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THE CRASH OF DELTA FLIGHT 191: ARE THE NIGHTMARES COMPENSABLE?

Robin Perlman

The ride got rougher and rougher. It seemed like there was something on top of the plane, pushing it to the ground. The pilot tried to pull out of it. The speed of the engines increased. We started rocking back and forth. Then we were tossed all around. I saw an orange streak coming toward me on the left side of the floor. I thought we were going to explode. At that point, I said, 'well, it's all over.'

On its final descent into Dallas/Fort Worth ("D/FW") airport on Friday, August 2, 1985, at 6:05 p.m., Delta Airline Flight 191 emerged through a sky that had become suddenly darkened by an unexpected storm. The wide-bodied Lockheed L-1011 carrying 162 people plunged abruptly downward short of runway 17. The plane dipped its left wing, skidded over rush-hour traffic on State Highway 114, bounced, slid into a water-storage tank and burst into a large orange ball of flames. The crash was the first major air crash at D/FW airport, the worst in Texas history, and the fourth worst aviation

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1 "Like A Wall of Napalm," TIME, Aug. 12, 1985, at 18 [hereinafter cited as TIME].
2 Id. Flight 191 was making an intermediate stop at Dallas/Fort Worth airport on its flight from Ft. Lauderdale to Los Angeles. Id.
5 See id. at col. 4.
6 NEWSWEEK, supra note 3, at 30.
accident in the United States. Miraculously, thirty-one survivors either walked away from the wreckage or were carried out of the debris and taken to area hospitals. As some family members and friends gathered at the hospitals, others huddled in nearby hotel rooms or coffee shops to await news of the identification of their loved ones. The survivors and even some bystanders experienced emotions of terror, panic, frustration, and guilt generated by a tragedy that brought man face to face with his own mortality.

The crash of Flight 191 has, as expected, generated numerous lawsuits by decedents' estates, survivors, and bystanders. Some of the decedents and survivors and many of the bystanders are Texas residents and will therefore file suit in Texas. The lawsuits in Texas that have been or may be filed can be categorized according to the status of the plaintiffs. First, on behalf of the decedents, actions may be brought under the Texas Wrongful Death Act and the Texas Survival Statute. Second, the survi-

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8 TIME, supra note 1, at 18. The majority of the survivors were seated in the plane's tail section which broke off on impact. NEWSWEEK, supra note 3, at 30. To date, 5 of the 31 survivors have died from injuries caused by the crash. The death total stands at 137. One person remains in a rehabilitation center.
12 TEX. REV. CIV. STAT. ANN. art. 4671 (Vernon Supp. 1941-85). This act states "[w]hen an injury causing the death of any person, occurring either within or without this state, is caused by the wrongful act, [or] neglect . . . of another person, . . . [or] corporation . . . , such persons . . . shall be liable in damages for the injuries causing such death." Id. The wrongful death claim "may be brought by the surviving husband, wife, children, and parents of the person whose death has been caused. . . ." TEX. REV. CIV. STAT. ANN. art. 4675 (Vernon 1952).

Although an analysis of a wrongful death cause of action is beyond the scope of this Comment, the statutorily defined plaintiffs from Delta 191 may be able to recover under the statute. However, it is unclear what will be recovered and by whom. Until recently the Texas rule was that a plaintiff could only recover for the pecuniary loss as a result of the death. See March v. Walker, 48 Tex. 372, 375
vors may have a cause of action for their actual damages including pain and suffering.¹⁴ Third, witnesses and third parties may attempt to recover damages for negligent infliction of emotional distress.¹⁵

This Comment will focus on the causes of action available in Texas which may allow survivors and witnesses of the Delta crash to recover damages for emotional distress. It will begin with a review of Texas history and development of negligent infliction of emotional distress.¹⁶ The concept of emotional damage will be analyzed by examining specific types of air crash cases in various jurisdictions.¹⁷ This will be followed by a review of the history and development of pain and suffering damages in Texas.¹⁸ The next section relates emotional damages to air crash cases in other jurisdictions.¹⁹ Finally, this Comment will examine facts and statements made about the

(1877). However, the Texas Supreme Court in Sanchez v. Schindler, 651 S.W.2d 249, 251 (Tex. 1983) allowed a mother to recover for loss of society and companionship and damages for mental anguish from the wrongful death of her minor child.

The courts are split on whether Sanchez extended the right to recover for loss of companionship and mental anguish to survivors other than parents of minor children. See Piper Aircraft Corp. v. Yowell, 674 S.W.2d 447, 462 (Tex. App.—Fort Worth 1984, writ granted) (court concluded that Sanchez limited recovery of loss of companionship to parents of minor children); City of Houston v. Stoddard, 675 S.W.2d 280, 285 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.) (court followed Sanchez concurrence holding a parent could recover for mental anguish resulting from death of adult daughter); Missouri Pacific R.R. v. Dawson, 662 S.W.2d 740, 742 (Tex. App.—Corpus Christi 1983, writ ref’d n.r.e.) (court expanded Sanchez by holding that surviving spouse could recover loss of consortium damages when death results).

¹⁴ See infra notes 171-249 and accompanying text.
¹⁵ See infra notes 21-170 and accompanying text.
¹⁶ See infra notes 21-127 and accompanying text.
¹⁷ See infra notes 110-170 and accompanying text.
¹⁸ See infra notes 171-206 and accompanying text.
¹⁹ See infra notes 207-249 and accompanying text.
Delta Flight 191 crash and consider the possible emotional damage recoveries that may exist.20

I. Bystander's Action for Negligent Infliction of Emotional Distress

A. Texas

1. Pre-Dillon v. Legg

The first Texas decisions allowing recovery for negligent infliction of emotional distress required that the plaintiff actually be "impacted" by the defendant's actions.21 Subsequent to those decisions the courts moved away from the strict "impact" test and adopted a pure negligence approach based upon foreseeability.22 The courts required that the plaintiff simply suffer a physical injury23 After adopting this liberal test for awarding mental anguish damages, the Texas courts returned to a stricter approach based upon the zone of danger test.24 Under the zone of danger test, initially proclaimed as more objective than previous tests, a plaintiff could recover for emotional damages only if he were in the zone of danger of defendant's negligent conduct.25 Texas courts are currently split as to whether the zone of danger test requires the plaintiff to exhibit physical manifestations to verify his emotional distress.26

The question of a bystander's right of recovery in Texas for damages caused by the negligent infliction of emo-

