manifestation requirement because they presented "an especial likelihood of genuine and serious mental distress" which dispelled the need to require other guarantees of genuineness. 361 N.W.2d at 443 (quoting PROSSER & KEETON, *supra* note 8, at § 54).

²⁴⁵ The *Quill* court stated that "[t]he nature of that experience guarantees plaintiff suffered severe emotional distress during the descent and the emergency detour" to land the plane. 361 N.W.2d at 443.

²⁴⁶ *Id.*

²⁴⁷ *Id.* (quoting PROSSER & KEETON, *supra* note 8, at § 54).

²⁴⁸ See *supra* notes 129-31 and accompanying text.

²⁴⁹ See *supra* notes 255-65 and accompanying text.

²⁵⁰ *In re Air Crash Disaster Near Chicago, Illinois*, On May 25, 1979, 507 F. Supp. 21 (N.D. Ill. 1980). This is the same airplane crash from which the Illinois Air Crash cases arose. See *supra* text at notes 181-84 and 190-97.

²⁵¹ National Transportation Safety Board, Aircraft Accident Reports: American Airlines, Inc.,

engine on its left side during takeoff, it gained an altitude of about 300 feet,²⁵² began to roll to the left approximately eleven seconds before the crash,²⁵³ and reached a 90-degree angle to the ground three seconds before crashing.²⁵⁴ In *Malacynski v. McDonnell-Douglas Corp.*,²⁵⁵ the widower of a passenger killed in the crash sought recovery for the decedent's pain and suffering caused by her apprehension of her impending death.²⁵⁶ The Federal District Court for the Southern District of New York held that the plaintiff's claim was compensable under New York law.²⁵⁷ The court reasoned that a pre-impact mental anguish claim was consistent with two "well-settled principles" of New York law: first, that recovery is available for mental distress caused by fear of personal injury, even when such injury does not occur;²⁵⁸ and second, that recovery is available for post-impact pain and suffering sustained when a decedent regains consciousness after impact.²⁵⁹ The district court also noted that one New York state court indicated that it would recognize such a claim under the proper circumstances.²⁶⁰

DC-10-10, NILOAA, Chicago, O'Hare International Airport, Chicago, Illinois, May 25, 1979 at 2 (1979) [hereinafter NTSB Report]. The National Transportation Safety Board (NTSB) concluded that the accident was not survivable "because impact forces exceeded human tolerance." *Id.* at 11. In addition, two persons in the vicinity of the crash were killed, and two others were seriously injured. *Id.* at 2.

²⁵² *Id.* Just before takeoff, the left engine separated from the plane and fell onto the runway. The NTSB concluded that the design and improper maintenance procedures caused the separation. *Id.* at 1.

²⁵³ *Id.* at 5.

²⁵⁴ *Id.*

²⁵⁵ 565 F. Supp. 105 (S.D.N.Y. 1983).

²⁵⁶ *Id.* at 105.

²⁵⁷ *Id.* at 106. The court noted that the parties did not contest the application of New York law. *Id.* at 106 n.2. Defendant American Airlines moved to dismiss the plaintiff's claim for pre-impact distress, claiming that New York law did not recognize this cause of action. *Id.* at 105. The defendant's contention was based on *Clancy v. Port of New York Auth.*, 55 A.D.2d 587, 389 N.Y.S.2d 615 (1976), where the court dismissed a claim for the pain and suffering experienced by a decedent who fell twenty-five stories down an elevator shaft to his death. The *Clancy* court stated that an award could not be sustained "because it cannot be successfully maintained that decedent's life lasted for even the smallest interval of time after the tremendous impact resulting from his fall." *Id.* at 588, 389 N.Y.S.2d at 616 (emphasis added). The *Malacynski* court found the defendant's reliance on *Clancy* unwarranted, as it concluded that *Clancy* did not involve a claim for pre-impact damages. *Malacynski*, 565 F. Supp. at 106 n.3.

²⁵⁸ *Id.* at 106 (citing *Battalla v. State of New York*, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961)).

²⁵⁹ *Malacynski*, 565 F. Supp. at 106 (citations omitted).

²⁶⁰ *Id.* (citing *Anderson v. Rowe*, 73 A.D.2d 1030, 425 N.Y.S.2d 180 (1980)). In *Anderson*, the administrator of the estates of two decedents sought compensation for the pain and suffering of the victims despite evidence that they were killed immediately upon impact. In discussing the claim, the court noted that the plaintiff was unable to present any evidence that the victims suffered any pain or introduce any evidence which would imply "that the decedents were aware of the danger and suffered from pre-impact terror." *Anderson*, 73 A.D.2d at 1031, 425 N.Y.S.2d at 181. The *Malacynski* court concluded that this language evidenced state judicial recognition of a claim for pre-impact distress. *Malacynski*, 565 F. Supp. at 106.

The district court in *Malacynski* also refused to grant the defendant's motion for summary judgment. *Id.* The defendant argued that the plaintiff could not introduce sufficient proof to justify the inference that the decedent was aware of the impending disaster or experienced fear. *Id.* at 107. The plaintiff countered that evidence provided by eyewitnesses to the crash, information on file with the NTSB, and the decedent's seat assignment were sufficient to justify this inference. *Id.* The court refused to summarily dismiss the claim, stating that it was "inclined to believe that the

In *Lin v. McDonnell-Douglas Corp.*,²⁶¹ another case arising out of the Flight 191 crash, the same court that decided *Malacynski* reiterated its holding that New York law permits recovery for pre-impact pain and suffering.²⁶² The court reasoned that pre-impact recovery was just a "short step" from the already permissible recovery for pain and suffering experienced after injury.²⁶³ The Court of Appeals for the Second Circuit affirmed this decision, stating that it found "no intrinsic or logical barrier to recovery for the fear experienced during a period in which the decedent is uninjured but aware of an impending death."²⁶⁴ In fact, the more controversial issue in *Lin* was whether the plaintiffs had introduced sufficient evidence to support their claim for pre-impact anguish, not whether this claim was legally cognizable.²⁶⁵

evidence as described by plaintiff's counsel would support such an inference that Malacynski knew she was in immediate danger when the aircraft turned nose-up and rolled over due to the loss of an engine" *Id.*

²⁶¹ 574 F. Supp. 1407 (S.D.N.Y. 1983), *modified*, 742 F.2d 45 (2d Cir. 1984). The suit, brought by the administrator of the decedent's estate and his wife and children, sought compensation for the decedent's pain and suffering prior to his death. *Id.* at 1409, 1416. The jury awarded \$10,000 for the decedent's pre-impact fright, and the defendants moved for judgment notwithstanding the verdict. *Id.* at 1416.

²⁶² 574 F. Supp. at 1416.

²⁶³ *Id.* The district court relied on the fact that New York law permitted recovery for a decedent's post-injury pain and suffering and that New York courts included apprehension of impending injury as a proper element of post-injury pain and suffering. *Id.* (citing, *inter alia*, *Juiditta v. Bethlehem Steel Corp.*, 75 A.D.2d 126, 138, 428 N.Y.S.2d 535, 543 (4th Dept. 1980) ("degree of consciousness, severity of pain, apprehension of impending death along with duration" are all factors to be considered in awarding damages for pain and suffering)). The *Lin* court also found explicit judicial approval of the claim in *Malacynski* and *Anderson*, and stated that *Clancy* was inapposite, as that court considered only post-impact pain and suffering. *Lin*, 574 F. Supp. at 1416 & n.4 (citing *Malacynski*, 565 F. Supp. at 107; *Anderson*, 73 A.D.2d at 1031, 425 N.Y.S.2d at 181; *Clancy*, 55 A.D.2d 587, 389 N.Y.S.2d 615).

