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MENTAL DISTRESS IN AVIATION CLAIMS—EMERGENT TRENDS

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I. INTRODUCTION

TEGRAL TO the agenda of the Diplomatic Conference on Private Air Law of the International Civil Aviation Organization (ICAO) of May 1999 was the Draft Convention for the Unification of Certain Rules for International Carriage by Air. This document, which was adopted as a full-blown convention1 by the states parties to the convention on May 28, 1999, seeks to replace the existing Warsaw Convention of 19292 in its totality.

Article 17 of the Warsaw Convention states:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.3

From its inception, this provision has proved contentious in its application as courts adjudicating claims under Article 17 have conservatively interpreted the phrase “bodily injury” as either pure physical injury or mental suffering accompanied by physical injury where the latter was a causative factor in bringing about the former. These rulings held that there could not be compensation under Article 17 for pure mental shock, psychic trauma, anxiety, or mental discomfort. In the 1991 case of East-

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3 Warsaw Convention, supra note 2, at art. 17.
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ern Airlines, Inc. v. Floyd, the United States Supreme Court concluded that there must at least be physical manifestation of injury, if not death or physical injury, in order for a claimant to successfully sue an air carrier under Article 17. The Court, however, did not address the issue as to whether mental injury accompanied by physical injury was a compensable element. The Floyd decision is consistent with its precursor—the 1974 case of Rosman v. Trans World Airlines, Inc. which related to a hijacking incident—holding that there must be palpable, objective, bodily injuries, including those caused by psychic trauma related to the incident, and the damage must flow from the bodily injuries and not from the trauma itself. The Rosman decision followed in the wake of a 1973 decision which held the same.

The inclination of the courts to insist on pure physical injury as an essential element of compensability is arguable due to the reason that courts took refuge in the original French terminology of the Convention which was lésion corporelle which means in the French language “physical wound” as against lésion mentale which means “mental wound.”

A diametrically opposed view emerged in a cursus curiae which ignored the connotations of the French language and visited the original intention of the drafters of the Convention. In Husserl v. Swiss Air Transport Co., also a case concerning the hijacking of an aircraft, the court observed the lacuna relating to the absence of reference to emotional injury in Article 17 and deemed fit to construe the provision broadly to include injuries other than pure physical injury.

This polarization of views will be moot once courts start to apply the new ICAO Convention, which has gone through several drafts through the ICAO Legal Committee. In its first draft, the new Convention, under Article 16, provided as follows:

The carrier is liable for damage sustained in case of death or bodily injury or mental injury of a passenger upon condition only that the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not

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5 314 N.E.2d 848 (N.Y. 1974).
7 For a detailed discussion on this subject see Caroline Desbiens, Air Carrier's Liability for Emotional Distress Under Article 17 of the Warsaw Convention: Can It Still Be Invoked? in 17 ANNALS OF AIR AND SPACE LAW 153, 159-166 (1992).
liable if the death or injury resulted solely from the state of health of the passenger.\textsuperscript{9}

This draft, which was the result of the deliberations of the ICAO Study Group on the subject in 1995, underwent further revision at a later stage of the Group's deliberations, which introduced the element of personal injury into the provision to cover both physical and mental injury. However, the final draft submitted to the May 1999 Diplomatic Conference reads:

The carrier is liable for damage sustained in case of death or 
\textit{bodily injury} of a passenger upon condition only that the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable to the extent that the death or injury resulted from the state of health of the passenger.\textsuperscript{10}

The reintroduction of the words "bodily injury" and the removal of "personal and mental injury" could be interpreted either way—that the final draft intended retaining exclusively physical injury with no hint of mental injury, or, that mental injury is imputed to bodily injury, taking into consideration the emergent trend of linking mental injury with a tangible bodily injury.

Although courts have been somewhat preoccupied with the term bodily injury as against mental injury, the crux of the matter essentially lies earlier in the provision which speaks of "damage caused." The 1996 Supreme Court decision in \textit{Zicherman v. Korean Air Lines Co.}\textsuperscript{11} ruled that it was quite evident that the English word "damage" or "harm," which was reflected in the official French text of the Convention as "dommage," has a wide application and was, in fact, used by the Warsaw Convention drafters in its classical French law sense of legally cognizable harm. The \textit{Zicherman} decision incontrovertibly brings to bear the compelling significance of legally cognizable harm as being a compensable element and therefore admits of mental injury as damage under Article 17, if the domestic law applicable to a case were to deem mental injury as such. The operative issue therefore remains as to whether mental injury is a legally cognizable harm.


\textsuperscript{11} 516 U.S. 217 (1996).
This article will discuss scientific and forensic implications of mental injury as interpreted by the medical and legal professions, with a view to extrapolating the possible future outlook for the damage as a compensable element in private air carrier liability.

II. THE NATURE OF MENTAL DISTRESS

The law, as any other human discipline, has treated the mind as an unfathomable abstraction. Through the years, this attitude has led to a blend of caution and curiosity. This led to a compromise to give legal recognition to an injury to the human mind only when it was accompanied by some physical attribute perceptible to the senses. To the lawyer, it remains a mere legal platitude which still exerts a strong influence on the attitude of the courts towards tortious liability.

Although it can be seen that this attitude has acted as a pervasive influence in restricting the award of damages for pain of mind, a closer study of recent trends reveals an interesting development. Legal writing, sociological change, and scientific developments have prompted the courts in the United States to show signs of recognizing the infliction of mental distress as being compatible with the legal definition of a tort. Mere pain of mind has hitherto been recognized as being abstract and indefinable in terms of visual assessment. It is this quality which has cautioned the courts against fraudulent and frivolous actions. However, it is clear that mental distress, once identified and defined, can be considered a damage for the purpose of the law of torts.

It is a curious fact that the courts in the United States and the United Kingdom recognize a set of torts as actionable wrongs. Had they pondered over a suitable definition of a tort, they would have realized that defining a tort is as difficult as defining mental distress. Conceptually, a tort remains a breach of duty which grounds an action for damages. This excludes contractual or quasi-contractual duty. Thus far, the courts have not been overtly concerned about the question, "What is a tort?"

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12 See Lynch v. Knight, 11 Eng. Rep. 854, 863 (H.L. 1861) where Lord Wensleydale said that "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone . . . ."

13 Hereafter, injury to the human mind, mental distress, pain of mind, emotional distress, and other similar references mean any influence on the human mind which would temporarily or permanently upset the mental stability of a person, sufficient to cause discomfort to the mind.
Rather, they have sought an answer to the question, "What are torts?" A treatise on torts says, "A 'tort' is simply the Norman word for a 'wrong,' but 'torts' have typically been distinguished from . . . 'wrongs' identified with contractual relations. Tort law, then, is concerned with civil wrongs not arising from contracts."14

Normally, definitions of tort refer to harm or damage caused to the injured as a requirement for the award of damages. As mentioned earlier, generally the courts have been hesitant to consider mental distress as damage, as it has been considered to be incapable of assessment. In sharp contrast is the view taken by some early writers15 that mental suffering is indeed damage and an injury upon the human being and therefore should be considered a tort. It is submitted that such a view is more acceptable as it is based both on scientific and sociological studies.

The society we live in today is far more complex and variegated than the ones before the twentieth century. Rising population, expanding industry, and increasing production have exposed man to many more hazards than before. The incidence of mental injury in today's society can be expected to grow. As White says, "[e]motional distress was the stuff of 'real' life in twentieth-century America, and hence the stuff of tort law."16

It is no surprise therefore, that when Prosser called the infliction of mental distress a separate and independent tort,17 he was acutely aware of the reluctance of the courts to consider mental distress as a damage or harm, and thus regard its infliction as a tort. Whether mental distress causes damage and whether it can be assessed is worthy of discussion.

In the area of tortious liability, it cannot be disputed that an imbalance of a person's mental equilibrium is inextricably related to fear. If one looks at a definition of "fear," its relationship with pain of mind caused by a civil wrong becomes immediately apparent. "The word 'fear' comes from the old English 'Faer' for sudden calamity or danger and was later used to describe the emotion of uneasiness caused by the sense of

16 White, supra note 14, at 106.
17 Intentional, supra note 15, at 892.
impending danger.” Fear is “[a] normal response to active or imagined threat in higher animals and comprises an outer behavioural expression, an inner feeling and accompanying physiological damage.”