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20 See infra notes 250-311 and accompanying text.
23 PROSSER & KEETON, supra note 21, at 364. An example of physical injury would be a pregnant woman suffering a miscarriage as a result of an emotional trauma caused by viewing a negligent act by defendant.
24 See infra notes 42-60 and accompanying text.
25 PROSSER & KEETON, supra note 21, at 365.
26 See infra notes 89-109 and accompanying text.
tional distress has been robustly debated.\textsuperscript{27} The principle of negligent infliction of emotional distress allows a bystander to recover for emotional damages from viewing the negligent infliction of physical harm to another.\textsuperscript{28} The primary reasons for limiting the recovery of these damages are: 1) the difficulty of allowing recovery for harm that is often temporary; 2) the possibility that the claims will be falsified or imagined; and 3) the perceived unfairness of imposing increased financial burdens upon a merely negligent defendant, whose conduct appears remote from the wrongful act.\textsuperscript{29}

In \textit{Hill v. Kimball},\textsuperscript{30} the Texas Supreme Court adopted the cause of action for negligent infliction of emotional distress but held that a bystander need not prove "impact" in order to recover.\textsuperscript{31} To limit the defendant's liability and the chance for feigned claims, the court stated that in the absence of impact the mental anguish must result in physical injury.\textsuperscript{32} In \textit{Hill}, the plaintiff brought suit

\begin{footnotes}
\footnotetext{27}{See \textit{Prosser \\& Keeton}, \textit{supra} note 21, at 362-65.}
\footnotetext{28}{\textit{Id.} at 361-62.}
\footnotetext{29}{\textit{Id.} at 360-61.}
\footnotetext{30}{76 Tex. 210, 13 S.W. 59 (1890).}
\footnotetext{31}{\textit{Id.} In order to limit recovery for bystanders, courts in other jurisdictions originally required a showing of some "impact" upon the plaintiff as a precondition to recovering damages. For a discussion of the impact rule, see Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896) (a woman frightened by a horse car which stopped with the woman between two horses' heads was not allowed recovery for her fright and subsequent miscarriage because there was "no immediate personal injury"). The plaintiff had to prove impact by showing that the defendant's conduct set some force in motion which came in contact with the plaintiff's person. \textit{E.g.}, Consolidated Traction Co. v. Lambertson, 59 N.J.L. 277, 36 A. 100 (1896) (passenger in wagon recovered emotional distress damages from a negligent defendant who ran a traction company car into the wagon even though passenger was not physically harmed by the impact of the car into the wagon). \textit{See also Prosser}, \textit{The Law of Torts} § 54 at 330-33 (5th ed. 1971) [hereinafter cited as \textit{Prosser}]. The "impact" requirement afforded a guarantee that the mental disturbance was genuine and legitimate. \textit{Prosser}, at 331. Other jurisdictions eventually decided that if the emotional damage was caused by an unreasonable and foreseeable act by the defendant without impact, the plaintiff should also be able to recover. \textit{Prosser \\& Keeton}, \textit{supra} note 21, at 364-65.}
\footnotetext{32}{\textit{Hill}, 13 S.W. at 59. This physical injury rule was concisely stated by a Massachusetts Court in Sullivan v. Old Colony St. Ry. Co., 197 Mass. 512, 516, 83 N.E. 1091, 1092 (1908): "The mental suffering, for which damages can be recovered, therefore, are limited to those which result to the person injured as the necessary}
for damages resulting from her miscarriage that occurred after she witnessed her landlord’s boisterous and violent assault of two men. The Texas Supreme Court upheld plaintiff’s cause of action despite the absence of impact because the plaintiff’s miscarriage was a “physical injury” caused by the landlord’s shouting. To prevent fabricated claims the court stated that no action would exist when only fright occurred without resulting physical injury.

The Texas Supreme Court affirmed Hill in Gulf, Colorado & Santa Fe Railway v. Hayter. The court allowed recovery for a plaintiff who suffered mental shock produced by fright when the train on which he was a passenger collided with another train. The court stated that recovery did not require “impact,” but added that physical injuries must result from the mental shock. The court also concluded that an injured party is entitled to recover only if the traditional negligence elements are present; “the act. . . is the proximate cause of the injury, [which] . . . ought . . . to have been forseen as a natural and probable consequence thereof.” By relying on negligence principles, the court refuted the criticism that allowing recovery causes multiple damage suits and intolerable litigation. The court concluded that physical injury can be a natural consequence of a mental emotion and that

or natural consequence of the physical injury. But sentiments of grief, sorrow, and mourning, which are aroused by extraneous causes, thoughts, or reflections are excluded.”

93 Tex. 239, 54 S.W. 944 (1900).

Although the court did not explicitly rely on it, it must be noted that he was a “direct” plaintiff. In other words, the negligence is said to be directed at him. See Note, Texas Bystander Recovery: In the Aftermath of Sanchez v. Schindler, 35 Baylor L. Rev. 883, 884 n.21 (1983).
such injuries can be anticipated.  

In an attempt to achieve a more objective standard for recognizing claims of negligent infliction of emotional distress and still limit recovery, some courts have replaced the impact and injury rules with the zone of danger rule. Under this rule, a bystander who reasonably fears for his own safety while witnessing the injuries of a third party may recover damages for mental anguish if he is in a position of potential bodily injury because of the defendant's negligence. In *Houston Electric Co. v. Dorsett*, the Texas Supreme Court held that plaintiff's lawsuit had been im-

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41 Id. The court stated "in the light of modern science — nay, in the light of common knowledge — can a court say . . . that a strong mental emotion may not produce in the subject bodily or mental injury?" Id.

Early Texas courts recognized two exceptions to the principle that a plaintiff must be physically injured at the time of mental distress in order to recover for damages for negligent infliction of emotional distress. See *Prosser, supra* note 22, at 329. The first exception involves negligent transmission of a message by telegraph companies. See, e.g., *Stuart v. Western Union Tel. Co.*, 66 Tex. 580 (1885) (failure to deliver message of declining health of brother); *Relle v. Western Union Tel. Co.*, 55 Tex 308 (1881) (failure to deliver within reasonable time a message of mother's death). The second exception involves mishandling of corpses. See, e.g., *Missouri, Ky. & Tenn. Ry. Co. v. Hawkins*, 109 S.W. 221 (Tex. Civ. App. 1908, writ ref'd) (defendant railroad negligently and roughly mishandled box of two month old corpse while in vicinity of parents); *Hale v. Bonner*, 82 Tex. 33, 17 S.W. 605 (1891) (railroad failed to promptly deliver the body of deceased husband). These special circumstances insure that claims are not feigned. The obvious likelihood of genuine and serious mental anguish arising in these situations allows Texas courts to award damages without a showing of physical injury. See, e.g., *Relle v. Western Union Tel. Co.*, 55 Tex. 308 (1881) (failure to deliver within reasonable time a message of mother's death).