²⁶⁴ *Shu-Tao Lin v. McDonnell-Douglas Corp.*, 742 F.2d 45, 53 (2d Cir. 1984). The appellate court stated that its conclusion was based "substantially" upon the reasons advanced by the trial court. The court also found support for its decision in *Anderson*, which, according to the Second Circuit, implicitly recognized this type of damages. *Id.* (citing *Anderson*, 73 A.D.2d at 1031, 425 N.Y.S.2d at 180).

²⁶⁵ *Shu-Tao Lin*, 574 F. Supp. at 1417. Noting that the absence of survivors deprived the court of direct evidence of the decedent's pre-impact trauma, the district court concluded that evidence that the decedent was assigned a window seat on the same side of the plane from which the engine broke away allowed the fact finder reasonably to infer that the decedent saw this event. *Id.* Alternatively, the court determined that the plane's sudden banking, altitude loss, and subsequent nosedive reasonably supported the inference that the decedent became aware of his peril prior to impact. *Id.* On appeal, the Second Circuit, viewing the evidence in the light most favorable to the plaintiffs, found that a fact finder could conclude that the decedent saw the engine break away and thus was aware of his peril for approximately thirty seconds. *Shu-Tao Lin*, 742 F.2d at 53. The Second Circuit did not address the reasonableness of the inference that the decedent experienced pre-impact fear due to the change in the plane's altitude. *See id.*

The Second Circuit was forced to distinguish two other cases arising out of the same crash, also involving pre-impact distress claims, in which the court found for the defendant. In *Shatkin v. McDonnell-Douglas Corp.*, the Second Circuit reversed an \$87,500 jury award for the pain and suffering the decedent experienced before the crash. 727 F.2d 202, 204 (2d Cir. 1984). The court assumed that New York law would recognize the claim but found no evidence to support a finding that the decedent suffered any pre-impact distress. *Id.* at 206-07. While noting that eyewitness testimony of the decedent's pain and suffering was not required — and indeed in these types of cases would be difficult to secure — the court found that the plaintiff failed to introduce even

D. Pre-Impact Distress Claims under Louisiana Law

In a case of first impression,²⁶⁶ the Court of Appeals for the Fifth Circuit had to determine whether the State of Louisiana recognized a cause of action for pre-impact fear experienced by a passenger killed in an airplane crash. In *Haley v. Pan American World Airways, Inc.*,²⁶⁷ the court noted the lack of any Louisiana decisions directly on point. It determined, however, that recognizing such a cause of action furthered the "broad compensatory principle" underlying the Louisiana Civil Code pursuant to which the plaintiffs brought their wrongful death and survival claims,²⁶⁸ and also comported with Louisiana precedent permitting recovery for mental anguish and fright suffered while an ordeal was in progress.²⁶⁹ The *Haley* court, after reviewing Louisiana case law,

circumstantial evidence which would support an inference of emotional distress. *Id.* (citing *Solomon v. Warren*, 540 F.2d 777, 779 (5th Cir. 1976), *cert. dismissed sub nom.*, *Warren v. Serody*, 434 U.S. 801 (1977)). The decedent in *Shatkin*, however, was assigned a seat on the right side of the plane, and lacking evidence that his attention was called to the problem, the court stated that it would be "sheer speculation" to suggest the decedent knew of the loss of the left engine. *Id.* at 206. Eyewitness evidence that the plane tilted and rolled was also insufficient, according to the *Shatkin* court, as it is a "common experience" for any plane, even one not experiencing problems, to bank sharply to one side to conform to a prescribed traffic pattern. *Id.* at 207. The court did note that the plane went into a 90 degree plunge only three seconds before it crashed, but did not explain why such a dramatic change in altitude and position, even for a short interval, was insufficient to support an inference that the decedent became aware of impending disaster. *Id.* at 206.

It is interesting to note that the Second Circuit was also silent on the district court's conclusion in *Shu-Tao Lin* that pre-impact pain and suffering could be inferred from the plane's rapid descent, if not on an inference that the decedent saw the engine break away. See *Shu-Tao Lin*, 742 F.2d at 53. Is the Second Circuit implying that three seconds of peril is insufficient as a matter of law to cause pre-impact emotional trauma? If so, this would seem to be at odds with *Anderson*, where it was not the short interval of the decedent's awareness of impending death that precluded recovery, but a failure to produce evidence of trauma. 73 A.D.2d at 1031, 425 N.Y.S.2d at 181.

The *Shu-Tao Lin* court concluded that its holding in *O'Rourke v. Eastern Air Lines, Inc.*, 730 F.2d 842 (2d Cir. 1984), also was not contrary to its *Shu-Tao Lin* holding. *Shu-Tao Lin*, 742 F.2d at 53 n.11. In *O'Rourke*, the decedent was killed when the plane on which he was a passenger crashed during its approach to Kennedy International Airport. 730 F.2d at 845. The Second Circuit affirmed the trial court's exclusion of the survivor's testimony. *Id.* at 854. The plaintiff argued that testimony concerning the conditions within the cabin after the plane wing struck the ground and before the final impact five to ten seconds later was not irrelevant, as it would have provided "sufficient circumstantial evidence to allow the trial court to draw the reasonable inference that [the decedent] probably suffered consciously . . ." *Id.* (quoting Brief of Plaintiff-Appellee-Cross-Appellant at 21) (emphasis supplied by court). The appellate court ruled, however, that the trial court did not abuse its discretion in excluding this evidence because the witness was seated ten to fifteen feet away from the decedent and admittedly did not know what happened to the decedent before the crash. *Id.* at 854-55.

²⁶⁶ For a discussion of the Louisiana approach to emotional distress claims see *supra* notes 157-61 and accompanying text.

²⁶⁷ 746 F.2d 311 (5th Cir. 1984). On July 9, 1982 the plaintiffs' son was a passenger on a Pan American plane which crashed and disintegrated upon impact with the ground. *Id.* at 313. The plane had ascended to a height of 163 feet after takeoff, and then began to descend and roll to the left, causing the wing to strike a tree limb. *Id.* at 315-16. The aircraft then rolled to the ground and disintegrated approximately six seconds later. *Id.*

²⁶⁸ *Id.* at 313-15. Article 2315 of the Louisiana Civil Code states in pertinent part: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." LA. CIV. CODE ANN. art. 2315 (West Supp. 1984). This section of the code provides for survival actions and recovery for wrongful death. *Guidry v. Theriot*, 377 So. 2d 319, 322 (La. 1979).

²⁶⁹ 746 F.2d at 313-14 (citations omitted). While conceding that the cases upon which it relied

concluded that mental anguish is itself a compensable injury, regardless of whether it is accompanied by physical injury.²⁷⁰ The court acknowledged that, because all on board were killed, no one would ever "know" whether the decedent was aware of his peril,²⁷¹ or the exact duration of his awareness,²⁷² but concluded that it was "reasonable" to infer apprehension of death for at least the four to six seconds after the plane hit the tree and before it disintegrated. The court, therefore, upheld the \$15,000 award to the plaintiffs.²⁷³

E. Pre-Impact Distress and Federal Statutory Law

Statutory law also provides an avenue of redress. Plaintiffs have sought damages for pre-impact distress under the Federal Employers' Liability Act (FELA)²⁷⁴ and the

involved recovery for post-impact mental anguish, the court declined to find that Louisiana courts would sever an "ordeal" into pre- and post-impact segments for purposes of awarding damages for emotional distress. *Id.* at 314. For a discussion of Louisiana cases in which plaintiffs sought recovery for mental distress experienced while an ordeal was in progress, see *infra* notes 341-43 and accompanying text.

²⁷⁰ 746 F.2d at 314 (citations omitted).

²⁷¹ *Id.* at 317. The defendant claimed that the plaintiff failed to introduce sufficient evidence that the decedent suffered any pre-impact fear. *Id.* at 315. The plaintiffs, however, did produce a videotape simulation of the take-off and crash, along with testimony by a psychiatrist who had treated survivors of other air crashes. *Id.* at 315-16. The psychiatrist testified that, at least from the time the plane hit the tree, if not earlier when it began to roll and descend, most, if not all, passengers would have experienced five levels of anxiety culminating in panic. *Id.*

²⁷² *Id.* at 317.