Much has been written in detail of the aggression committed by the feeling of fear and anxiety on the internal organs of the human body. Fear is said to have been “born of innumerable injuries in the course of evolution . . . developed into portentous foreshadowing of possible injury . . . capable of arousing in the body, all of the offensive and defensive activities that favour the survival of the organism.”

Emotional agitation, anxiety or fear is known to bring about an imbalance in the digestive process, dryness of the mouth, an increase in blood sugar, and a general disruption of the internal organs of the human body. This feeling of discomfort, even though temporary, is a positively unpleasant experience.

The observations made so far by medical authorities seem to clearly recognize the deleterious effects of pain of mind. There is no justification, therefore, for rejecting his motion in limine, as being beyond human perception. However, it is difficult to totally reject the point made by the courts in the United States that mental distress when inflicted should not be recognized as an actionable tort as it is difficult to prove and therefore would give rise to arbitrary and frivolous suits. The notion of mental distress, even though easily recognizable as damage, has to be considered with care. The plaintiff’s case has to be viewed with circumspection, which could be done by imposing stringent standards of proof of injury on the plaintiff.

Although the early view taken by the courts that the infliction of mental distress should not be entertained at all due to its vagueness was totally acceptable to them in the context of the time it was followed, modern science, which has drawn a distinct

19 Id.
20 CL XIII Boston Medical and Surgical Journal, 893 (1910).
21 See Walter B. Cannon, Bodily Changes in Pain, Hunger, Fear and Rage 253-54 (2d ed. 1953).
22 See id. at 325-26.
relationship between the human mind and the body, has proved the view to be inconsistent with the needs of the present time. At the present time, the United States courts have veered from the original state of apprehension they were in and have recognized mental distress as an injury, while setting standards of proof to be complied with by the plaintiff in order that the defendant be equally protected. This approach is both progressive and reasonable, although an overt emphasis on the protection of the defendant can easily act to the detriment of the plaintiff's case.

The early view taken by the courts in the United States, that mental injury is incapable of being visualized or proved, was the result of the influence of English common law. Heavy reliance was placed by the English courts in the tenth century on the fact that mental injury was beyond the realm of human understanding. Therefore, although not mentioned in specific language, it is evident that the courts, acknowledging the futility of defining mental distress as damage, attributed to the tortfeasor the same quality of being unable to realize and foresee the distinct mental injury that he could cause one who is injured by him. One can only surmise that it had been considered logical that if the courts could not identify mental distress as damage, neither could the tortfeasor. Therefore, originally, as a tortfeasor could not be expected to be conscious of the possibility of mental injury which his victim might suffer, he would not be held liable unless he actually intended the mental injury, or was conscious that his act would result in causing the victim pain of mind that would lead to an observable physical injury. The courts have been concerned with two main problems whether physical injury must necessarily follow mental injury and whether such mental injury must be intentionally caused for it to be recognized as damage. To both these questions, the answer had been in the affirmative.

A. Mental Injury Intentionally Caused

After the decision in Lynch v. Knight, the case of Wilkinson v. Downton followed, introducing the principle in England that the courts would recognize an act calculated to cause mental injury which leads to consequent physical injury as a wrong.

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26 2 Q.B. 57 (1897).
The words "calculated to" mean "likely to," which immediately calls for the requirement that the tortfeasor be consciously aware of the likelihood of mental injury to the injured. These two cases were heavily relied upon in the United States. The influence has been so significant that it has pervaded academic opinion as well. Prosser, in 1937, defined the infliction of mental distress as "the intentional, outrageous infliction of mental suffering in an extreme form." A conspicuous feature of the definition is the inclusion of the word "intentional." Does this mean that mental distress unintentionally inflicted is no damage at all in terms of a tort? The answer lies in the dictum in the Wilkinson case itself, which recognizes as actionable damage that is likely to be caused by the act of the tortfeasor. When compared with the element of intention which implies deliberation and a desire to cause a particular injury, the former is more suited to the context of modern tort law.

A prominent aspect of the law of torts has been its adherence to the principles of the common law in the award of damages. For example, in cases of negligence, the courts, both in the United States and in England, have not restricted the award of damages to intentional injuries. It is certainly true that an act deliberately intended to cause mental injury is much more heinous than an unintentional infliction of mental distress. However, it does not necessarily follow that only intentional mental injury should be recognized as a damage. Judicial and academic reasoning in support of insisting on an intentional infliction of mental injury has been based, so far, on the fact that the mind is not easily observable, and an injury to it is not easily envisaged by an injurer. Today, the mind and the body are considered a composite system, connected to one another. An injury to the mind is as apparent as an injury to the body, so that there is no longer a need to insist on the element of intention to establish the culpability of the tortfeasor. Therefore, a tortfeasor may be held responsible for the damage caused to the mind of the injured even though he did not actually intend to inflict mental injury.

27 Intentional, supra note 15, at 874.
B. Academic and Judicial Opinion on Mental Distress as a Physical Injury

Although Prosser dealt only with the intentional infliction of mental distress, he was quite emphatic that mental distress is similar to physical damage. He stated that: “mental suffering is . . . no less a real injury than ‘physical pain’ [and] it is . . . the business of the courts to make precedent where a wrong calls for redress.”

One of the earliest in England to observe the significance of mental distress as a positive injury was Judge Kennedy when he said: “I should not be surprised if the surgeon or the physiologist told us that nervous shock is or may be in itself an injurious affection of the physical organism.” This statement is an acknowledgement that mental injury may lead directly to physical injury which, though not externally visible, may be evident to a trained medical mind. However, it is interesting to note that such an opinion did not radically change the attitude of the courts in this respect. The basic difficulty was that the conventional view of tort liability could not be shaken. The commission of a tort had to be ascertainable externally. Judges, being laymen from the medical point of view, have been consistently hesitant to adjudicate upon anything which was not apparent or proven on an empirical basis. While it is true that the effects of mental injury could not be scientifically proven by way of a general test, the overwhelming opinion of medical science should have at least made the courts acknowledge the plausibility of what was stated. This makes the judicial approach on this subject a trifle disconcerting.

Once the courts recognize that mental distress per se is an actionable wrong when inflicted, they can devise a viable basis for determining who is entitled to damages. The guidelines for awarding damages and the role played by the courts form the substance of the last few chapters of this work. For the present, it can be stated that by adopting a rigid attitude towards the infliction of mental distress, the courts do not exhibit a full appreciation of mental distress as an injury.

Failure to accord recognition to the infliction of mental distress as an actionable injury raises the interesting point of whether it would constitute a violation of a fundamental human

28 See HANDBOOK, supra note 15 at 328-29.
29 Id. at 327-28.
30 Dulieu v. White, 2 K.B. 669, 677 (1901).
right in the context of American society. It cannot be doubted that the fundamental rights of individuals in the United States are the right of personal liberty and security, reputation, and property. The invasion of any of these fundamental rights constitutes a tort. It is fair to assume that no court will deny this principle. If this be so, it seems clear that the infliction of pain of mind under any circumstances, is an erosion of the right to liberty and security. To establish, therefore, that mental distress when inflicted upon a person can be regarded as a tort, the only element needed seems to be to ascertain definitely that mental distress ensured from a particular act. This should be done with caution.

That a tort is a wrong committed against a person is undisputed. To what extent this definition can be applied is seen in the statement that: “Particular torts, as trespasses of violence, defamation, nuisance, and the like, can be defined well enough, but the term ‘tort’ is also used to denote wrong in general. It includes the unclassified residuum as well as specific definable wrongs.”

The infliction of mental distress falls into the “unclassified residuum” and is certainly a wrong. Though not often, it has been judicially recognized that mental distress is synonymous with a state of anxiety caused by stress. Judge Stanford said, “Mental distress . . . includes sorrow and grief . . .” to which Judge Rainey added humiliation, mortification, and shame as sensibilities of the mind which show mental distress. This view is seen in one instance where a person subjected to a state of intense worry was held to be suffering from mental distress. On the one hand, it is evident that anxiety induced by stress in any form is both an injury and an infringement of a right. On the other hand, the courts definitely stand circumscribed, as they have not been able to visualize the damage and assess it. It is a dichotomy difficult to resolve. The only way out of this tangle is for the courts to view mental injury as a definite injury on the following lines.