42 See, e.g., *Whetham v. Bismark Hosp.*, 197 N.W.2d 678 (N.D. 1972) (mother denied recovery for severe mental and emotional injury when hospital employee dropped her newborn infant on floor because mother was not within zone of danger); *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.W.2d 419, 301 N.Y.S.2d 554 (1969) (mother, who heard screech of automobile brakes and saw injured child, was denied recovery because she was not within the zone of danger herself); *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), overruled, *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (applying zone of danger rule to preclude a mother's claim for emotional distress suffered as a result of witnessing her child being crushed to death).


44 145 Tex. 95, 194 S.W.2d 546 (1946).
properly dismissed by the trial court and that the petition did state a cause of action. Plaintiff claimed that she suffered extreme nervousness, severe headaches, lapse of memory, and brain deterioration resulting from the negligent operation of a bus driven by the defendant’s employee. The bus narrowly missed striking the plaintiff but it did not come into contact with her body. The defendant excepted to the plaintiff’s claims in her petition because the plaintiff was not hit by the bus, the damages were too remote and speculative, the negligence was not the proximate cause of the damage and the claim rested solely upon the grounds of fright and shock. Because the supreme court remanded the case to the trial court, it failed to expressly adopt the zone of danger rule. Nonetheless, the supreme court did recognize that the plaintiff met the requirements for applying the zone of danger rule in this case.

Even though the Texas Supreme Court failed to expressly adopt the zone of danger rule in *Houston Electric*, a lower court chose to adopt the rule. In *H.E. Butt Grocery Co. v. Perez*, an elephant escaped from the defendant’s grocery store parking lot. The plaintiff’s mother, hearing the screams next door and thinking her children were in trouble, ran outside where the elephant charged past her. The San Antonio Court of Appeals stated that plaintiff was not only concerned for her children, but, because the elephant passed in close proximity to her, she was also placed in apprehension of suffering injury herself. Additionally, the court stated that the plaintiff’s resulting miscarriage from the fright was reasonably foreseeable because of defendant’s negligence in not se-

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45 Id. at 548.
46 Id. at 546.
47 Id. at 547.
49 Id. at 578.
50 Id. at 581.
51 Id.
curing the elephant. Consequently, plaintiff was in the zone of danger, and her fear produced a physical injury.

Awarding damages to witnesses of an event that injures or kills another person has troubled Texas courts because the plaintiff’s injury is often unforeseeable by the defendant. The Texas Supreme Court attempted to alleviate this problem in *Kaufman v. Miller*. In *Kaufman*, the plaintiff was in a minor car accident with defendant and was afraid that the defendant or her passengers were injured. The plaintiff was later diagnosed as experiencing a “conversion reaction” which was triggered by the accident. The court again recognized the zone of danger theory but applied a negligence analysis. The court held that where the defendant cannot reasonably anticipate any harm, she owes no duty to the plaintiff. The court denied this plaintiff recovery because he suffered mental shock due to an injury or threatened injury to a third person (the defendant). Plaintiff failed to show fear of his own safety as required by the zone of danger rule. The court then considered the two elements of proximate cause required to prove negligence, cause in fact and foreseeability. The court stated that “but for” the accident, the plaintiff would not have been injured. Therefore, cause in fact was established. However, the court denied recovery since

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52 Id.
53 Id.
55 414 S.W.2d 164 (Tex. 1967). The court noted, liability of a defendant to all bystanders shocked by an accident and to relatives and friends upset by the accident is unjustified. Id. at 169 (citing PROSSER, THE LAW OF TORTS, 353-54 (3rd ed. 1964));

It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one man were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as his friends.
56 *Kaufman*, 414 S.W.2d at 166.
57 Id. at 167-70.
58 Id. at 170.
59 Id. at 168.
the plaintiff's neurosis was unforeseeable.\textsuperscript{60}

2. \textit{Dillon v. Legg}

The recovery limitations for negligent infliction of mental distress\textsuperscript{61} remained in effect in Texas and other states until the California Supreme Court decided \textit{Dillon v. Legg} in 1968.\textsuperscript{62} In \textit{Dillon}, the court abandoned the zone of danger rule previously applied by California courts in mental injury cases.\textsuperscript{63} Erin Dillon, the infant daughter of Mrs. Margery Dillon, was struck and killed by a negligently driven automobile.\textsuperscript{64} Mrs. Dillon and her other daughter witnessed the tragic accident.\textsuperscript{65} They filed causes of action alleging that the defendant driver's negligence caused "great emotional disturbance and shock and injury to [the] nervous system . . . [as well as] great physical and mental pain and suffering."\textsuperscript{66} The trial court allowed recovery for the decedent's sister only because she was in the zone of danger while Mrs. Dillon was not.\textsuperscript{67} Noting the awkward result, the California Supreme Court abandoned the zone of danger rule.\textsuperscript{68} In its place the court adopted a "pure" negligence approach based on foreseeability, and reversed the trial court as to Mrs. Dil-
The court established a three-part test for determining the foreseeability of a bystander's injury: 1) the plaintiff must be located near the scene of the accident, as contrasted with one who is at a distance away from it; 2) there must be a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident as contrasted with learning of the accident from others after its occurrence; 3) the plaintiff and victim must be closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship. This decision by the California Supreme Court was the first attempt to provide guidelines for foreseeability in negligent infliction of emotional distress cases. Other states have adopted or modified the Dillon test as an analytical framework for emotional distress claims.

3. The Aftermath of Dillon v. Legg

Texas courts resisted adoption of the Dillon rationale even when the ideal fact situation for application of the Dillon principle was presented to the Houston Court of Appeals in 1974. In Dave Snelling Lincoln-Mercury v. Simon, the plaintiff and her son were passengers in a car when, because of a defective door latch, plaintiff witnessed her son fall out of the car and on to the highway. After he had fallen out of the vehicle, another car struck him. The court allowed recovery based on the principles of foreseeability. The court concluded that the de-

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69 Id. at 916-25.
70 Id. at 920. It is important to note that Mrs. Dillon suffered consequent bodily illness as a result of the shock. Id. Proving bodily injury was the rule in California until Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980); see infra note 89 for discussion of the court's decision in Molien.
73 Id. at 924.
74 Id. at 926.
fendant could have reasonably foreseen that by not properly fixing the car door lock, a small child or anyone might be injured if the lock should malfunction resulting in foreseeable emotional distress. Although the California decision of Dillon had been decided by the time of this case, the court did not need to rely on it, because the same result could be reached using the zone of danger rule. The Houston Court of Civil Appeals observed that some Texas state courts of appeals had recognized the zone of danger rule, but that the Texas Supreme Court had not. The court of appeals applied negligence principles instead of the zone of danger rule to analyze the case. The court stated, however, that although they did not apply the zone of danger rule, its conditions were still met. In dicta, the court artificially stretched the meaning of the zone of danger to allow recovery when plaintiff did not fear for her own safety, as the rule prescribes, but feared only for the safety of her son.