²⁷³ *Id.* Contrary to defendant's argument that damages were too speculative, the court found sufficient evidence to support the award. *Id.* The court also rejected the defendant's contention that \$15,000 for four to six seconds of anguish was excessive. *Id.* at 318. The court reviewed pre-impact distress damage awards in other jurisdictions and concluded that the sum was neither "shocking" nor contrary to reason. *Id.* at 318.

In another case arising from the same airplane crash, *Pregeant v. Pan American World Airways Inc.*, the Fifth Circuit reiterated its holding in *Haley* that Louisiana law recognized a cause of action for pre-impact fear. 762 F.2d 1245, 1247 (5th Cir. 1985). The *Pregeant* court upheld a \$16,000 jury award for pre-impact pain and suffering that lasted not more than 20 seconds, noting that the decedent, a former flight attendant and experienced flier, could be expected to detect danger sooner than the average passenger. *Id.* at 1248-49 & n.2.

The Fifth Circuit did, however, find excessive a \$25,000 jury award for a victim's pre-impact terror on the evidence presented in *In re Air Crash Disaster Near New Orleans, Louisiana* on July 9, 1982, 789 F.2d 1092, 1099 (5th Cir. 1986). The court found the testimony of "unusual sound[ing] engines," "violent maneuvering" until the plane was 90 degrees off level, and the wingtip smashing trees as it descended sufficient to raise a jury issue, but concluded that this evidence did not justify such a large award. *Id.* at 1098-99. It distinguished the awards in *Haley* and *Pregeant* on the ground that "the quantity and quality of the evidence" in those cases exceeded that presented in the case at bar. *Id.* at 1099. The Fifth Circuit noted that in *Haley* and *Pregeant*, the plaintiffs had produced a videotape simulating the takeoff and crash, as well as psychiatric testimony about the passengers' probable condition and reactions. *Id.* No such evidence was presented in this case, the court observed. *Id.* Thus, the court ordered the plaintiffs to accept remittitur to \$7500 for the pre-impact fear, or the court would grant a new trial on the issue of damages. *Id.*

²⁷⁴ 45 U.S.C. §§ 51-60 (1982). FELA gives employees of common carriers who are injured in the course of their employment the right to recover for their injuries.

Section 1 of the FELA, 45 U.S.C. § 51, provides for a right of recovery for the injury of an employee of a common carrier by rail, in interstate or foreign commerce, and in case of the death of the employee to his [or her] personal representative or certain designated dependents when it results "in whole or in part from the negligence of

Jones Act.²⁷⁵ The first court to discuss such a claim denied recovery under the Jones Act, describing as "a mere guess" the damages recoverable for emotional suffering endured by a seaman who fell thirty feet to his death.²⁷⁶ In dicta, however, another court suggested that the Jones Act would allow recovery for pre-impact distress despite the brevity of the suffering.²⁷⁷ In *Kozar v. Chesapeake & Ohio Railway Co.*, a case brought under FELA, the United States District Court for the Western District of Michigan allowed recovery for pre-impact fright.²⁷⁸ The decedent in *Kozar*, the foreman of a crew responsible for removing wrecked trains from the railroad bed and returning derailed cars to the track,²⁷⁹ was killed when a crane malfunctioned and dropped a refrigerator car on him.²⁸⁰ One of Kozar's co-workers shouted a warning as the car began to fall, but

any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, its . . . appliances, machinery, . . . or other equipment."

M. NORRIS, *THE LAW OF SEAMEN*, § 660 (3d ed. 1970) (quoting 45 U.S.C. § 51). The Act was passed in 1908 in response to the then-common law rule that "the death of a human being, though wrongfully caused, affords no basis for the recovery of damages, and a right of action for personal injuries dies with the injured person." Annot. *Recovery In Action Under Federal Employers' Liability Act or Jones Act for Decedent's Pain and Suffering Between Injury and Death Federal Cases*, 13 L.Ed.2d 1014 (1965).

²⁷⁵ 46 U.S.C. § 688 (1982). The Jones Act, enacted in 1920, extends the FELA provisions to seamen and, in the case of the seaman's death, to his or her personal representative. *Id.* The Act permits "[a]ny seaman who shall suffer personal injury in the course of his [or her] employment . . . [to] maintain an action for damages at law [against his or her employer] with the right of trial by jury." *Id.* All federal statutes that modify or expand a common law right or remedy in personal injury actions are applicable to cases brought under the Jones Act. NORRIS, *supra* note 274, at § 659.

²⁷⁶ *Smith v. United States*, 121 F. Supp. 778, 785 (S.D. Tex. 1953), *aff'd on other grounds*, 220 F.2d 548 (5th Cir. 1955). The seaman was killed when the rope ladder which he was climbing broke away, causing him to fall onto the ship's deck and then into the water. *Id.* While the plaintiffs attempted to prove that the seaman survived after he struck the deck and thus was conscious of his peril as he fell into the water, the court found it unclear whether impact with the deck or drowning caused the seaman's death. *Id.*

²⁷⁷ *Wiggins v. Lane & Co.*, 298 F. Supp. 194, 196 (E.D. La. 1969). The decedent was working on a pile driving rig approximately 50 feet above the deck of a barge. *Id.* at 194. He was struck in the chest by a piling and fell to the deck below. *Id.* Medical experts testified that the decedent died on impact with the deck but did not indicate whether he was conscious during the fall. *Id.* The jury returned a verdict awarding damages for the decedent's pre-death suffering. *Id.* at 194-95.

The court found that, because of conflicting evidence, the jury could find that the decedent experienced a brief period of conscious pain and suffering prior to death. The court also concluded that despite judicial pronouncements to the contrary, the Jones Act did not eliminate a cause of action merely because of the limited time the decedent suffered. *Id.* 198-99. To better support its own decision to permit recovery, the *Wiggins* court stated: "If a seaman fell from the mast into the sea, [and] was rescued a few seconds later after almost drowning, . . . it would appear certain that he could recover for the fright suffered in the moments when he thought he was falling to his death." *Id.* at 196 (footnote omitted).

²⁷⁸ 320 F. Supp. 335, 365-66 (W.D. Mich. 1970), *aff'd in part and vacated in part*, 449 F.2d 1238 (6th Cir. 1971).

²⁷⁹ *Id.* at 341. This job, which the court characterized as "extremely hazardous," required the crew to clear wrecked and derailed cars from the defendant's rail beds. *Id.*

²⁸⁰ *Id.* at 342. The crane's brake system, which was supposed to prevent the raised object from slipping and falling, had been in a defective condition for at least four years prior to this incident. *Id.* at 343. After the crane lifted the 40-ton refrigerated car, the decedent walked either alongside or under the car, to inspect and determine where to place the ties necessary to pivot the car to position it parallel to the tracks. It was then that the car began to slip. *Id.* at 342.

the decedent could not escape in time.²⁸¹ The jury awarded \$500 for the fright the decedent experienced after he realized the car was falling and before it struck him.²⁸² The court concluded that the evidence supported a finding that the decedent suffered emotional distress when he knew he was about to die and because of the impact the tragedy would have on his family.²⁸³ Concluding that FELA allowed such damages, the court emphasized that the statute provided recovery to any person suffering "injury,"²⁸⁴ and noted that a number of courts had construed the term to encompass mental agony and emotional fright.²⁸⁵ It concluded that there was no legal distinction between a mental distress injury suffered before impact and one suffered after.²⁸⁶ The court also noted that the statute contained no language barring such damages and relied upon the Supreme Court's admonition against construing FELA in a "narrow . . . and niggardly" fashion to support its interpretation.²⁸⁷ The Texas Court of Appeals, relying on *Kozar*,

²⁸¹ *Id.*

²⁸² *Id.* at 364. The plaintiff sought \$10,000 for this pain and suffering. *Id.* The jury, however, awarded no damages for the decedent's pain and suffering after he was struck by the car, concluding that he experienced no conscious pain and suffering during the interval between impact and death. *Id.* at 340.