52 Thomas Atkins Street, Foundations of Legal Liability xxv-xxvi (1906).
It is a common human feature to undergo a mental reaction under stress. For instance, if a person is involved in an accident directly or indirectly by witnessing the accident, the thought process of that person would be far from pleasant. The thoughts that run through his mind threaten his sense of security. Therefore, a person who causes the accident commits a wrong against anyone who is either directly involved or who witnesses it and is shocked by what he sees. However, it does not necessarily mean that liability attaches in respect of everyone in the vicinity of the accident. A clear burden of proof should rest on the plaintiff to show that he, in fact, suffered mental injury as a result of an act of the defendant.

A gradual awakening to the problem which veered from the initial attitude of regarding the infliction of mental distress along the lines of the English common law, which rejected the notion as being abstract and vague, was seen with the emergence of American Realist thinking. It brought out new perspective to the concept of tort. This was done by acknowledging that the dispensation of justice was dependent, if not fully, to some extent at least on allied disciplines. Medical science, economics, and technology were used to deduce facts which were outside the purview of the law. In this light, mental distress ceased to be vague. It was found that mental distress could be assessed. The functions of Realism in the context of tort law have been subsumed in the statements: "Realism, we have seen, reflected an enhanced twentieth-century awareness of the psychological dimensions of human behavior, an awareness that was linked to a growing interest in the explanatory powers of the behavioral sciences."^36

The infliction of mental distress has been recognized by writers as an actionable wrong for a considerable period of time. The emphasis so far has been on the intention of the person who causes it. In fact, legal thinking has not been generally used to associate the infliction of mental distress with an unintentional act. This was due to regarding the human mind as totally unrelated to the functions of the human body. A duty not to upset the mental stability of a person to his detriment does not seem to tie up with the duty of care not to injure one’s neighbor,^37 the fundamental premise on which negligence is based. As a result of this, the majority of jurisdictions in the

^36 White, supra note 14, at 103.

^37 See Donoghue v. Stevensen, 1932 App. Cas. 562 (appeal taken from Scot.).
United States have insisted that mental distress is parasitic and should be the outcome of an intentional act causing visible physical injury. Yet, there are some jurisdictions which recognize the infliction of mental distress per se as actionable. This has been done with no uniformity; courts have digressed from one concept to another, ranging from foreseeability in negligence\textsuperscript{38} to the extreme measure of imposing strict liability.\textsuperscript{39} The profusion of legal writing, which has dealt mostly with the principles of negligence as applicable to the infliction of mental distress, and the general policy laid down in most states to award damages in tort to the most deserving have left the courts even more confounded. To inquire into this situation, the judicial trends which evolved into the existing position must be traced.

IV. SOME JUDICIAL TRENDS IN THE TREATMENT OF MENTAL DISTRESS

A. MENTAL DISTRESS INTENTIONALLY INFLECTED ACCOMPANIED BY PHYSICAL INJURY

In the United States, mental distress has been the subject of much litigation. The cases, most of which are similar in facts, are innumerable. It seems both fruitless and difficult to analyze each case in order to arrive at a general conclusion as to what the law is on the subject. It is proposed in this paper to analyze the case law selectively, on the basis of how important the cases are in portraying the overall judicial attitude towards the subject.

The recognition of the infliction of damage in the field of torts evolved gradually. As mentioned earlier, the courts were hesitant to identify mental distress as compensable and as an isolated head of liability. Therefore, the common law recognized mental distress as actionable only if intentionally inflicted or if accompanied by physical impact. Generally, the assessment was made by determining whether the two elements mentioned above caused some observable physical injury to the plaintiff. Most states in the United States relied heavily upon these criteria as guidelines in the award of damages.

\textsuperscript{38} See Dillon v. Legg, 441 P.2d 912 (Cal. 1968).

\textsuperscript{39} See Shepard v. Superior Court, 142 Cal. Rptr. 612 (1977).
B. THE PHYSICAL IMPACT THEORY

Mental distress has been regarded in many states to be merely the outcome of a physical injury which results from a physical impact upon the human body. The insistence on recognizing the actionability of mental distress if inflicted only as a result of an actual physical impact on the plaintiff was so prominent that it was known as the Physical Impact Theory. In legal parlance, the states that adopt this theory are called impact states. The theory itself is best illustrated by the case of Beaty v. Buckeye Fabric Finishing Co.,40 decided in Arkansas in 1959. One of the plaintiffs brought an action against the driver of a tractor which struck the plaintiff's vehicle. Consequently, the plaintiff's father was crushed and killed when the trailer rolled back from a stationary position due to brake failure. The deceased was heard to groan and cry out after the impact, which made the court conclude that the distress caused to the deceased was more mental than physical, though it lasted for a short duration. The court awarded damages of $1,000 to be distributed among the children of the deceased. Chief Judge Henley, delivering judgment, said that: "It is a well settled principle of Arkansas law that no recovery can be had for negligently inflicted mental anguish, fright, shock, or grief, unless the same is produced by a physical injury, and that rule extends to physical symptoms resulting from the emotional shock in question."41

Chief Judge Henley cited other decisions where physical injury was considered to be a natural precursor to mental injury.42 An exception is seen in cases involving the right of privacy, where courts have, while recognizing the necessity of the impact theory, deemed it fair to award damages for injury to the personality.43 The law seems to recognize public humiliation to be more of a mental injury than the infliction of death on a person. Ex facie, the demarcation sounds ludicrous, as both humiliation

41 Id. at 697.
43 See Olan Mills, Inc. of Texas v. Dodd, 353 S.W.2d 22, 24 (Ark. 1962) (finding that using a photograph of the plaintiff without permission gives rise to a cause of action irrespective of physical injury or mala fides).
and death can involve continuous mental suffering. It is time to review this attitude and treat both equally, as torts involving the human mind which cause acute discomfort. The ramifications of the impact theory and the developments which followed will be discussed later.

C. THE INTENTIONAL INFILCTION OF MENTAL DISTRESS

Some jurisdictions regard the infliction of mental distress as parasitic or dependent upon the element of intention, in the absence of physical impact. The dependence upon intention has almost been taken for granted. In many states, the infliction of mental anguish, pain of mind and apprehension are still heavily burdened with the necessity of being accompanied by an intentional act on the part of the defendant. In Connecticut, it has been recognized "that a cause of action in tort may be created for a plaintiff's emotional distress which is the foreseeable and proximate result of the defendant's intentional, wanton, or wilful wrongful conduct." 44

It is clear in this instance that the court meant that emotional distress caused to a person is damage recognizable in tort if the defendant could foresee the possible infliction of mental distress that could be caused by his intentional wrongful conduct. The act itself, though intentionally caused, need not be performed with the specific intention of causing mental distress to the victim.