The previously cited cases exemplify the courts’ hap hazard approach to bystanders’ claims for mental anguish. The artificial distinctions used by Texas courts have prevented a systematic method of recovery for these plaintiffs. In 1978, however, the Texarkana Court of Civil Appeals in Landreth v. Reed ignored the past limitations of the zone of danger rule and determined that a bystander’s recovery for mental anguish should be determined solely upon principles of negligence and proximate cause based upon reasonable foreseeability. In so doing, the court adopted the factors set forth in Dillon.

In Landreth, fourteen month old Kecia Reed fell into a

75 Id.
76 Id. at 925-26.
77 Id. at 925.
78 Id.
79 Id. at 926.
81 Id. at 489.
82 Id. See supra notes 62-70 and accompanying text for a discussion of the Dillon opinion and the factors enunciated as the basis for the opinion.
swimming pool at a day care center. Her sister, Melissa Reed, witnessed unsuccessful efforts to resuscitate Kecia. The defendant, the owner of the day care center, challenged the mental anguish claim on the basis that Melissa Reed was not in the zone of danger and did not suffer an impact. The court, however, chose to "disregard the artificial distinctions" created by these rules and instead based its decision on the foreseeability of Melissa Reed's injuries as applied in the traditional concept described in Dillon. First, the court concluded that Melissa must have been close to the scene of the accident since the day care center was a relatively small area and Melissa was near the pool. Second, although she may not have been in the pool with Kecia, Melissa received direct emotional impact from sensory and contemporaneous observance of the drowning because she saw unsuccessful attempts to revive Kecia. The third Dillon factor, a close relationship between plaintiff and victim, was also satisfied since Kecia and Melissa were sisters. Consequently, with all three Dillon factors being satisfied, the court found defendant negligent and allowed Melissa to recover for physical injuries resulting from the mental anguish she sustained.

Even after the adoption of Dillon by the court of appeals decision in Landreth, several uncertainties remain concerning the scope and applicability of the Dillon factors. The most important uncertainty today is whether the Texas Supreme Court will allow recovery for negligent infliction of emotional distress without proving some physical manifestation resulting from the emotional harm. The un-

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83 Landreth, 570 S.W.2d at 488.
84 Id. at 489.
85 Id.
86 Id. at 489-90. The court stated that "actual observance of the accident is not required if there is otherwise an experiential perception of it, as distinguished from learning of it from others after its occurrence." Id. at 490.
87 Such sibling relationships generally are considered sufficiently close for bystander recovery purposes. See id. at 490.
88 Id. at 489-90.
89 In Bedgood v. Madalin, 600 S.W.2d 773, 775 (Tex. 1980), the Texas
certainty is caused by the court's decision in *Sanchez v. Schindler.* The plaintiff mother in *Sanchez* observed her son's bloody legs through the hospital door after he was in a motorcycle accident. The court allowed recovery in the wrongful death action for mental anguish, overruling prior law that a parent could recover only for the pecuniary loss of a child. Mrs. Sanchez also suffered traumatic depressive neurosis, frequent neck and shoulder pains and headaches as a consequence of her emotional distress. Because Mrs. Sanchez suffered physical ailments as a result of the emotional harm, the Texas Supreme Court did not address the issue of whether she could recover damages without proof of the physical manifestation.

Supreme Court avoided discussion of a potential physical manifestation issue by concluding that plaintiffs failed to plead their emotional distress claim properly at trial. The court of appeals had upheld a jury award for mental anguish after finding, in effect, an adequate trial amendment to the pleadings. *Id.* See Bedgood v. Madalin, 589 S.W.2d 797, 801-02 (Tex. Civ. App.—Corpus Christi 1979), aff'd in part, rev'd in part, 600 S.W.2d 773 (Tex. 1980). In *Bedgood,* plaintiff-father heard defendant's vehicle, then a scream from his son and a "thud like a watermelon being dropped from a great height." *Id.* at 802. The father rushed to his front yard to find his son lying on the curb bleeding. *Id.* The court of appeals denied mental anguish recovery to plaintiff-mother who had been out shopping at the time of the accident; but allowed mental anguish recovery to the father. *Id.* at 803. The only evidence of physical injury to father was that he suffered incapacitating depression following the accident. *Id.* The court of appeals did not elaborate on whether the father's mental anguish claim might have succeeded absent the evidence of depression.

For a discussion of a California case in which a court allowed recovery for mental anguish without physical manifestation, see Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (applying Dillon factors and allowing plaintiff to recover for negligent infliction of emotional distress, even without proof of physical illness, where defendants incorrectly diagnosed plaintiff's wife as having syphilus).

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90 651 S.W.2d 249 (Tex. 1983).
91 *Id.* at 250.
92 *Id.* at 251. Traditionally, the recovery for pecuniary loss of a child was minimal so the court rejected the limitation. *Id.* Although this cause of action is for wrongful death rather than negligent infliction of emotional distress, the requested damages for mental anguish are the same. However, since plaintiff was capable of bringing the wrongful death claim instead of an independent tort claim for mental anguish, she did so in order to maximize her potential damage recovery.
93 *Id.* at 253.
Subsequent analyses of Sanchez by several Texas Court of Appeals decisions create a split in the courts as to whether the Texas Supreme Court will require manifestations of physical injury. The Dallas Court of Appeals in Air Florida, Inc. v. Zondler\textsuperscript{94} held that in a simple negligence case, "proof of accompanying physical injury is a necessary predicate to recover damages for mental anguish."\textsuperscript{95} Zondler's wife brought a wrongful death action against Air Florida after its jetliner crashed in Washington D.C. killing 78 passengers, including Zondler.\textsuperscript{96} The Dallas court first determined that Sanchez did not restrict the recovery of nonpecuniary loss in a wrongful death action for minor decedents.\textsuperscript{97} The court concluded that Sanchez created the possibility of recovery of mental anguish damages as a result of the death of a spouse.\textsuperscript{98} The court, however, then considered whether Sanchez required proof of accompanying physical injury to recover damages for mental anguish. Noting that decisions prior to Sanchez required physical injury, the court of appeals could find nothing in the majority's opinion in Sanchez to indicate a change from former decisions.\textsuperscript{99} The court consequently did not allow recovery for Mrs. Zondler's mental anguish because of her inadequate showing of physical injury.\textsuperscript{100}

To the contrary, the Beaumont Court of Appeals in Baptist Hospital of Southwest Texas, Inc. v. Baber\textsuperscript{101} allowed recovery for mental or emotional trauma despite the lack of depression or secondary reactions manifested physically.\textsuperscript{102} In Baber, decedent's wife filed a medical malprac-