²⁸³ *Id.* at 366. The court noted the evidence that the decedent took his family obligations seriously, and found that the jury could infer that he suffered greatly at the thought of the effect of his death on his family. *Id.*

²⁸⁴ *Id.* at 365 (quoting 45 U.S.C. §§ 51 and 59) (emphasis supplied by court).

²⁸⁵ *Id.* at 365-66 (citations omitted).

²⁸⁶ *See id.* at 366. The court stated that if any distinction exists between pre- and post-impact mental distress, it is factual in nature and should, therefore, be left to the jury. *Id.*

The court noted, however, that every case cited by the plaintiff as precedent for pre-impact distress in fact involved some physical impact before the mental fright and suffering. *See id.* at 364. The only case that actually addressed pre-impact distress was *Smith v. United States*, 121 F. Supp. 778 (S.D. Tex. 1953), *aff'd on other grounds*, 220 F.2d 548 (5th Cir. 1955). *See also supra* note 276 and accompanying text. The plaintiff in *Kozar* argued that the court in *Smith* denied recovery based on the facts presented, not the law, and argued that the trier of fact should be allowed to consider whether the decedent experienced such distress. *Kozar*, 320 F. Supp. at 365. The *Kozar* court agreed that recovery was denied in *Smith* because of that plaintiff's failure to present sufficient evidence, but found that where such damages were not speculative, no rule of law barred recovery. *See id.* at 366.

²⁸⁷ *Id.* (quoting *Rogers v. Missouri Pac. R.R.* 352 U.S. 500, 509 (1957)). The *Kozar* court asserted that it was the United States Supreme Court's opinion, as expressed in *Rogers*, that Congress mandated a generous interpretation of the statute:

The fact that Congress has not seen fit to substitute . . . [a worker's compensation plan for that statutory] scheme requiring fault cannot relieve this Court of its obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction.

Id. (quoting *Rogers*, 352 U.S. at 509 (emphasis deleted)). It is important to note that the *Rogers* Court was not commenting upon the extent of the Act's coverage, but instead was reminding the courts that Congress intended that the jury would decide whether the employer's fault was in any way causally responsible for the employee's injury, and not the court, as had occurred in *Rogers*. *Rogers*, 352 U.S. at 509-10. It was this congressional intent which the Supreme Court warned courts were eroding by "narrow and niggardly construction." *Rogers*, however, does implicitly support the idea that the statute should be generously construed to allow recovery. For instance, the employer in *Rogers* argued that the statute permitted recovery only if the evidence established that the employer's negligence was the "sole, efficient, producing cause of injury." *Id.* at 506. The Supreme Court rejected this interpretation of the statute, holding that recovery was possible under the statute whenever "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* (footnote omitted).

similarly upheld a verdict under FELA for the mental anguish suffered by a railroad employee who was thrown to the ground in front of an oncoming train and struck and killed as he scrambled to get out of its path.²⁸⁸ Thus, under a federal law providing recovery for "injuries" to federal employees, pre-impact distress presents a viable claim.

IV. WERE THE DECISIONS CORRECT?

This portion of the Article examines the previously discussed judicial holdings on claims for pre-impact stress. It seeks to determine whether the courts, in fact, employed the proper approach, as determined by precedent in that jurisdiction, in ruling on the issue and, if so, whether the court properly applied the approach in arriving at its decision. The text analyzes decisions reached in jurisdictions adhering to the impact rule,²⁸⁹ the zone-of-danger test,²⁹⁰ and the genuineness in the circumstance exception,²⁹¹ as well as those cases decided under Louisiana²⁹² and Federal statutory law.²⁹³ A critical review of the decisions illuminates the deficiencies of approaches used and demonstrates the need for a new approach, a rule that is limited in scope to pre-impact distress. Such a rule is the focus of a subsequent section of this article.²⁹⁴

A. The Impact Jurisdictions

Courts in two jurisdictions which followed the impact rule reached opposing conclusions regarding whether a cause of action for pre-impact emotional distress was compatible with the rule. The Federal District Court for the Northern District of Illinois, in *In re Aircrash Disaster Near Chicago* — a decision handed down prior to the state's decision to abandon the impact rule — dismissed the claim, holding that the impact rule required that the impact in fact cause emotional distress.²⁹⁵ The Fifth Circuit, however, in *Solomon v. Warren*, held that even subsequent impact provided the basis for granting relief for the plaintiff's distress.²⁹⁶

Judicial precedent and the original rationale behind the impact rule support the Fifth Circuit's conclusion that a plaintiff need not establish a causal relationship between impact and emotional distress. First, some courts in earlier decisions had permitted recovery even though emotional distress preceded the impact.²⁹⁷ In other cases, courts allowed recovery for distress which was unrelated to the contact.²⁹⁸ Second, the Fifth

²⁸⁸ *Port Terminal R.R. Ass'n v. Sweet*, 640 S.W.2d 362 (Tex. Ct. App. 1982), *aff'd*, 653 S.W.2d 291 (Tex. 1983). In this wrongful death action, brought pursuant to FELA by the widow of a railroad employee, the decedent was riding on the outside of the train's lead car and was thrown forward and run over after the train lurched. *Id.* at 363. The jury awarded \$25,000 for the decedent's pre-death pain and suffering. *Id.* The *Sweet* court reduced the award to \$10,000, finding the evidence insufficient to support a conclusion that the decedent was conscious at any time after being struck by the train and before his death. *Id.* at 366-67.

²⁸⁹ See *infra* note 295-303 and accompanying text.

²⁹⁰ See *infra* notes 304-39 and accompanying text.

²⁹¹ See *infra* notes 324-38 and accompanying text.

²⁹² See *infra* notes 339-44 and accompanying text.

²⁹³ See *infra* notes 347-49 and accompanying text.

²⁹⁴ See *infra* notes 350-62 and accompanying text.

²⁹⁵ See *supra* notes 181-84, 190-97 and accompanying text.

²⁹⁶ See *supra* notes 172-75 and accompanying text.

²⁹⁷ See *supra* cases cited at note 84.

²⁹⁸ See *supra* notes 81-82 and accompanying text.

Circuit's decision is justified in light of the impact rule's purposes. One purpose of the rule is to discourage false or frivolous claims.²⁹⁹ Allowing recovery to plaintiffs who suffered emotional distress prior to impact, that is, those plaintiffs who are unable to prove a causal relationship between impact and distress but who nevertheless experience the actual impact which they feared would happen, would not pose any greater risk of fabricated claims than would the rule of allowing recovery where the impact precedes the distress.³⁰⁰ A rule requiring a causal relationship between impact and distress would not only deny recovery to plaintiffs who managed to avoid impact altogether, as the dissenting judge correctly noted in *Solomon*,³⁰¹ but would also deny recovery to plaintiffs who ultimately experienced the impact they apprehended. Thus, the *Solomon* court's holding, which allows recovery for some distress claims in which no causal link is established, is compatible with the impact rule's intention to allow recovery for a greater variety of plaintiffs.