In Florida, which shows consistent litigation on the subject of the infliction of mental distress, the law is in sharp contrast to the broad rationale mentioned above. There is no single instance of the infliction of pain of mind being regarded as independent of intention. 45 The most recent pronouncement comes from Steiner & Munach, P.A. v. Williams, 46 decided in 1976, which decided that the law in Florida still remains that there is no recovery for mental or emotional injuries unless

45 See Slocum v. Food Fair Stores of Fla., 100 So. 2d 396 ( Fla. 1958) (recognizing that recovery may be had for intentionally inflicted mental injury without physical impact). In Korbin v. Berlin, 177 So. 2d 551, 553 (Fla. Dist. Ct. App. 1965), the court held that malice and mental distress are complementary factors. See also Jackson v. Rupp, 228 So. 2d 916, 918-19 (Fla. Dist. Ct. App. 1969); Ellington v. United States, 404 F. Supp. 1165, 1167 (M.D. Fla. 1975) (implying that for an action in mental distress to be sustained, there has to be both physical impact resulting in a physical injury, and the element of intention).
MENTAL DISTRESS

there are other factors present. These factors can be either a physical impact or such injuries produced as a result of a deliberate and calculated act performed with the intention of producing such an injury by one who knows that his act would in fact cause injury.\textsuperscript{47} This insistence on intention as a requisite for the award of damages for mental distress is seen in Maryland,\textsuperscript{48} Kansas,\textsuperscript{49} and South Carolina.\textsuperscript{50} There is almost an implied recognition that mental security or stability need not be taken into account by a reasonable man as a protected right of an individual. Most states have followed the rule that for the infliction of mental distress to be recognized as a damage, it has to be the outcome of physical injury caused by physical impact, or it has to be the result of an intentional act by the defendant. This attitude can be observed in Massachusetts\textsuperscript{51} as well as in Pennsylvania,\textsuperscript{52} Ohio,\textsuperscript{53} New Jersey,\textsuperscript{54} Minnesota,\textsuperscript{55} Mississippi,\textsuperscript{56} Missouri,\textsuperscript{57} Michigan,\textsuperscript{58} Washington,\textsuperscript{59} Virginia\textsuperscript{60} and Texas.\textsuperscript{61}

\textsuperscript{47} See id. at 42.
\textsuperscript{48} See Zeigler v. F. Street Corp., 235 A.2d 703, 705 (Md. 1967).
\textsuperscript{57} See Francisco v. Travelers Ins. Co., 363 F.2d 1019, 1022-23 (8th Cir. 1966); Langworthy v. Pulitzer Publ'g Co., 368 S.W.2d 385, 389 (Mo. 1963); Gambill v. White, 303 S.W.2d 41, 43 (Mo. 1957); Smith v. Aldridge, 356 S.W.2d 532, 537 (Mo. Ct. App. 1962).
\textsuperscript{59} See Browning v. Slenderella Sys. of Seattle, 341 P.2d 859, 863 (Wash. 1959).
\textsuperscript{60} See Womack v. Eldridge, 210 S.E.2d 145, 148 (Va. 1974). The four elements were required to satisfy the requirement to award damages for mental distress without physical injury. They were an intentional and reckless act, outrageous...
The heavy reliance placed on the element of intention is due to the fact that the courts do not regard mental distress as an injury for which a tortfeasor could be held liable unless he desires such injury to be inflicted on the injured.

A far less stringent criterion is observed in Nebraska, which recognizes that physical injury is not an essential prerequisite for awarding damages for the infliction of mental distress, if mental injury is a reasonably certain result of the act of the tortfeasor. There are some states which rely so much on the element of intention that they have recognized the infliction of mental distress to be solely dependent on whether the defendant's act was intended to cause mental injury to the plaintiff. New Jersey has gone a step further in saying that the only factor necessary is the defendant's conduct when he inflicted the injury on the plaintiff.\(^6\) Undeniably, in this case the courts would inquire whether the defendant's conduct shows a disregard for the possible mental pain that could be caused to the plaintiff by the defendant's act.

One conspicuous feature which stands out in the above instances is that much is left to judicial discretion. To elaborate further, while all jurisdictions have stated that mental distress has to be accompanied either by physical injury or by an intentional act on the part of the defendant, the methods adopted and the criteria laid down to determine whether mental distress can result from particular circumstances have differed. This is especially so in the case of intention. While some courts have laid down requirements to determine the nature of the act, others have determined the existence or non existence of an

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intentional act without laying down specific guidelines for doing so. This is an interesting feature which warrants discussion.

Determining the conduct of the plaintiff has been approached in two different ways. The first is both stringent and direct. An example of the first category is Iowa, which has categorically stated that the element required is a willful act which is carried out against the plaintiff. This approach was first seen in 1932 in the case of Barnett v. Collection Service Co. It concerned the claim of an elderly widow who had been repeatedly sent letters of demand by a coal company for $28.75, which she owed them. She claimed that she suffered mental distress as a result of the letters. There was no evidence of physical injury whatever. The court held that an action would lie for the infliction of mental distress on the plaintiff, as she was the subject of a willful act committed by the defendant company.

Almost the same terminology was followed in 1967, where a court decided that mental distress is recognized only if it is inflicted in the course of a willful act on the part of the defendants. The courts do not definitely say whether by a willful act they mean an act committed willfully with a desire to cause mental distress in particular, or whether the act alone has to be deliberate with no specific intent to cause mental injury. Academic opinion favors the view that it should be a willful act with desire to cause mental distress.

The second is where the requirement of intention has yielded to the element of foresight. In Oklahoma, the element required is neither a willful act nor intention to cause mental injury, but mere foreseeability. This obviates the insistence on volition on the part of the defendant. In pursuance of this policy, an Oklahoma court held that an action could be successfully grounded against a defendant whose act had inflicted traumatic neurosis on the plaintiff, if the circumstances enabled the defendant to have reasonable foresight of the result of his act.

63 242 N.W. 25 (Iowa 1932).
64 See id. at 28.
V. JUDICIAL RECOGNITION OF MENTAL DISTRESS AS DAMAGE

Generally, mental distress is inflicted as a result of an accident. It may be caused as a result of the negligence of the persons involved in the accident, or even by a third party who is not physically present at the accident. For example, an accident may be caused by a defective product which fails to function properly. In that case it may be entirely the fault of the manufacturer. The attitude of the courts has thus far been either to insist on a physical impact on the plaintiff, or an intentional act on the part of the defendant. In both cases observable physical symptoms were the basis of the courts assessment of the mental injury. In this sense the infliction of mental distress has always been dependent on one of the two accompanying factors mentioned above.

This attitude prevailed as late as 1958.68 In Ohio, where a court rejected a claim for damages for emotional distress and embarrassment caused by threats, Justice Stewart citing precedent69 observed: ‘‘the damages sought to be recovered are too remote and speculative. The injury is more sentimental than substantial. Being easily simulated and hard to disprove, there is no standard by which it can be justly, or even approximately, compensated.’’70

This total rejection of mental distress unaccompanied by any other element was largely due to heavy reliance being placed on the accepted view that “mental suffering and its consequences are so evanescent and intangible that they cannot be foreseen or anticipated and for that reason have no reasonable proximate causal connection with the act of the defendant.”71

The view that mental distress, to be recognized as inflicted on a person tortiously has to be fortified by other elements, has led to uncertainty in Florida. In 1972, a court pronounced on a general basis that in the area of tort, the infliction of mental distress is compensable. Two years later, in a suit brought by a person against the manufacturer of an airplane, for mental suffering caused to his wife as a result of an accident, the court

68 See Parmalee v. Ackerman, 252 F.2d 721, 722 (6th Cir. 1958) (per curiam).
69 See Grill v. Abele Funeral Home, Inc., 42 N.E.2d 788 (Ohio Ct. App. 1940); Reed v. Ford, 112 S.W. 600, 601 (Ky. 1908).
70 Bartow v. Smith, 78 N.E. 2d 735, 740 (Ohio 1948) (quoting Reed v. Ford, 112 S.W. 600, 601 (Ky. 1908)) overruled by Yeager v. Local Union 20, Teamsters, 455 N.E. 2d 666 (Ohio 1983).
71 Bartow, 78 N.E.2d at 740 (Hart, J., dissenting).
held that the infliction of mental pain and anguish, in the absence of physical impact, could not be recognized.\textsuperscript{72} This makes Florida fall into the category of an impact state. In the 1972 case, Judge Mager stated that if mental distress was the outcome of a tort committed against a person, it was compensable.\textsuperscript{73} There was no further expansion of explanation. If one were to accept the view that a tort is a civil wrong against a person which is not contractual as stated earlier, the statement of Judge Mager would mean that if mental distress is inflicted as a result of a breach of duty which one owed to another it is compensable. All that the plaintiff need show is that the defendant owed the plaintiff a duty of care which was breached, as a result of which the plaintiff suffered damage. The only difficulty lies in determining what damage is. To Florida and the other impact states it should be the outcome of an actual physical impact on the plaintiff. In other words, the damage should be perceptible to the senses and be caused by a physical impact alone. The essential weakness of the impact theory is that its proponents considered the infliction of mental injury to be actionable only if it showed its ill effects after being caused by a physical impact on the body of the victim. There arises cause for the criticism that the theory does not envisage that mental injury can be caused by hearing or by seeing something unpleasant. In the modern context, a person who witnesses an accident caused by a defective product such as faulty aircraft or who hears a loud sound which a defective product causes and suffers mental distress as a consequence, would not have any remedy against the person responsible for the product. The main reason for the narrow outlook taken by the impact theory is that no consideration has been given to the real nature of mental distress and how differently it can be caused.