\textsuperscript{94} 683 S.W.2d 769 (Tex. App.—Dallas 1984, no writ).
\textsuperscript{95} Id. at 773.
\textsuperscript{96} Id. at 770. Because the Zondlers were Texas residents, Mrs. Zondler filed the lawsuit in Dallas. Air Florida admitted liability, so the parties tried the case solely on the issue of damages. Id.
\textsuperscript{97} Id. at 771-72.
\textsuperscript{98} Id. at 772.
\textsuperscript{99} Id. at 773.
\textsuperscript{100} Id. at 774.
\textsuperscript{101} 672 S.W.2d 296 (Tex. App.—Beaumont 1984, writ granted). As of the writing of this Comment the Texas Supreme Court has not decided this case.
\textsuperscript{102} Id. at 298-99.
tice action asserting that defendants’ conduct resulted in Mr. Baber’s death. The plaintiff sought damages for mental injuries as a result of the death. The court stated without elaboration that Sanchez authorizes the recovery for mental injuries absent physical manifestation. The Houston Court of Appeals in Missouri Pacific Railroad Co. v. Vlach also held damages for mental anguish are recoverable without proof of physical manifestations. In Vlach, the wife and children of decedent filed a wrongful death action requesting damages for mental anguish. The court of appeals upheld the trial court’s award of mental anguish damages, stating that Sanchez abrogated the requirement of accompanying physical injury to mental anguish.

Another question facing the Texas Supreme Court since the lower court’s adoption of the Dillon factors is the “contemporaneous perception” scenario and whether recovery is allowed in an action for negligent infliction of emotional distress if the bystander is not present at the exact time the injury occurs. In General Motors Corp. v. Grizzle, the plaintiff arrived on the scene a few minutes after a car and truck collision involving her daughter. Plaintiff fainted at the sight of the wreckage and awoke hearing her daughter’s screams. The daughter was then taken to the hospital where plaintiff waited during the surgery.

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103 Id. at 297.
104 Id.
105 Id. at 299. Whether physical manifestations are required for proof of mental anguish was not expressly stated by the majority in Sanchez. However, the dissent in Sanchez stated that the court’s holding was an indirect mandate “that any mental anguish however slight, is compensable.” Sanchez, 651 S.W.2d at 258 (Pope, C.J., dissenting).
106 687 S.W.2d 414 (Tex. App.—Houston [14th Dist.] 1985, no writ).
107 Id. at 297.
108 Id. at 416.
109 Id. at 417.
110 642 S.W.2d 837 (Tex. App.—Waco 1982, writ dism’d).
111 Id. at 844.
112 Id. at 843.
Citing *Landreth* and *Bedgood v. Madalin*, the Waco Court of Appeals allowed the plaintiff to recover for her mental anguish, even though she neither witnessed nor sensorily perceived the actual occurrence of the accident. The court noted that "the triggering of the mental anguish is not from only perceiving a collision, but from the realization of its consequences." *Grizzle* demonstrates the possible ramifications of extending the *Dillon* requirement that a plaintiff receive a direct emotional impact from sensory and contemporaneous perception. *Grizzle* raises the question of how much time can pass before the plaintiff sees the victim, and still recover for contemporaneous perception. Will this factor be extended to the point that one can recover after merely hearing of the accident from someone else? Probably not. The court in *Dillon* specifically excluded that possibility, and the Texas Supreme Court has given no indication in its prior decisions that it would extend a plaintiff's recovery this far.

In a recently reported decision, the Austin Court of Appeals allowed recovery for negligent infliction of emotional distress despite the lack of contemporaneous perception of the injury. In *City of Austin v. Davis*, the plaintiff's son was hospitalized after a motor vehicle accident. Because of the son's disorientation and confusion, the doctors ordered him to be physically restrained or medicated. The plaintiff, Davis, visited his son regularly but on his arrival at the hospital one day, his son was not in the room. While searching with hospital security, Davis found his son's body at the base of a ten-story airshaft. The son had entered the shaft and fallen to his

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113 589 S.W.2d at 797. See *supra* note 89 for a discussion of the court's decision in *Bedgood*.
114 *Grizzle*, 642 S.W.2d at 844.
115 *Id.*
116 See *Landreth*, 570 S.W.2d at 489.
117 693 S.W.2d 31 (Tex. App.—Austin 1985, writ ref'd n.r.e.).
118 *Id.* at 32.
119 *Id.*
120 *Id.*
121 *Id.* at 33.
death.\textsuperscript{122} Davis disclaimed interest in the wrongful death action and won a judgment in the trial court for his own suit for the mental distress and physical injuries he sustained as a bystander to the incident.\textsuperscript{123} Relying on Landreth's factors in determining proximate cause, the court of appeals held that although Davis was not present at the time his son fell to his death and, therefore, did not experience a contemporaneous perception, he could still recover.\textsuperscript{124} The court, citing Grizzle, stated that Davis "was brought so close to the reality of the accident as to render [his] experience an integral part of it," and that Davis experienced sufficient perception to satisfy the requirements of the bystander doctrine.\textsuperscript{125}

Only recently, the Texas Courts of Appeals developed the law for a bystander's independent action for negligent infliction of emotional distress. The Texas Supreme Court has not confronted this issue in a case where this action is the sole action. Therefore, some question exists as to how the supreme court would decide these issues. The supreme court would most likely use the Dillon factors as adopted in Landreth as well as its own additional factors espoused in Kaufman and permit recovery for mental anguish when the plaintiff satisfies these requirements. The supreme court will also probably require that there be only some contemporaneous perception by the plaintiff of the accident allowing plaintiff to recover on discovering the body without prior knowledge of the acci-

\textsuperscript{122} Id.
\textsuperscript{123} Id. This case also shows the distinction between bringing a wrongful death action and a separate cause of action for negligent infliction of emotional distress. \textit{Id.} at 34. The claim for mental anguish damages is only one of the claims of a cause of action under the wrongful death statute.
\textsuperscript{124} Id. at 33-44.
\textsuperscript{125} Id. The court also described the independent tort for negligent infliction of emotional distress. \textit{Id.} at 33. The court stated that Davis, who satisfied the requirements of the bystander doctrine, may bring his own suit and not join other wrongful death beneficiaries. \textit{Id.} at 34. The court stated "[t]his bystander suit is not derivative of the statutory wrongful death action." \textit{Id.} Even before Sanchez, a parent present at the accident could recover for his own emotional injuries even though they would not have been able to recover in a wrongful death action. \textit{Id.} (citing Bedgood, 589 S.W.2d at 797).
Despite some lower court interpretations of Sanchez, the court will probably not require a showing of physical manifestations, recognizing the absurdity in the requirement as expressed by Justice Guillot's dissent in Zondler. Justice Guillot descriptively stated that had Mrs. Zondler fallen to her knees, bruising them, when hearing of her husband's death then she could recover fully for her mental anguish. However, since she did not suffer such a physical "injury," she was unable to recover.