The *In re Aircrash* court's reliance on prior Illinois case law which denied recovery for emotional suffering³⁰² does not support the *In re Aircrash* court's conclusion that under Illinois law, recovery is predicated on the fact of prior impact. The plaintiffs in cases prior to *In re Aircrash* failed to prevail on their mental distress claims simply because they could not establish the requisite contact.³⁰³

B. The Zone of Danger Jurisdictions

Recovery for pre-impact distress in those jurisdictions which have adopted the zone-of-danger rule poses a difficult problem. While it cannot be denied that the victims meet the first prong of the test — being within the zone of physical danger — the requirement that the emotional distress manifest itself in physical injury may make recovery nearly impossible in instances where the victim dies or the impact occurs soon after recognition of the danger. Pre-impact distress often results from circumstances that preclude more than a fleeting recognition and apprehension of danger before the feared event occurs.³⁰⁴ While the Illinois district court, ruling on the availability of pre-impact distress under the state's recently adopted zone-of-danger test, noted that the "necessarily short duration" of pre-impact distress should not preclude recovery if the loss is otherwise compensable,³⁰⁵ such a brief interval may preclude any physical manifestation of the emotional distress.³⁰⁶ Furthermore, even if the plaintiff can show some physical manifestation, such as increased heart rate, sweating, or pupil dilation, the effect of this proof on the pre-impact distress claim will depend on how stringently the jurisdiction applies the physical manifestation factor.³⁰⁷ For instance, in jurisdictions adopting the comments to

²⁹⁹ See *supra* notes 69–70 and accompanying text.

³⁰⁰ Dean Prosser's suggestion that the true value of the impact lies in the opportunity it affords a defendant to defend against a claim for emotional distress on testimony that there was no contact is not in any way weakened by this conclusion. See *supra* note 70.

³⁰¹ See *supra* text at note 177.

³⁰² See *supra* notes 184 and accompanying text.

³⁰³ See *supra* note 184.

³⁰⁴ The experience of the passengers on the Japan Air Lines flight provides a notable exception. There, the passengers were aware of their peril for some thirty minutes before the plane actually crashed. See *supra* note 7.

³⁰⁵ *In re Air Crash Disaster Near Chicago*, 18 Av. Cas. (CCH) 17,215, 17,216 (N.D. Ill. 1983).

³⁰⁶ See Comment, *Independent Tort*, *supra* note 35, at 1249–50.

³⁰⁷ See *supra* note 197 and accompanying text.

the *Restatement of Torts (Second)* as a guideline, courts may deem such manifestations "inconsequential," and failing to meet the "substantial bodily harm" language.³⁰⁸ Other jurisdictions which have spoken simply in terms of physical consequences or manifestations may find that fleeting physical responses to the impending danger are sufficient to allow recovery for the emotional distress.

Given the physical injury requirement in Pennsylvania and Kansas, the courts in *Nye v. Commonwealth* and *Fogarty v. Campbell 66 Express* properly found against the plaintiffs where there was no proof that the decedent's emotional distress manifested itself in any physical symptoms.³⁰⁹ The Illinois district court's conclusion, however, in *In re Air Crash Disaster Near Chicago* that, because the Illinois Supreme Court recently abandoned the impact rule in favor of the zone-of-danger rule,³¹⁰ minimal physical responses, if proved, could support recovery for pre-impact distress, is more suspect. In *Rickey v. Chicago Transit Authority*, the case in which Illinois abandoned the impact rule, the Illinois Supreme Court stated that damages for physical "injury or illness" resulting from emotional distress were compensable.³¹¹ The victim's ailments in *In re Air Crash Disaster Near Chicago* constituted neither. And while the *Rickey* court did, at one point, state that the plaintiff's complaint was sufficient because it alleged "physical manifestations,"³¹² the *Rickey* facts make it clear that the plaintiff's symptoms were serious and prolonged.³¹³ Furthermore, the Illinois Supreme Court explicitly declined to follow the approach advocated by the California Supreme Court in *Molien v. Kaiser Foundation Hospitals* — an approach that would allow recovery for emotional distress alone — because that standard was "too vague."³¹⁴ Thus, it is likely that the *Rickey* court would reject the sweaty palms and increased heart rate that the *In re Air Crash Disaster Near Chicago* court found sufficient to satisfy the physical manifestation prong of the zone-of-danger rule.³¹⁵ Notwithstanding its improvident use of the phrase "physical manifestations," in *Rickey* the Illinois Supreme Court carefully characterized the plaintiff's suffering as "definite," "extreme," "prolonged," and "continuing."³¹⁶ In addition, it is certainly valid to question the district court's determination that a court which adhered to the impact rule as the test of recovery for emotional distress for over a century suddenly would allow any physical symptoms manifested by the decedent to satisfy the zone-of-danger rule.³¹⁷

³⁰⁸ RESTATEMENT (SECOND) OF TORTS § 436A comment c (1965).

³⁰⁹ *Nye v. Commonwealth*, 331 Pa. Super. 209, 480 A.2d 318 (1984); *Fogarty v. Campbell 66 Express, Inc.*, 640 F. Supp. 953 (D. Kan. 1986). See *supra* notes 200–13 and accompanying text.

³¹⁰ *In re Air Crash Disaster Near Chicago*, 18 Av. Cas. (CCH) at 17,215; reconsideration in light of *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983). For a discussion of *Rickey*, see *supra* note 191.

³¹¹ *Rickey*, 98 Ill. 2d at 555, 457 N.E.2d at 5. See also *supra* notes 191–92 and accompanying text.

³¹² *Rickey*, 98 Ill. 2d at 556, 457 N.E.2d at 5. See also *supra* note 192.

³¹³ *Rickey*, 98 Ill. 2d at 449–50, 457 N.E.2d at 2. See also *supra* note 192.

³¹⁴ *Rickey*, 98 Ill. 2d at 544, 457 N.E.2d at 4. See also *supra* note 191.

³¹⁵ See *supra* text at note 197.

³¹⁶ *Rickey*, 98 Ill. 2d at 549–50, 457 N.E.2d at 2. See also *supra* note 192.

³¹⁷ This interpretation is further bolstered by the recent case of *Goldberg v. Ruskin*, 128 Ill. App. 3d 1029, 471 N.E.2d 530 (1984). That court stated that, after studying the *Rickey* opinion, "we believe that *physical injury or illness* must be established in order for a plaintiff to recover for negligently caused emotional distress, regardless of whether the plaintiff was the direct victim or a bystander." *Id.* at 1043, 471 N.E.2d at 539–40 (emphasis added). The Minnesota Court of Appeals

The approach of the Texas courts to claims for pre-impact distress is most difficult to understand. Although there has been some suggestion that a 1983 Texas Supreme Court decision may have abrogated the physical injury requirement for emotional distress, at the time of two early decisions concerning pre-impact distress, Texas firmly adhered to the zone-of-danger rule.³¹⁸ In *Green v. Hale* and *Hurst Aviation v. Junell*, however, the courts ignored the rule entirely. In *Green v. Hale*, the Court of Civil Appeals characterized the decedent's pre-impact distress as pain and suffering, and then relied on a prior decision holding that consciousness of approaching death is a factor courts may consider in evaluating these types of claims.³¹⁹ Thus, the *Green* decision is immediately suspect: the court treated the mental distress as parasitic to a physical injury, which it logically is not because the mental distress preceded any physical harm. Furthermore, the *Green* court responded to the defendant's contention that there was no evidence that the decedent had experienced distress by noting that triers of fact may presume such suffering "where it is the natural consequence of the injury of which the plaintiff complains."³²⁰ Again, the court failed to realize, or ignored, the fact that the mental anguish was not a consequence of any physical injury but, rather, of the decedent's apprehension of danger immediately preceding the impact. By deciding *Green* as a pain and suffering claim, the court avoided determining whether the zone-of-danger test's physical manifestation requirement should apply to pre-impact cases at all. The *Hurst Aviation* decision, in which the court similarly treated a claim for pre-impact distress as one for pain and suffering, and relied on *Green* for support, suffers from the same shortcomings.³²¹

Air Florida, Inc. v. Zondler is the first case to characterize a claim for pre-impact distress as one for mental anguish.³²² The court did not reach the decision of whether physical symptoms must be established to recover for pre-impact distress because the plaintiff failed to introduce sufficient evidence showing any distress.³²³ Without such proof, damages should not be awarded under any test. Thus, the *Air Florida* court correctly rejected plaintiff's claim.

was presented with equally ephemeral examples of physical consequences in *Quill v. Trans-World Airlines, Inc.*, 361 N.W.2d 438 (Minn. App. 1985). There the plaintiff's physical manifestations included adrenaline surges, sweaty hands, and higher pulse and blood pressure. *Id.* at 441. Unlike the decedents in *In re Air Crash Disaster Near Chicago*, however, this pre-impact distress "victim" was fortunate enough to have avoided the feared plane crash, and the physical symptoms of which he complained manifested themselves not at the time he anticipated the crash, but during subsequent flights. *See id.* *See also In re Air Crash Disaster Near Chicago, Illinois* on May 25, 1979, 18 Av. Cas. (CCH) 17,215 (N.D. Ill. 1983).