VI. THE INFLICTION OF MENTAL DISTRESS AS AN INDEPENDENT HEAD OF DAMAGE

The component states of the United States are divided on the question of the status of mental distress per se. Mental distress per se means mental distress independent of observable physical injury caused by either physical impact upon the plaintiff or an intentional act on the part of the defendant. Generally, it can


\textsuperscript{73} See id.
be said that most states still adhere to the traditional common law approach of requiring one or the other. The states which have deviated from this trend, though few in number, have been more specific in asserting the recognition of the infliction of mental distress as an independent tort.

Illinois is an example of a state which, though an adherent to the common law principle that physical injury is essential for the award of damages, has digressed radically to change its law. In *Bushers v. Graceland Cemetery Association of Albion, Illinois,* in which the plaintiff claimed infliction of mental distress, this approach was clear. The plaintiffs objected to oil drilling in a cemetery in which a relative of theirs was buried. Chief Judge Platt stated that there was a recognized breaking away from the general rule on this point. His honor cited a previous decision where it was stated that "[t]he common law, it is said, grants recoveries only for injuries either to the person or the purse and not for mere mental suffering. This reasoning no longer accurately portrays the state of the law."

This brought the court to the conclusion that the trend in the United States was to give increasing protection to the interests of freedom from emotional distress. The same line of judicial thinking is observed in Maine, where the overriding consideration has been for the recognition of the freedom from mental assault. In *Wallace v. Coca-Cola Bottling Plants, Inc.* where the plaintiff brought an action against a soft drink bottler for injuries caused to him when he drank from a bottle containing a prophylactic, the court discounted a previous decision which held that bodily injury was essential to an action in mental distress. The decision in the *Wallace* case was heavily influenced by the advancement made by medical science in this area. Judge Pomeroy summed up by saying that mental damage, to be actionable, "must be substantial and manifested by objective symptomatology." By this is meant that the courts have every right to assess the circumstances of a case and conclude whether

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75 See id. at 212.
77 See id. at 746.
78 269 A.2d. 117 (Me. 1970), overruled by Culbert v. Sampson's Supermarkets, Inc., 443 A.2d 433 (Me. 1982).
79 See id. at 120 (citing Herrick v. Evening Pub Co., 113 A. 16 (Me. 1921), overruled by Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970), modified, 534 A.2d 1282 (Me. 1987)).
80 Id. at 121.
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mental distress has been inflicted on a plaintiff or not. This decision was later cited with approval by Chief Justice McKusick in *Vicnire v. Ford Motor Credit Co.*, stating that any person merits protection from even an unintentional act which produces mental distress.

Medical science has done much to present the notion of mental distress in a new perspective. This is one reason why some jurisdictions recognize mental distress even though it is caused independently of physical impact. The statement of Presiding Judge Crumpacker, in 1956, illustrates the subtlety that "mental anguish for which recovery may be had in an action for personal injuries is something more than the mental sensation of pain resulting from physical injuries." The same criterion has been followed rigidly in Kansas, which has accepted the view that neither physical injury nor an intentional act is necessary to award damages for inflicted mental distress. The policy behind such reasoning is that mental distress is no longer an unidentifiable concept, but a definite, independent wrong when inflicted on a person.

Louisiana is yet another jurisdiction which has been emphatic about the recognition of the infliction of mental distress as an independent head of compensation. In *Gremillion v. C & L Construction Co., Inc.*, the court positively stated that the infliction of mental distress warrants damages. The plaintiff suffered shock when heavy equipment owned by the defendant and insured by the co-defendant ran out of control and crashed into the plaintiff's truck. Judge Hood observed that "[i]n Louisiana damages for mental anguish and shock, resulting from trespass or damage to property, are considered as actual damages and as such are compensatory."

His honor cited the case of *McGee v. Yazoo & M.V.R. Co.*, which expressed the same principle more elaborately. The court in the McGee case said:

we see no reason why damages for mental anguish or suffering cannot be recovered in addition to property damage. Mental

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81 401 A.2d 148 (Me. 1979).
82 See id. at 154.
86 Id. at 201.
87 19 So. 2d 21 (La. 1944).
anguish or suffering is a distinct element of damages and is not merely an incident to be taken into consideration in addition to a pecuniary loss suffered by reason of a wrongful or negligent injury to persons and property.\textsuperscript{88}

This gradually evolved into the recognition that the concept of mental distress as an independent head of damage is an integral part of contemporary jurisprudence in Louisiana.\textsuperscript{89} Once the infliction of mental distress is established by circumstance, the courts award damages without going into whether there was an intentional act of the defendant, or whether there was a physical impact on the plaintiff.

In the state of New York, the rule set out in \textit{Michel v. Rochester Railway Co.},\textsuperscript{90} that mental anguish caused by the fault of a person is not actionable against him in the absence of contemporaneous physical impact, has since been abrogated.\textsuperscript{91} In \textit{Battalla v. State}, the court held that a nine year old girl could recover for psychic injury caused to her by the act of an operator of a chair lift who failed to fasten the safety bar in the chair.\textsuperscript{92} However, this reasoning has been cautiously applied so as not to apply on an overtly general basis. This is because of an apprehension that it would \textit{prima facie} act to the detriment of the defendant. The courts in New York have insisted on stringent evidence of mental suffering before a claim for damages can be allowed. Conceptually it has been recognized that mental injury without attendant physical injury is allowable as a head of damage.\textsuperscript{93} However, the courts have stated the general law to be based on the criterion of whether the act was intentional or not.\textsuperscript{94} However, in the \textit{Battalla} case, neither of these elements is mentioned, as the court decided to award damages in the circumstances of the case. It is envisaged that in New York a decision would largely depend on the facts of a case. Where the negligence is gross and the injury caused is considerable, the courts would have no hesitation in making an exception as in the \textit{Battalla} case.

\textsuperscript{88} Id. at 24; see also Fontenot v. Magnolia Petroleum Co., 80 So. 2d 845, 850 (La. 1955).
\textsuperscript{90} 45 N.E. 354, 355 (N.Y. 1896).
\textsuperscript{91} See \textit{id.} at 355.
\textsuperscript{92} 176 N.E.2d 729, 730 (N.Y. 1961).
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Under Montana law, the courts have taken a different approach. The application of the law itself is liberal. Montana recognizes any detriment caused by a person as a compensable injury. Pursuant to this principle, the courts on two occasions have recognized an independent cause of action for mental injury inflicted. The identical judicial policy is seen in the application of the law in Michigan where courts have unreservedly accepted the infliction of mental distress as an independent tort. Stewart v. Rudner was a case where the parents of a stillborn child suffered pain of mind as a result of the failure on the part of the surgeon to perform a cesarian operation on the mother. The mother sued the surgeon for failure to perform his contractual obligations. The court held that recovery for mental disturbance is actionable both in contract and in tort. Justice Smith said:

Although the law in this field is in a state of marked transition and fluidity, it is not too early to state that there is a marked trend towards recovery . . . . We have come to realize, slowly, it is true that the law protects interests of personality, as well as physical integrity of the person, and that emotional damage is just as real (and as compensable as) physical damage.