B. Application of Bystander Rules in Aircrash Cases

The principles governing recovery for negligent infliction of emotional distress must be applied to the special circumstances arising in airplane crash litigation in jurisdictions other than Texas. Texas courts are most likely to look to other states for guidance because of the lack of Texas cases involving commercial air crashes. This section will discuss some unique characteristics of aviation crashes that make them different from other situations, including the fact that commercial airplane crashes involve an extreme amount of publicity. In addition, family members are often uncertain whether their loved ones are on the flight. The injuries resulting from air crashes are especially severe because of the frequency of burns and dismemberments. In addition, plane crashes usually generate complex litigation because of the many deaths that are usually involved.

Airplane crash litigation presents unique questions of liability for negligently inflicted emotional distress. Courts considering claims for emotional distress arising from air crashes generally apply a restrictive foreseeability test. The concern for unlimited liability for the multitude of injuries that could fall within reasonable foreseeability is prevalent throughout these cases. First, airplane crash litigation is unique because there is the uncertainty

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120 See Landreth, 570 S.W.2d at 490.
127 Zondler, 683 S.W.2d at 776 (Guillot, J., dissenting).
128 See infra notes 137-162 and accompanying text.
arising after the crash regarding exactly who was on the flight. Initially, records are incomplete because there are passengers who boarded the flight at the last minute. Therefore, when the plane crashes, officials need time to gather information in order to announce a complete and accurate list of passengers. The case of *Wood v. United Air Lines, Inc.*\(^{129}\) presented the question of airline liability when inaccurate information about the manifest list was given to families of those on board.\(^{130}\) *Wood* arose from the 1965 United Airlines accident in which 43 of the 85 passengers died when the plane crashed while landing in Salt Lake City, Utah.\(^{131}\) The plaintiffs, heirs of passenger Betty Wood, brought suit claiming damages for the emotional distress sustained when a United Airlines' representative told them that Mrs. Wood was not on the plane, when in fact she was.\(^{132}\) Plaintiffs claimed that these statements were a direct cause of their emotional distress.\(^{133}\)

Although the Tenth Circuit Court of Appeals recognized that claims for mental anguish are sometimes recoverable, the court stated that “damages for [any] mental pain and suffering, where there has been no physical injury, are allowed only in extreme cases.”\(^{134}\) In reviewing Utah law, the court concluded that a plaintiff can not receive this type of recovery when there is only a negligent

\(^{129}\) 404 F.2d 162 (10th Cir. 1968).

\(^{130}\) *Id.* at 163-64. The manifest list is the airline's list of passengers who have supposedly checked in and are on the flight.

\(^{131}\) *Id.* at 163.

\(^{132}\) *Id.* at 163-64. The plaintiffs recovered substantially under the wrongful death claims asserted. *Id.* at 163. However, the questions considered by the appellate court concerned claims asserted against defendant with respect to acts occurring subsequent to the accident and death of Mrs. Wood. *Id.* The flight manifest list did not include Mrs. Wood's name and United representative deliberately maintained to the plaintiffs that Mrs. Wood was not on board and therefore not injured. *Id.* at 163, 166. Plaintiffs also claim emotional distress because of the delay in time it took defendant to identify the body and turn it over to plaintiffs. *Id.* at 164. The court held that United Air Lines acted within its authority and had permission from the Civil Aeronautics Board for all of its actions. *Id.* at 165.

\(^{133}\) *Id.* at 164.

\(^{134}\) *Id.* at 165 (citing United States v. Hatahley, 257 F.2d 920, 925 (10th Cir.), cert. denied, 358 U.S. 899 (1958)).
infliction of emotional distress by defendant.\textsuperscript{135} The court stated that this recovery will be allowed when there is an\textit{intentional} act by defendant or when defendant's conduct is grossly outrageous.\textsuperscript{136}

Plane crashes also cause widespread immediate publicity. Often, family members of those on the flight hear of the crash and probable death of their loved ones through the media before being officially notified. After hearing through a third party source (television, radio or another person) that a family member died as a result of an air crash, these family member plaintiffs attempt to recover damages for infliction of emotional distress. In Saxton v. McDonnell Douglas Aircraft Co.,\textsuperscript{137} the plaintiff claimed that publicity was a cause of the negligent infliction of emotional distress and consequently a cause of suicide. The publicity concerned an air crash that occurred near Paris, France, on March 3, 1974, when a Turkish Airlines DC-10 crashed killing 346 persons. The case involved a damage claim for the mental injuries suffered by Betty Kween, the mother of a deceased passenger. Mrs. Kween allegedly suffered "shock, depression, melancholia and uncontrollable and irresistible [sic] urge to take her life" as a result of the tremendous publicity that followed the crash.\textsuperscript{138} Approximately two years after the crash, Betty Kween committed suicide.\textsuperscript{139}

The personal representatives of Betty Kween's estate claimed Mrs. Kween's death was foreseeable by the defendants, the manufacturers of the plane.\textsuperscript{140} The Federal District Court for the Central District of California, applying California law, noted the foreseeability requirements

\textsuperscript{135} Wood, 404 F.2d at 165.

\textsuperscript{136} Id. In dicta, the court stated "a reckless error made conversely, that Mrs. Wood was on board when she was not, might well have been actionable" (emphasis by court). \textit{Id.} at 166.


\textsuperscript{138} \textit{Id.} at 1049.

\textsuperscript{139} \textit{Id.} at 1048.