Because the Minnesota Court in *Quill* preferred to view the case as one where the circumstances giving rise to the claimed distress, and not the physical manifestations, assured its genuineness, 361 N.W.2d at 438, the fact that both courts found a cause of action for pre-impact distress under similar facts does not weaken the conclusion that that district court wrongly decided the case.

³¹⁸ See *supra* note 214 and accompanying text.

³¹⁹ 590 S.W.2d 231, 237 (Tex. Civ. App. 1979) (citing *Jenkins v. Hennigan*, 298 S.W.2d 905, 911 (Tex. Civ. App. 1957)).

³²⁰ *Green*, 590 S.W.2d at 237 (quoting 17 TEX. JUR. 2D *Damages* § 252, at 312 (emphasis added)).

³²¹ *Hurst Aviation v. Junell*, 642 S.W.2d 856, 859 (Tex. Civ. App. 1982) (citing *Green*, 590 S.W.2d at 237).

³²² See *supra* note 228 and accompanying text.

³²³ 683 S.W.2d 769, 775 (Tex. Ct. App. 1984).

C. *The Exceptions for Guarantees of Genuineness Jurisdictions*

Plaintiffs advanced pre-impact distress claims in two zone-of-danger jurisdictions which had suspended the physical injuries requirement when the circumstances giving rise to the claim for emotional distress guaranteed the merits of the claim. In Minnesota, under the "special guarantee of genuineness" exception, the *Quill* court, despite the lack of proof of physical manifestations of the plaintiff's emotional distress, properly allowed recovery for the pre-impact emotional distress he experienced as the plane plunged to the ground. The *Quill* court accurately perceived that the experience was such that the traditional concerns regarding spurious claims were not pertinent to this case.³²⁴ In *Quill*, the victim knew that the defendant's negligence had placed him in danger of serious physical harm or death prior to the actual impact.³²⁵ These facts support an exception to the physical injury requirement which is at least as compelling as the negligent notification of death or the corpse mishandling cases.³²⁶

Federal Courts applying New York law, however, ignored this approach when asked to rule on the viability of such a claim. The Federal District Court for the Southern District of New York and the Second Circuit Court of Appeals have concluded that a cause of action for pre-impact distress exists under New York law, apparently without requiring that the plaintiff establish physical manifestations.³²⁷ The reasoning advanced by these courts, however, does not withstand critical analysis. For instance, in *Malacynski v. McDonnell Douglas Corp.*, the district court cited a 1961 New York Court of Appeals decision as support for its conclusion that that state allows recovery for emotional distress even without resulting injury.³²⁸ While it is true that the minor plaintiff in *Battalla v. State of New York* did not sustain physical injury as a consequence of any impact resulting from the defendant's negligent failure to secure her properly on a ski lift, the court reported that her distress resulted in "consequential injuries."³²⁹ Thus, while one could interpret *Battalla* as abolishing the impact requirement, the district court's conclusion that distress unaccompanied by injury merits compensation under New York law is simply too generous.

The *Malacynski* court also relied on New York State cases allowing recovery for post-impact pain and suffering,³³⁰ but because such damages traditionally were awarded as parasitic to the underlying physical injury claim,³³¹ it is difficult to understand how such recovery supports an independent cause of action. By addressing the claim for damages under the rubric of pain and suffering, however incorrect, the *Malacynski* court side-

³²⁴ See *Quill*, 361 N.W.2d at 443. See also *supra* notes 245-47 and accompanying text.

³²⁵ See *Quill*, 361 N.W.2d at 440-41.

³²⁶ Although Dean Prosser suggested that the two situations meriting exceptions shared a guarantee of genuineness, he did not consider these exceptions exclusive. In fact, he suggested that whenever such a guarantee of genuineness existed, recovery should be allowed. PROSSER & KEETON, *supra* note 8, at § 54. See also *supra* note 126 and accompanying text.

³²⁷ *Malacynski v. McDonnell-Douglas Corp.* 565 F. Supp. 105 (S.D.N.Y. 1983); *Shu-Tao Lin v. McDonnell-Douglas Corp.*, 574 F. Supp. 1407 (S.D.N.Y. 1983). In neither *Malacynski* nor *Shu-Tao Lin* was there any direct evidence that the victim exhibited any physical manifestations of their distress. *Malacynski*, 565 F. Supp. at 105; *Shu-Tao Lin*, 574 F. Supp. at 1417.

³²⁸ *Malacynski*, 565 F. Supp. at 106 (citing *Battalla v. State of New York*, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961)).

³²⁹ *Battalla*, 10 N.Y.2d at 239, 219 N.Y.S.2d at 35, 176 N.E.2d at 730.

³³⁰ See *supra* note 259 and accompanying text.

³³¹ See *supra* note 39.

stepped any requirement that the plaintiff establish resulting physical injury. The same criticism applies to the district court's reasoning in *Shu-Tao Lin v. McDonnell Douglas Corp.*³³² That court held that recovery for pre-impact distress was just a "short step" from recovery for post-impact pain and suffering.³³³ Post-impact pain and suffering are associated with, and appended to, claims of physical injury.³³⁴ Claims for pre-impact emotional distress, however, are separate from any such injuries.

Finally, all three courts found a basis for their decisions in one memorandum opinion, *Anderson v. Rowe*, in which the court dismissed a claim for pre-impact distress because of the plaintiff's inability to show that the decedent was aware of the danger and actually suffered the distress.³³⁵ Significantly, the court did not dismiss for failure to state a cause of action. The *Anderson* court, however, did not indicate what type of proof was necessary to establish that the decedent "suffered" pre-impact emotional distress.³³⁶ Courts relying on *Anderson* may have correctly interpreted its meaning. It is equally plausible, however, that *Anderson* did not suggest a break from the New York "resulting injury" rule and would have required the plaintiff to introduce evidence of resulting harm before allowing recovery for the pre-impact distress.

The federal courts could have reached the same conclusions by relying on those cases in which the New York State courts permitted recovery for emotional distress without physical symptoms where the defendant placed the plaintiff at risk of physical harm and where the circumstances provided sufficient guarantees of genuineness.³³⁷ Certainly, the defendants' negligence in both *Malacynski* and *Shu-Tao Lin* created an unreasonable risk of physical harm to the victims.³³⁸ Furthermore, the genuineness of any emotional distress claim is evident from the fact that the feared event actually occurred.

D. Louisiana

The Fifth Circuit, in *Haley v. Pan American World Airways, Inc.*, found that damages for pre-impact distress conformed with Louisiana law.³³⁹ The decision appears sound in view of that state's generous approach to emotional distress claims. Louisiana courts have rejected any physical manifestations requirement, preferring to allow a plaintiff to recover whenever he or she can prove the existence of the claimed mental distress.³⁴⁰ Thus, Louisiana plaintiffs do not have to clear the hurdle, presented in zone-of-danger jurisdictions, of proving that they suffered physical manifestations of the distress. Plaintiffs also do not need to consider whether an emotional distress followed by impact sequence is sufficient to establish a cause of action, as required in an impact jurisdiction.