In Iowa and Colorado, the infliction of mental distress is in limine considered a viable, separate cause of action, provided there exists a causal nexus between the act and the resulting injury. However, the interesting feature in these two jurisdictions is that while the infliction of mental distress is accorded considerable independence from other wrongs, the courts have approached the subject by taking into consideration the circumstances and the seriousness of a case. Courts have been emphatic about the need for a definite connection between the act of the defendant and the injury caused. In this respect, the law in these two states is not dissimilar to that in New York, which was discussed earlier. The discretion exercised by the courts in assessing the infliction of mental distress in relation to the act of

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98 See Northrup v. Miles Homes Inc. of Iowa, 204 N.W.2d 850, 860 (Iowa 1973); see also Hopper v. United States, 244 F. Supp. 314, 318 (D. Colo. 1965); Towns v. Anderson, 579 P.2d 1163, 1164-65 (Colo. 1978).
the defendant is so wide that in *Meiter v. Cavanaugh* decided in Colorado in 1978, in which the purchaser of a house sued the vendor for not vacating the house and indulging in outrageous conduct, the court awarded damages to a plaintiff for mental distress caused by the action of the defendant without laying down the criteria it followed.  

The history of the notion of mental distress has undergone a steady evolution in California. The prominent feature in this jurisdiction is that the case law seems to have been decided on the initial premise that mental distress is an independent injury. It has been differentiated from physical injury as being self-existent and *sui generis*. In *United States v. Hatahley*, Circuit Judge Pickett stated the view that one could recognize mental distress as an independent injury if it is the result of extreme circumstances of the defendant’s behavior. However, a division of opinion exists in some instances where the courts have stated that the infliction of mental distress is not in itself a tort, but a form of injury resulting from tortious conduct. There is yet another view which says that mental distress must be severe and must result in physical injury to be compensated. This reflects the Californian attitude that while mental distress is considered to exist independently, the courts have been circumspect about awarding compensation due to the absence of a precise definition of the phrase “mental distress.” Much is left to the discretion of the courts to award damages. This is due to two factors. The first is that the courts, in assessing mental distress, have not embarked upon a serious study of the notion of mental distress from a psychological standpoint. If this was

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101 See id. at 401-02.
103 257 F.2d 920 (10th Cir. 1958).
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The second is that the courts have always regarded the measure of damages to be altogether incapable of being assessed. The result of this attitude brought about a great deal of diversity within the courts.

The 1967 case of *Vanoni v. Western Airlines* demonstrates a new approach to the treatment of mental distress. In an instance in which some passengers of a flight operated by Western Airlines sued for nervous disorders experienced by them due to the negligent landing of the aircraft, Judge Elkington took a more liberal view:

The real question . . . is whether the subsequent nervous disturbance of the plaintiff was a suffering of the body or of the mind. The interdependence of the mind and the body are in many respects so close that it is impossible to distinguish their respective influence upon each other . . . . 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 system, 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 . . . . Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and the nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves, or the entire nervous system, is thus affected, there is a physical injury thereby produced; and, if the primal cause of this injury is tortious, it is immaterial whether it is direct . . . or indirect, through some action upon the mind.

This judgment, unlike the others previously delivered, was apparently formed without regarding mental distress as an unknown quantity, coupled with a more liberal view of the biophysical interpretation of the concept. In addition, the court took the view that the causal connection between the act of the defendant and the injury suffered by the plaintiff may be established either directly or indirectly through the mind. The basis of the decision was that if the initial act of the defendant is tortious, in that it amounts to a breach of a duty of care owed to the

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108 Id. at 117 (quoting Sloane v. Southern Cal. Ry. Co., 44 P. 320, 322 (Cal. 1896)).
plaintiff, it matters not whether the mental injury that follows occurs directly or indirectly through some reaction upon the mind. This decision has shed an entirely new light on the notion of mental distress as it has been judicially recognized by the common law. It is not disputed that stringent standards have to be set in measuring the physical harm done to a person in assessing the mental injury suffered. However, it must be acknowledged that a basic recognition of the damage done to the human being in terms of Judge Elkington’s evaluation would raise the concept of mental distress from the quagmire of dormancy it has been placed in by the courts.

VII. SOME DEFINITE TRENDS TOWARD THE RECOGNITION OF THE INFLICTION OF MENTAL DISTRESS AS AN INDEPENDENT THEORY OF LIABILITY

There are a few states previously cited that show unequivocally that the infliction of mental distress is purely an independent head of liability. These states have recognized that the common law subscribes to this view. In order to examine their attitude in more detail, a broader discussion is warranted.

Perhaps the most enlightening view in favor of treating the infliction of mental distress per se as a separate theory of liability is the line of judicial authority in Louisiana. A clear view that mental distress need not in any way be accompanied by any other factor to be considered eligible for redress prevails over all other considerations. Its independence as a separate entity is well illustrated by Judge Lottinger in Trahan v. Perkins, where his honor stated:

It is well established in our jurisprudence that a tort which gives rise to mental anguish or emotional upset or other mental suffering on the part of the injured party creates a claim for damages.


which is separate and distinct from any claim for physical pain or suffering resulting from physical injury.\textsuperscript{111}

This statement unquestionably demonstrates that the established law in Louisiana favors the independence of the infliction of mental distress as a tort.

Oregon also has recognized the viability of the infliction of mental distress as a separate theory of liability. In \textit{Hovis v. City of Burns},\textsuperscript{112} in which a widow brought an action against a city council which had disinterred the remains of her husband, Judge Holman said that the infliction of mental distress was definitely an invasion of a legal right, and therefore a wrongful act. He concluded that no physical injury or other factor is necessary to award damages.\textsuperscript{113} An encouraging factor in these two jurisdictions is that the courts are not unmindful of the risk of falling into difficulty if this view is practiced without reservation. To counter the problem, the courts have, while recognizing the necessity of giving significance to the mental element in human beings, exercised the maximum caution. The courts have done this by considering two factors—tracing liability to the defendant and assessing the measure of damages. With regard to the former, the requirement has been that a definite nexus be established between the plaintiff and the defendant in order that it be clearly shown that the defendant caused injury to the plaintiff.\textsuperscript{114}

After much uncertainty, the law in New York seems to favor the broad view accepted by both Louisiana and Oregon. Unlike most other states, the case law in New York has evolved steadily. New York rejected the original requirement of physical injury in the view that the infliction of mental distress is independently compensable. This has been dealt with earlier. The principle enunciated by this view is that there is recovery for pain of mind arising out of a breach of a duty of care owed to the plaintiff by the defendant. There is much authority on the point of treating the concept of freedom from mental distress as a legal right, based on the view that there need not be physical impact or an observable physical injury.\textsuperscript{115} The infliction of mental distress

\textsuperscript{111} \textit{Id.} at 99.

\textsuperscript{112} 415 P.2d 29 (Or. 1966).

\textsuperscript{113} See \textit{id.} at 91; see also Senn v. Bunick, 594 P.2d 837, 841 (Or. Ct. App. 1979).


can result directly from a negligent act which is accompanied by foresight on the part of the defendant. A conspicuous feature in New York, as compared with Louisiana, is that although both recognize mental distress as a separate injury eligible for redress, it is difficult to ascertain the policy of the former state from the cases at hand. The reason is that the New York courts have dealt with cases where the circumstances clearly establish prima facie liability on the defendant. In Lula v. Sivaco Wire & Nail Co., Judge van Pelt Bryan stated that although New York has recognized this concept independent of other factors, little has been said on the subject. The most recent decision is the case of Corso v. Crawford Dog & Cat Hospital Inc., decided in 1979. The owner of a pet poodle, who had paid for an elaborate funeral for her pet, opened the casket in which the poodle's remains were to be and found a dead cat inside. She sued the funeral director alleging, inter alia, mental distress. Judge Friedman considered the element of mental distress per se and awarded damages. This decision was based on the fundamental principle enunciated in Battalla v. State, that mental distress could be recognized alone if it was the outcome of a negligent act by the defendant.