\textsuperscript{140} \textit{Id.} at 1049. The plaintiffs claimed that "her death was foreseeable and within the risk of harm and 'zone of physical, emotional and psychological impact,'" \textit{Id.}
The court held that application of the foreseeability requirements excluded recovery on these facts as "remote and unexpected." The court based this decision largely on the policy against burdensome and unlimited liability. The court was additionally concerned that all manufacturers of even a single part of an airplane would have to "foresee that every single person throughout the world who flew on an airplane might have a relative of unstable mental capacity." Two other cases have denied recovery for negligent infliction of emotional distress. These cases are based on unforeseeability because knowledge of the crash came from a third party source. In *Cohen v. McDonnell Douglas Corp.*, plaintiff Manuel Cohen's claim arose as a result of an American Airlines crash near Chicago, Illinois, on May 25, 1979. The plaintiff learned about the crash while listening to the radio. After discovering that his brother, Ira, died on the flight, he called their mother, Nellie Cohen. Mrs. Cohen shortly thereafter suffered painful heart attacks and died two days later. Plaintiff claimed that American Airlines and the manufacturer of the plane were primarily liable for Nellie Cohen's mental distress and resulting death. Relying on the foreseeability requirements established in *Dillon*, the court denied recovery because Mrs. Cohen's injury did not result from a sensory perception of the injuries caused to her son or from the injury producing event. The court concluded that because these requirements were not met, liability could not be imposed under the doctrine of negligent in-
liction of emotional distress.\textsuperscript{149} In \textit{Saunders v. Air Florida, Inc.},\textsuperscript{150} Mr. Saunders brought suit claiming that he witnessed injuries sustained by his son, Michael Saunders, as shown in a television report of the January 13, 1982, Air Florida crash in Washington D.C.\textsuperscript{151} Michael Saunders was driving on the bridge when the airplane struck the bridge injuring many motorists including Saunders. The District of Columbia Court considered the case under both District of Columbia and California laws. The court first held that "there is no cause of action in the District of Columbia for negligent infliction of emotional shock occurring as the result of watching another's injury, even if such grief ultimately manifests itself physically in the plaintiff."\textsuperscript{152} Thus, the court interpreted District of Columbia law as permitting no recovery for a bystander not directly injured in the accident. The court then looked at this cause of action under California law and applied the \textit{Dillon} factors for foreseeability.\textsuperscript{153} The court concluded that by watching filmings of the crash, the father probably only saw filming of the aftermath of the crash. However, if it was a contemporaneous filming it was highly unlikely that he could discern his son's car.\textsuperscript{154} He was therefore only a "passive spectator" and could not recover because there was no perception of the injury or shock contemporaneous with the injury.\textsuperscript{155} The court concluded that the harms alleged by plaintiff were "not reasonably foresee-

\begin{itemize}
\item \textsuperscript{149} \textit{Id.} at 588.
\item \textsuperscript{150} 558 F. Supp. 1233 (D.D.C. 1983).
\item \textsuperscript{151} \textit{Id.} at 1234. Plaintiff brought suit under the D.C. Wrongful Death Statute as well as this second claim for negligent infliction of emotional distress. \textit{Id.} Plaintiff saw reports of the crash on television. Plaintiff alleges that after seeing the airplane strike his son's car on the bridge he sustained, "great emotional disturbance, shock, and injury to his nervous system which has caused, continued to cause, and will cause him great physical and mental pain." \textit{Id.} at 1235.
\item \textsuperscript{152} \textit{Id.} at 1236. The court additionally stated that "where a cause of action for emotional distress has been allowed in the District of Columbia, it is the emotional distress which arises from the physical injury-causing impact, rather than the physical injury which arises from the emotional harm." \textit{Id.}
\item \textsuperscript{153} \textit{Id.} at 1237.
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{155} \textit{Id.}
able to Air Florida and much too remote and unexpected to be actionable."156

Another unusual foreseeability case arose in which the plaintiff did not actually see the accident. The claim resulted from a crash between two Boeing 747's in the Canary Islands on March 27, 1977.157 Martha Burke, the twin sister of a crash victim, filed suit for her own physical and emotional injuries allegedly sustained while in her home in California and engaged in "extrasensory empathy" at the exact time of her twin's death.158 She alleged that at the time that she experienced this "extrasensory empathy," she knew that her sister had died.159

The District Court for the Southern District of New York, applying California law, assessed Burke’s claim in light of Dillon’s foreseeability factors.160 The court concluded that although there was a close relationship between Martha Burke and her twin, Martha Burke was not located near the accident-scene, nor did she suffer from a contemporaneous sensory observance of the accident.161 The court concluded that Burke's allegations were not sensory, but "extrasensory perception" and outside the realm of foreseeability.162

Another unique set of legal issues usually associated with plane crashes is the investigation and cleanup of the debris and carnage. In a lawsuit resulting from the Pan American World Airways crash in Kenner, Louisiana, on July 9, 1982163 two law enforcement officers sued to recover damages for emotional distress suffered as a result of performing their duties at the scene of the crash and

156 Id. at 1238.
158 Id. at 851. Burke purports to have felt a painful burning sensation inside her chest and abdomen, and "sensations of being 'split' and of emptiness 'like a black hole' within her body." Id.
159 Id.
160 Id.
161 Id. at 851-52.
162 Id. at 852.
observing the injuries of the passengers. The court in *Leconte v. Pan Am. World Airways* did not allow recovery because Louisiana "clearly prohibits bystander recovery for mental anguish suffered as a result of another's injury or death." In considering unique factual situations for claims of negligent infliction of emotional distress, the Minnesota Court of Appeals did allow recovery to the plaintiffs based on the zone of danger rule. In *Quill v. Trans World Airways*, the plaintiff brought suit claiming negligent infliction of emotional distress after the plane in which he was a passenger dove 34,000 feet in an uncontrolled tailspin before finally landing safely. Plaintiff claims that as a result of the incident he experienced adrenaline surges, sweaty hands, elevated pulse and increased blood pressure. The Minnesota Court of Appeals allowed recovery and held that plaintiff was in the zone of danger providing "an indicia of genuineness" for his physical injuries.

These cases demonstrate various ways in which claims for negligent infliction of emotional distress have been brought. In most cases, if the jurisdiction allows recovery for a bystander due to someone else's injury, the plaintiff will probably recover if he is in the zone of danger. If the jurisdiction has adopted *Dillon*, however, the plaintiff's recovery is more uncertain because he must satisfy *Dillon*'s three requirements to establish foreseeability.

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164 *Id.* at 1020. These men contend they suffered "severe nausea, vomiting, insomnia, nightmares, nervousness and anxiety." *Id.*

165 *Id.* at 1021. See Note, supra note 43, at 371 for a discussion of the applicable Louisiana law.

166 361 N.W.2d 438 (Minn. Ct. App. 1985).

167 *Id.* at 440. The plane was cruising at an altitude of 39,000 feet when it rolled over and plunged downward. *Id.* Its tailspin continued for the next 40 seconds at speeds around "the speed of sound," causing the plane to shake violently. *Id.*

168 *Id.* at 441. The plaintiff did not consult any medical professionals because he himself was a doctor, and he knew they could not help him. *Id.*

169 *Id.* at 443-44.

170 This still supposes that the factors of *Dillon* are met so that the emotional distress was a foreseeable result of the negligence by defendant.
II. PAIN AND SUFFERING ACTUAL DAMAGES — PRE-IMPACT FEAR

The previous section dealt with the first situation in which mental anguish damages are generally permitted. These are for the independent tort of negligent infliction of emotional distress. As shown, this recovery is for bystanders who suffer emotional distress as a result of seeing a relative either injured or killed because of the defendant's negligence. This section will deal with the second category in which recovery for mental anguish is permitted. Damages for mental anguish in this instance are recoverable when the emotional injury is the proximate result of physical injury or pain of someone who is a direct victim. Because of the confusion that ordinarily arises as a result of the similarity between these two areas of recovery for emotional distress, it is necessary to clarify the differences and the situations in which they overlap.