The Fifth Circuit derived much support from prior state decisions which broadly pronounced that a plaintiff would receive compensation for emotional distress experienced while an ordeal was in progress.³⁴¹ None of these cases suggested that the "ordeal"

³³² *Shu-Tao Lin v. McDonnell Douglas Corp.*, 574 F. Supp. 1407, 1416 (S.D.N.Y. 1983).

³³³ See *supra* note 11 and accompanying text.

³³⁴ See *id.*

³³⁵ 73 A.D.2d 1030, 425 N.Y.S.2d 180 (1980).

³³⁶ *Id.*

³³⁷ For a discussion of these cases, see *supra* notes 129-31 and accompanying text.

³³⁸ See discussion *supra* at note 214.

³³⁹ 746 F.2d 311 (5th Cir. 1984); see also *supra* notes 267-73 and accompanying text.

³⁴⁰ For a discussion of the Louisiana approach to emotional distress, see text at notes 128-32.

³⁴¹ *Haley*, 746 F.2d at 313-14.

commenced only after impact.³⁴² The Fifth Circuit properly concluded that an "ordeal" begins when the victim perceives the impending danger. This interpretation of the term is more natural than one which would require physical contact before finding an ordeal is in progress.³⁴³ The Louisiana Civil Code, which requires those who have caused "damages" to compensate the victim, also bolsters the Fifth Circuit's decision.³⁴⁴ Because Louisiana courts have determined that mental distress experienced during an ordeal is an independent element of damages, it appears incumbent upon a negligent defendant to compensate the victim for such damage. Recovery for pre-impact distress, even in the absence of physical manifestations, is thus proper under Louisiana law.

E. Federal Statutory Law

The recovery afforded individuals protected under FELA and the Jones Act for pre-impact distress appears in harmony with the mandate of Congress, as interpreted by the United States Supreme Court.³⁴⁵ As the *Kozar v. Chesapeake & Ohio Railway Co.* court noted, judicial construction of the term "injury" has included mental distress.³⁴⁶ In view of the Supreme Court's caution to avoid stringent interpretations of the statute which would preclude recovery,³⁴⁷ the *Kozar* court's refusal to find a statutory distinction between pre-impact mental distress and post-impact distress is sound.³⁴⁸ Mental distress, when proven, is an injury no matter when it occurs.

Unfortunately, the *Kozar* and *Port Terminal Railroad Association v. Sweet* holdings provide little assistance in analyzing the approaches various jurisdictions have taken in pre-impact distress claims. With the partial exception of the Louisiana cases, in all the other cases discussed in this Article the courts decided pre-impact distress claims based on that jurisdiction's common law for recovery of similar claims. Those courts applying the federal statutes were not so constrained. Instead, *Kozar* and the other federal cases presented the issue of whether a pre-impact distress claim was cognizable under the pertinent federal law — a matter of pure statutory construction.³⁴⁹ Thus, any disagree-

³⁴² See *supra* note 269 and accompanying text.

³⁴³ In *Dawson v. James H. Stuart & Deaton, Inc.*, 437 So. 2d 974 (La. App. 1983), the defendant's truck struck the plaintiff's vehicle from behind. *Id.* at 975. The plaintiff was compensated not, however, for fear associated with this contact, but rather for the distress he experienced as his vehicle came perilously close to being pushed over the edge of an elevated interstate. *Id.* at 976. Thus, while the emotional distress occurred after the initial impact, the court allowed recovery for the plaintiff's fear of a second impact under the "ordeal in progress" approach. *Id.* It would appear, therefore, that in *Dawson*, the court focused on the victim's recognition of the danger to which he was exposed and not the fact of impact.

³⁴⁴ LA. CIV. CODE ANN. art. 2315 (West Supp. 1984).

³⁴⁵ For a discussion of the Supreme Court's construction of FELA see *supra* note 287.

³⁴⁶ *Kozar v. Chesapeake & Ohio R.*, 320 F. Supp. 335, 365 (W.D. Mich. 1970), *aff'd in part and vacated in part*, 449 F.2d 1238 (6th Cir. 1981). See also *supra* note 284 and accompanying text.

³⁴⁷ See *supra* text at note 287.

³⁴⁸ It must be noted again, however, that the *Kozar* court used this language out of context. The Supreme Court, in *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500, 509 (1957), was cautioning against a construction of the Act which took questions Congress desired to have resolved by a jury as facts and gave them to the court to determine as matters of law. See *supra* note 287 and accompanying text. The *Rogers* decision, however, provides implicit support for an expansive interpretation of the Act's coverage. *Id.*

³⁴⁹ *Kozar v. Chesapeake & Ohio R.* 320 F. Supp. 335, 366 (W.D. Mich. 1970) (*construing Federal Employer's Liability Act*, 45 U.S.C.A. §§ 51 et seq.).

ment with the *Kozar* and *Sweet* holdings focuses on whether Congress intended the word "injury" in the statute to encompass pre-impact claims, and not whether these claims are compatible with the jurisdiction's approach to mental distress.

V. A NEW APPROACH

Much of the difficulty and confusion evident in many pre-impact distress decisions stems from judicial insistence that the plaintiff bring the cause of action within the confines of that jurisdiction's rules governing claims for negligently inflicted emotional distress.³⁵⁰ Unfortunately, the courts tend to adhere to these arbitrary and worn out rules, originally developed to discourage fraudulent claims, to protect the defendant from unlimited liability and to prevent a "flood of litigation."³⁵¹ Accordingly, courts have failed to address whether such historically valid policy considerations are in fact advanced by their application to claims for pre-impact distress.

No claim for pre-impact distress suffered by a victim who is injured or dies as a result of the occurrence of the feared event should be subject to these rules. Rather, so long as the plaintiff can establish to the satisfaction of the fact-finder that he or she experienced distress, courts should allow recovery. Worries about fraud, burdensome litigation, and potentially unlimited liability for the defendant can be abated by applying the approach suggested in this Article rather than denying recovery for such distress.

This Article suggests an approach to the problems of pre-impact distress claims which recognizes that some circumstances virtually ensure the claim's genuineness. When the defendant negligently places a victim in danger of serious physical harm or death, and injury or death does in fact occur as a result of the feared event, courts should allow recovery for pre-impact distress without requiring proof of preceding impact or resulting physical manifestations. This approach is viable for all jurisdictions which have not yet developed a cause of action for pre-impact distress. This approach also addresses the concerns which motivated courts' past reluctance to extend protection to a plaintiff's mental health: increased litigation, potentially unlimited liability for the defendant, and fear of spurious claims. The need to protect courts from burdensome litigation, as a reason for denying recognition to a meritorious claim, has been soundly discredited.³⁵² Claims for pre-impact distress would not increase the number of lawsuits because a plaintiff would simply append, however, the pre-impact distress claim to the action the plaintiff already has against the defendant for injury or death caused by defendant's negligence.

³⁵⁰ The Southern District of New York, the United States Court of Appeals for the Second Circuit, and the Texas Court of Civil Appeals have attempted to allow recovery for such damages under the theory of pain and suffering. Most courts and commentators have recognized and maintained a distinction between damages for emotional distress and those for pain and suffering which arise from physical injury. See *supra* note 11. The attempts by these courts to bring pre-impact emotional distress claims within an all encompassing definition of pain and suffering may well avoid the problems of fitting such a claim within the jurisdiction's usual approach to claims of negligently inflicted emotional distress. It does not, however, make the analysis correct. See *supra* notes 250-65 and 216-36 and accompanying text.

³⁵¹ See *supra* text at notes 34-38.

³⁵² See e.g., *Falzone v. Busch*, 45 N.J. 559, 214 A.2d 12 (1965) ("the fear of an expansion of litigation should not deter courts from granting relief in meritorious cases"); PROSSER & KEETON, *supra* note 8, § 54, at 361 (it is the court's business to make precedent if a wrong requires redress, regardless of increase in lawsuits).