If an assessment is to be made on the number of jurisdictions that do not consider the infliction of mental distress as independent against those which regard the existence of the concept separately, it could be said that in the United States, still, there are more states that regard mental distress as parasitic. Even among the jurisdictions which have shown a liberal attitude, apart from Louisiana and Illinois, the law is uncertain and only partially developed. Apart from this, there is an overwhelming majority of jurisdictions, the attitudes of which are totally repugnant to the sustenance of the infliction of mental distress as a separate area of compensable injury. The inexorable conclusion that can be arrived at from these factors is that this area of law in the United States has still not expanded to accommodate the notion of pain of mind fully. However, the


117 See id. at 225.


119 See id. at 183.

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veheemt minority has broken all barriers. Perhaps the most liberal view so far has been taken in a Tennessee case, in which the court required both outrageous conduct of the defendant and serious mental injury to the plaintiff. Chief Judge Burnett said:

Memory and empathy tell us that the “hurt” perceived through sensory media other than that of touch may be just as painful if not more so than the “hurt” perceived by the tactile sense. Moreover, physicians tell us that the consequences of invasions of the person accomplished through the perceptory media of sight and sound may be as damaging, if not more damaging than invasions of the person accomplished through the sense of touch.\(^\text{121}\)

A prominent feature in the minority view is that although it recognizes mental distress as independent and compensable, the courts have considered the gravity of the injury, showing a sensible balance of equities, as it would be dangerous to award damages for the mere reason that mental distress is inflicted on a person. For the present, the most encouraging thought is that at least a few states have recognized the nature of mental distress. Once this is done, establishing criteria to protect against arbitrary actions should not be difficult.

VIII. EMOTIONAL INJURY UNDER THE WARSAW SYSTEM OF LIABILITY

It is incontrovertible that in a discussion of whether mental injury is a “wounding” or “bodily injury” as reflected in the Warsaw Convention, a “personal injury,” as referred to in the Guatemala City Protocol,\(^\text{122}\) or a fortiori “lésion corporelle” as appearing in the French text of the Convention, its nature has to be both medically and forensically determined in order that the concept of mental distress be assigned its place in the Convention. No judge could presume to comprehend the nature of mental injury in all its pathological and medical connotations—a necessity if a juridical basis for mental injury were to be determined under the Warsaw system.

Medical jurisprudence is greatly assisted by the pioneering research of Sigmund Freud who first analyzed mental injury and


traced its origins to a combination of fear and anxiety that caused physical changes in the human body.\textsuperscript{123} It is now well established from a medical standpoint (if not from a medical jurisprudence standpoint) that fear and anxiety cause "unpleasant subjective feelings of terror, a pounding heart, muscular tenseness, exaggerated startle, dryness at the throat and mouth, a sinking feeling in the stomach, nausea, perspiration, and urge to urinate and maybe to defecate . . . difficulty in breathing, etc."\textsuperscript{124}

Forensically speaking, the terms bodily injury, wounding and lesion corporelle have been obfuscated by the preconceived juridical notion that there is a strict difference between mental and bodily injury. The confusion seems to have been worsened by the interpretation of the French text of lesion corporelle as strictly bodily injury (which indeed it may well be), and therefore the erroneous basis of the two being mutually exclusive had prevailed in some instances. \textit{Burnett v. Trans World Airlines, Inc.}\textsuperscript{125} is one such case where the court held that the French

\begin{footnotesize}
\begin{enumerate}
\item Marks, \textit{supra} note 18. The experience of fear and anxiety is known to cause a person to "bend quickly, jerk his head forward, and blink his eyes." \textit{May, supra} note 123, at 46. \textit{The Psychosomatic Journal of the American Medical Association}, in 1947 at page 1527, recorded that half the cases of acute illnesses and recovery problems are attributable to the mental state of the patient. Anxiety is also known to bring about an imbalance in the digestive process. See \textit{Cannon, supra} note 21, at 253-54. In his book \textit{The Wisdom of the Human Body}, Cannon states that mental distress would increase blood sugar levels of a subject bringing an unpleasant experience. See \textit{Cannon, supra} note 23, at 276.
\item 368 F. Supp. 1152 (D.N.M. 1973).
\end{enumerate}
\end{footnotesize}
version of the Convention should prevail, and therefore only a bodily injury (and not mental injury) must be considered as compensable. Although the case of *Rosman v. Trans World Airlines, Inc.*\(^{126}\) later rejected this view that the French text prevails as the primal document, its ultimate decision was that mental injury per se was not compensable under Article 17 of the Convention. The courts in this line of cases seem to have adopted the archaic views of *Lynch v. Knight*\(^{127}\) without consulting the prevalent findings of forensic medicine. A second line of thinking emerged in the case of *Husserl v. Swiss Air Transport Co.*\(^{128}\) where the court held that mental injury was included in bodily injury, claiming that the words “bodily injury” in the Convention really covered mental injury. Here again, the court refused to identify a medical similarity between the two terms but rather went on to read the words “mental injury” into the Convention.\(^{129}\) Miller concludes that if a court adopts the line of thinking in the *Husserl* and *Karfunkel* decisions, a plaintiff would recover for mental distress, while if the *Rosman* decision were to be followed, no award of damages would ensue.

The operative point here is not whether the French text prevails over the English translation of the Convention. Nor is it, for that matter, which of the two lines of the *cursus curiae* are acceptable. The matter at issue is whether mental injury is actually a physical injury in a medical sense. If this question is decided in the affirmative, there would be no need to sustain the debates that have prevailed over the thread of cases that have run through this contentious issue.

It is interesting to note that in the case of *Floyd v. Eastern Airlines, Inc.*\(^{130}\) the Eleventh Circuit Court of Appeals examined lésion corporelle in the original French text and decided that the legislative history of the Convention and the case law admitted of mental injury, even without accompanying physical injury, being compensable under Article 17. This is the only early instance of a court transcending the bounds of judicial

\(^{126}\) 314 N.E.2d 848 (N.Y. 1974).


\(^{130}\) 872 F.2d 1462 (11th Cir. 1989).
parochialism and actually recognizing that there are other fields of human expertise that become relevant in the adjudication of human disputes.

Mankiewicz, in a well reasoned and *au fait* paper refers to the concept of "personal injury" in the Guatemala Protocol (which was also suggested at the Hague Protocol 1955), and suggests the following viable compromise: "The legislative history of Article 17 compels the conclusion that, at least as far as American courts are concerned, the expression 'lésion corporelle' should be understood to mean 'personal injury.'"\(^\text{131}\)

It is somewhat disturbing that some recent cases have still held on to the need for accompanying physical injury in order for emotional injury to be compensable. In the 1997 Australian case of *Kotsambasis v. Singapore Airlines, Ltd.*,\(^\text{132}\) the New South Wales Court of Appeal followed the *Floyd* decision and held that without accompanying bodily injury, the plaintiff could not recover for pure psychological injury. The plaintiff in this case had claimed that she had suffered acute nervous shock and feared for her life following a fire which broke in the engine of the aircraft in which she was traveling, while at the Athens airport. The Court of Appeal went on the basis that the signatory states to the Warsaw Convention in 1929 had no specific intent to include pure psychological or emotional distress within the purview of Article 17 of the Convention.\(^\text{133}\) The Court of Appeal in the *Kotsambasis* case disagreed with the lower court judges’ finding with an earlier Australian decision\(^\text{134}\) that was in the appellate process at the time the *Kotsambasis* case was being decided. Although the New South Wales Court of Appeal conclusively decided at the appeal of the *Georgeopoulos* case that pure mental distress was comparable without there being a need for accompanying physical injury, the *Kotsambasis* decision overruled it.

In the Untied States, although few instances of judicial determination following *Floyd v. Eastern Airlines, Inc.*\(^\text{135}\) support the

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\(^{133}\) Johnston, *supra* note 132, at 166.

\(^{134}\) *Georgeopoulos v. America Airlines, Inc.*, (unreported, Supreme Court, NSW, Ireland J, 10 December 1993).

\(^{135}\) 872 F.2d 1462 (11th Cir. 1989).
view that plaintiffs could recover only for physical injuries and for emotional injuries flowing from those injuries, the 1996 decision of Zicherman v. Korean Air Lines Co, gave the United States Supreme Court the opportunity to confirm that the Warsaw Convention itself contained no specific or particular preclusion from recovering compensation from any damages, be it physical or mental. The Zicherman decision allowed the plaintiff to claim for legally cognizable harm to be determined by local law in accordance with otherwise applicable choice of law principles. A year later, the 1997 decision of In re Aircrash Disaster near Roselawn, Indiana on October 31, 1994 held with the Supreme Court findings in the Zicherman case, stating that "Article 17 does not say that a carrier will only be liable for damage caused by a bodily injury, or that passengers can only recover for mental injuries if they are caused by bodily injuries."

The aviation community has now reached a stage where the cursus curiae at common law such as the Floyd and Zicherman decisions would be moot in the context of the ICAO Convention for the Unification of Certain Rules for International Carriage by Air, which was adopted at Montreal through a diplomatic Conference held between May 10-28, 1999. This Convention blazes a new trail, and provides the judiciary with the travaux preparatoires of the Conference as resource material. Courts would no longer have to inquire as to the intent of the makers of the original Warsaw Convention of 1929, since the 1999 ICAO Convention would pre-empt its predecessor.

In terms of the element of mental injury, it is very clear that the working papers of the Study Group, which was appointed by the ICAO Council in November 1995 for the specific purpose of developing a mechanism within the framework of ICAO to accelerate the modernization of the Warsaw system, are explicit in reflecting the Group's intentions. Vijay Poonoosamy, the Rapporteur of the Study Group, in his report states:

the expression personal injury would open the door to non-physical personal injuries such as slander, libel, discrimination, fear, fright and apprehension and this could be neither desirable nor acceptable. Use of bodily injury would be more acceptable but

139 Id. at 179.
would exclude mental injuries such as shock. Recent Court decisions in the U.S. demonstrates how difficult an area this is and a clear statement must be agreed upon which is not limitless in scope. Since it would be clearly fair and equitable to compensate for impairment of health (i.e. both physical and mental/psychic injuries) it may be preferable to define personal injury as such.140

It is interesting to note that the Rapporteur, on behalf of the ICAO Study Group, categorizes fear, fright and apprehension, which are symptoms of injury that bring about physical results as shown in the scientific evidence at the Introduction of this article, as non-physical injuries. He then goes on to identify shock as a mental injury.

The ICAO Legal Committee, which examined the report of the Study Group, retained the phrase “mental injury” in Article 16 of the ICAO Draft Convention.141 However, the Convention of 1999, in Article 17.1, provides that “The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place onboard the aircraft or in the course of any of the operations of embarking or disembarking.”142

It is interesting that the Draft Convention which was considered by the Conference had this provision in Article 16.1 with an additional sentence at the end stating, “However, the carrier is not liable to the extent that the death or injury resulted from the state of health of the passenger.”143

Both in the draft, and in the final version of the Convention, the words “personal” and “mental” have been stricken out of the original phrase “personal bodily or mental injury,” making it incontrovertible that the new Convention does not intend to encompass mental injury as a compensable element in Article 16. This exclusion, ipso facto, would give the courts clear direction as to the way to proceed in an adjudication involving mental injury in the carriage by air of a person, except that it is not clear whether by the exclusion of the word “mental injury,” the Convention also wished to exclude “the impairment of mental health,” which can be imputed as being inclusionary in the working papers of the ICAO Study Groups. It would not be sur-

141 See id. at 313.
142 Convention, supra note 1.
prising if this dichotomy were to create in the future two schools of judicial thought, as indeed existed under the 1929 Warsaw Convention and its Protocols. Under the circumstances, this could not be helped, as the Montreal Convention has seemingly adopted the most prudent approach of leaving the issue open. Thus, there could also well be a line of reasoning, as in the Zicherman case, which would insist on interpreting "bodily injury" as extending to "legally cognizable harm" thereby extending the phrase to mental injury.

IX. CONCLUSION

There is no doubt that medical science has clearly identified mental disturbance. Modern science has debunked the legal attitude which was brought about by the requirement that physical injury is an essential prerequisite of mental injury. It is now believed by medical science that the mental injury that a victim suffers can be extreme. Although it is caused by fear, in most cases it is not mere fright or nervous shock but also an extreme form of neurosis which follows the traumatic event of an accident. Neurosis in its extreme form is a psychogenic disorder following a psychic injury with or without physical harm. It results in considerable impairment of the ability to function in ordinary life. Generally, it is precipitated by a traumatic incident and is solely due to psychological reactions, which make external physical injury a totally unrelated factor.

It is not surprising that, as far back as in 1939, the courts pronounced that "we need the privilege of being careless whether we inflict mental distress on our neighbors." The courts viewed mental injury as no redressable injury. The unfortunate thing is that although in many areas of the law academic opinion and judicial decisions have been symbiotic, the courts did not heed the comments of Prosser, Bohlen, and many others who at an early stage recognized mental injury as an

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144 See J. Mark Hart, Neurosis Following Trauma: A Dark Horse in the Field of Mental Disturbance, 8 CUMB. L. REV. 495 (1997).
145 See id. at 497.
146 Clark v. Associated Retail Credit Men of Washington, D.C., 105 F.2d 62, 64 (D.C. Cir. 1939).
147 See Handbook, supra note 15 at 327.
148 See Francis H. Bohlen, Right to Recover for Injury Resulting from Negligence Without Impact, 41 N.S. AM. L. REG. 141 (1902).
149 See Herbert F. Goodrich, Emotional Disturbance as Legal Damage, 20 Mich. L. Rev. 497 (1922); Fowler v. Harper & Mary Coate McNeely, A Re-Examination of the Basis for Liability for Emotional Distress, 1938 Wis. L. REV. 426 (1938); Calvert Ma-
independent injury which infringes the interest of peace of mind. The only conclusion that can be reached is that the courts have not taken the trouble to seek a definition for mental injury and this had made their treatment of the injury misguided and often erroneous. As pointed out earlier, a minority of jurisdictions have, notwithstanding this general attitude, been courageous enough to say that it is a definite and identifiable injury.

The courts should primarily consider the meaning and purpose of the law when dealing with mental injury and accident liability. To say that it is the business of the law to remedy wrongs that deserve it\(^\text{150}\) is a legal platitude. If the injury suffered by a plaintiff is proved by connecting it to an accident, there is no doubt that the injury is a wrong that needs correction by way of awarding damages to the plaintiff.

There is little room for doubt that most common law courts would readily regard Post Traumatic Stress Disorder (PTSD), which is a relatively new phenomenon (earlier referred to by the medical profession as whiplash injuries), as a legally cognizable harm. PTSD excludes mental injury caused as a result of a person's death by natural causes, such as witnessing the death of a family member under natural circumstances. It includes mental injury or distress caused by witnessing sudden events such as accidents, natural disasters, and instances of armed combat. Typical symptoms of PTSD are recurrent and persistent experiencing of an event in question; exclusion of the outside world when experiencing such recurrences of events in one's mind; avoidance of circumstances needing change; and increased discombobulation and disturbance of mind, resulting in such experiences as lack of sleep and temper tantrums.\(^\text{151}\) The facta probanda, or elements of proof needed to establish PTSD, are in an aircraft accident: (1) the fact that the claimant is suffering from PTSD, (2) such PTSD has been brought about by shock caused by experiencing the event of an accident or other incident calculated to induce such a psychiatric disorder, and (3) the close proximity of the claimant to the accident site. The issue as to whether the courts would associate PTSD with bodily injury as envisioned in the present Warsaw structure or even the

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new regime reflected in the Convention proposed by ICAO would largely depend on the extent to which courts would be ready to embrace the compelling scientific findings with regard to mental distress and its application within the term "bodily injury."

In the United States, torts became a distinct area of the law only in the late nineteenth century. It has been regarded as a flexible discipline where rigid distinctions are impossible to make. Inflexible principles and conservatism have no place in the rapidly evolving tort law in America.\textsuperscript{152} One writer\textsuperscript{153} has aptly commented that due to this progressive evolution of tort law, the common law in time to come would entertain mental distress actions freely. The immunities given to the injurer under fault liability would gradually disappear. The reason for this is quite clear. In a civil wrong such as a tort, the law now seeks to correct a wrong rather than punish a wrongdoer. for this purpose there is no need to depend on fault liability as the sole criterion of deciding an action in mental distress. The only thing necessary is to determine that the victim is free of fault and that the defendant was responsible in some way for the injury caused. The law itself on this matter should be based heavily on social welfare. It is inevitable that eventually the courts will follow this trend, taking into account social policy and the interests of society as a whole, and compensate injury, whether mental or physical, in an appropriate manner.

\textsuperscript{152} N. Green, \textit{Proximate and Remote Cause} (in essays) at 1.