This approach properly limits defendant liability because it imposes no additional duty to conform one's conduct to avoid a negligence judgment. Rather, this approach is based on a duty already recognized by all jurisdictions: the duty to avoid exposing another to an unreasonable risk of serious bodily injury or death. Therefore, this approach is not as far-reaching as that recently embraced by courts in Hawaii, California, and elsewhere which, in addition to abolishing the physical injury requirement, further imposed a duty on the defendant to avoid creating risks of inflicting mental distress upon a victim. This limit on defendant's duty thus should assuage concerns about disproportionate liability.

Finally, this approach addresses judicial concerns that plaintiffs can too easily fake claims for mental distress. The rule would apply only where the negligence victim actually apprehends the event causing the distress and is injured or dies when the event occurs. This approach is warranted by the circumstances — the fact that the event which caused the distress does occur establishes the genuineness of the victim's stress. The "guarantee of genuineness" test is at least as applicable to this type of pre-impact distress as it is to corpse mishandling and inaccurate telegram cases.³⁵³ These pre-impact cases share with the previously recognized exceptions "an especial likelihood" of genuine and serious mental distress³⁵⁴ making it unfair to require the plaintiff to establish additional proof of the merits of his or her claim.

When the plaintiff fortuitously avoids the event which caused the distress, courts are free to apply their existing rules concerning claims for mental distress. Such a distinction between pre-impact claims is merited. First, it may be that, despite a plaintiff's fears for his physical safety, the defendant's acts or omissions did not, in fact, expose the plaintiff to an unreasonable risk of physical harm.³⁵⁵ Under the suggested rule, the defendant could not be liable as he or she breached no recognized duty. In other instances, the defendant may have exposed the plaintiff only to a risk of emotional distress, conduct which most courts and this approach do not label as negligent.³⁵⁶ Furthermore, even if the defendant negligently exposed the plaintiff to a risk of physical harm the fact that the harm did not occur affects the genuineness of the claim. Where the harm is avoided, the genuineness of the claim, if tested by the circumstances giving rise to the distress, will depend upon the immediacy of the threat to plaintiff's security. These "avoided impact" cases, then, are not susceptible to a general rule which posits the existence of a guarantee of genuineness in the circumstances.

Where the defendant's conduct threatens the victim with serious physical harm or death, the arbitrary rules developed to discourage spurious or fraudulent claims are thus unnecessary. In zone-of-danger jurisdictions, it is unnecessary to require that physical symptoms result from the mental distress, because the death or injury of the victim demonstrates the validity of the claim for distress. This approach would eliminate the necessity of time consuming argument over whether elevated blood pressure or pulse rate is a sufficient physical consequence to allow recovery as a physical manifestation.³⁵⁷

³⁵³ For a discussion of these exceptions see *supra* notes 121-28 and accompanying text.

³⁵⁴ PROSSER & KEETON, *supra* note 8, at § 54.

³⁵⁵ *Shatkin v. McDonnell-Douglas Corp.*, 727 F.2d 202 (2d Cir. 1984). The court noted that planes frequently bank sharply to one side. *Id.* at 207. Thus, while a passenger on board may experience emotional distress due to the sudden movement, he or she may not, in fact, be at any risk.

³⁵⁶ Compare *supra* notes 31-140 with notes 141-56 and accompanying text.

³⁵⁷ See *supra* text at note 197.

It does leave the courts free, however, to conclude that in particular cases the circumstances giving rise to the emotional distress merit an exception to the jurisdiction's general approach to emotional distress claims.³⁵⁸ Moreover, jurisdictions which continue to follow the impact rule as a method of distinguishing between valid and spurious claims will not have to determine whether the impact preceded the mental injury. While it appears that the *Solomon v. Warren*³⁵⁹ decision was correct in finding that the fact of impact, not its timing, is controlling, some jurisdictions may persist in requiring an impact-distress sequence. This Article's approach will prevent absurd decisions in which courts strain to find some evidence of impact. Otherwise, plaintiffs will argue that the victim suffered slight impact, perhaps from a flying plate or magazine when a crashing plane began to roll, and therefore should be able to recover for mental stress although the impact was totally unrelated to the distress.³⁶⁰

This Article does not address the issue of proof,³⁶¹ certainly an issue of major concern when the victim — the best witness as to the existence and extent of pre-impact distress — is unavailable.³⁶² Nevertheless, the suggested approach does not in any way shift or lessen a plaintiff's burden of proving the existence of the damage claimed. Issues of proof obviously will generate controversy. When circumstances show, however, that a plaintiff was clearly aware of his or her impending death, courts should not summarily dismiss the claim merely because of the estate's inability to establish that the plaintiff endured a preceding impact or suffered resulting physical consequences prior to death.

The Challenger accident presents an especially compelling scenario for recognizing a right to recover for pre-impact distress. One can only guess at the tremendous fear which some members of the crew experienced, however fleetingly, as they realized that something terribly wrong had happened to the craft. In a case like this, it is simply unnecessary to require that the plaintiffs establish either physical injuries or prior impact to ensure the genuineness of their claims.

VI. CONCLUSION

Courts have recognized claims for mental distress reluctantly. While the courts were initially uniform in denying all recovery, progressive courts later began to recognize mental health deserved legal protection, first against intentional invasions,³⁶³ and then against negligent ones.³⁶⁴ But concerns about unlimited litigation, unlimited liability, and fraudulent claims caused courts to require that the plaintiff prove elements in addition

³⁵⁸ See discussion of *Quill*, 361 N.W.2d 438, *supra* at note 132-40.

³⁵⁹ 540 F.2d 777 (5th Cir. 1976).

³⁶⁰ It is true that this Article's suggested approach, which would allow recovery for emotional distress suffered prior to impact by a decedent, will result in denying recovery to plaintiffs who experience the same mental fear and anguish yet are fortuitously spared impact. It has already been noted, however, that the impact rule excludes many genuine claims. The suggested approach, while not solving the dilemma, at least potentially broadens the number of valid claims for which there can be recovery.

³⁶¹ For a discussion of one author's comments concerning problems of proving the existence of pre-impact distress, see *supra* note 164.

³⁶² For a discussion of cases in which questions concerning proof of emotional distress have been raised, see *supra* notes 172-75, 190-97, 264-65 and accompanying text.

³⁶³ See *supra* notes 48-59 and accompanying text.

³⁶⁴ See *supra* notes 60-161 and accompanying text.

to negligence and resulting distress.³⁶⁵ Only recently have a few jurisdictions repudiated these approaches in favor of recognizing a cause of action for negligently inflicted foreseeable serious emotional distress.³⁶⁶

Pre-impact distress is mental distress caused by the victim's appreciation that defendant's negligence has placed him or her at risk of harm. Some courts have considered claims for pre-impact distress as other than merely claims for mental distress.³⁶⁷ Most courts that have considered claims for pre-impact distress, however, have required the plaintiff to fit the action within the jurisdiction's rules for claims of mental distress generally.³⁶⁸ In so doing, courts have failed to consider whether the reasons underlying the traditional rules are furthered by requiring that claims for pre-impact distress fit within such bounds.

This Article suggests that where a defendant has negligently exposed a victim to a risk of injury or death, and injury or death actually occurs, courts should allow recovery for the victim's mental distress without reference to traditional rules so long as the plaintiff can prove that the victim apprehended his or her peril prior to the event. Such an approach adequately protects against burdensome litigation and unlimited liability for a defendant, yet recognizes that the guarantee of genuineness inherent in the facts giving rise to the claim makes other tests for distinguishing between meritorious and spurious claims unnecessary.

³⁶⁵ See *supra* notes 34-38 and accompanying text.

³⁶⁶ See *supra* notes 141-56 and accompanying text.

³⁶⁷ See *supra* notes 214-36 and 248-265 accompanying text.

³⁶⁸ See *supra* notes 170-84, 185-213, 240-47, 266-73, 274-88 and accompanying text.

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