Pain and suffering damages may be awarded only to a person who is directly injured. The award may be made for the pain he suffered prior to judgment, and for that pain likely to be suffered in the future. Although pain and suffering is an inseparable element of the overall damage claim, it actually consists of three categories. The first and second categories are physical pain and the mental suffering which arises from the discomfort and inconvenience of physical pain. The third category is mental anguish, which includes unpleasant mental consequences, such as fright and apprehension that attend physical injury. This third category also includes humiliation and embarassment resulting from an injury that in-

\[171\text{ See infra notes 172-206 and accompanying text.}\]
\[173\text{1 DAMAGES IN TORT ACTION (MB) § 4.10 (1985) [hereinafter cited as DAMAGES].}\]
\[174\text{Kingham Messenger & Delivery Serv. v. Daniels, 435 S.W.2d 270, 273 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ).}\]
volves any disfigurement. Because separate categories of pain and suffering exist, suffering can continue after the pain subsides. In fact, to recover for pain and suffering, especially in the future, physical pain is not necessary and emotional suffering alone is compensable. Pain and suffering damages are unliquidated and indeterminate and, therefore, left to the discretion of the trier of fact. Because of the speculation involved in determining the value of damages for pain and suffering, some question exists whether these damages truly serve their purpose of compensating the plaintiff. Despite this speculation, most states, including Texas, generally accept these damages for pain and suffering.

Damages for pain and suffering are generally allowed for the time prior to judgment as well as for the time after the trial. Several Texas cases exemplify the recovery for

175 See Houston Lighting & Power Co. v. Reed, 365 S.W.2d 26, 29-31 (Tex. Civ. App.—Houston 1963, writ ref’d n.r.e.).
176 Fuchsberg, Damages For Pre-impact Terror, 16 TRIAL LAW. Q. 29, 31 (1984) [hereinafter cited as Fuchsberg].
177 DAMAGES, supra note 173, at § 4.02. Unliquidated and indeterminate damages are called such because they are difficult to prove with mathematical certainty. See Newcomer v. Weyerhaeuser Co., 26 Wash. App. 958, 614 P.2d 705 (Wash. Ct. App. 1980).
178 Within the second category of damages for pain and suffering the term "mental suffering" is distinguishable from "mental anguish" and "emotional distress." Because courts often use these terms interchangeably, the terms must be understood in order to distinguish recoveries for negligent infliction of emotional distress and recoveries for pain and suffering. In Bruce v. Madden, 208 Va. 636, 160 S.E.2d 137 (1968), the court said that these distinctions are without a difference. Id. at 140. However, for this Comment, they will be used in different respects. Practically, "mental anguish" and "emotional distress" are used in most cases where the mental suffering is the principal injury for which recovery is sought. "Mental suffering," however, is usually confined to cases in which mental suffering accompanies a claim of physical injury or pain. DAMAGES, supra note 173, at § 4.11. Therefore, "emotional distress" and "mental anguish" or "mental suffering" without pain is related to the claim for the independent tort of negligent infliction of emotional distress. "Mental suffering" constitutes a part of the damages for pain and suffering awarded in a personal injury case.

Finally, there is still a question whether the Texas Supreme Court will require plaintiffs to prove physical manifestations of the mental anguish in addition to meeting either the Dillon test or the zone of danger test. Therefore, "emotional distress" and "mental anguish" or "mental suffering" without pain is related to the claim for the independent tort of negligent infliction of emotional distress.
pain and suffering prior to judgment.\textsuperscript{179} In \textit{Wilson v. Yates} \textsuperscript{180} plaintiff recovered for “severe and excruciating pain resulting in physical and mental suffering” prior to trial as a result of being hit by an automobile.\textsuperscript{181} In \textit{Burrus v. Knotts},\textsuperscript{182} the Tyler Court of Appeals affirmed the trial court’s ruling that the deceased had experienced conscious pain and suffering prior to death. The appellate court did, however, reduce the damages awarded by the trial court. The appellate court stated that a person can recover only for pain consciously experienced, and that events subsequent to unconsciousness are not compensable.\textsuperscript{183} The court concluded that the jury failed to distinguish between periods of consciousness and unconsciousness of the deceased and therefore ordered a remittitur.\textsuperscript{184}

Proving damages for pain and suffering in the future is usually more difficult than proving past pain and suffering. To prove damages for past pain and suffering, courts require testimony by the plaintiff and the doctor. However, to support an award for pain and suffering after the trial, the evidence must be sufficient to show with reasonable probability that the physical pain and suffering will persist in the future.\textsuperscript{185}

\textsuperscript{179} See \textit{infra} notes 180-184 and accompanying text.
\textsuperscript{180} 120 S.W.2d 639 (Tex. Civ. App.—Fort Worth 1938, no writ) (allowing damages for pain and suffering where defendant ran over plaintiff in defendant’s automobile).
\textsuperscript{181} Id. at 641.
\textsuperscript{182} 482 S.W.2d 358 (Tex. Civ. App.—Tyler 1972, no writ). Decedent was killed by a fire due to negligence of the hotel where he was staying. The jury awarded damages for his death as well as for 10 minutes of pain and suffering. The jury relied on the death certificate that stated this interval of time between onset of the “acute burn and smoke inhalation” and death. \textit{Id.} at 362.
\textsuperscript{183} \textit{Id.} at 363.
\textsuperscript{184} \textit{Id.} The court of appeals concluded that Knotts was not conscious for the entire 10 minutes and would have lost consciousness sometime before death. Therefore, the jury erred in awarding pain and suffering for the entire 10 minutes. \textit{Id.}
\textsuperscript{185} E.g., San Antonio v. Mendoza, 532 S.W.2d 353 (Tex. Civ. App.—San Antonio, writ ref’d n.r.e. 1975). In \textit{Mendoza}, plaintiff was operating a tractor-mower when gasoline leaked and the machine burst into flames, severely burning his legs. \textit{Id.} at 356. The San Antonio Court of Appeals upheld the trial court’s
A. Texas

Recently, the courts have considered another category of pain and suffering damages that includes the unique pain and suffering caused by the terrifying fear that death is imminent. In most jurisdictions, this category is generally called pre-impact fear and is often associated with plane crashes. In Texas, however, the majority of these cases have dealt with deaths resulting from accidents other than plane crashes. The Texas Supreme Court has applied pre-impact fear to cases brought by decedent’s estates but it has not used the principle in cases brought by survivors. It is not clear whether the Texas Supreme Court would allow recovery of damages for pre-impact fear to survivors. However, because the proof for pain and suffering is no longer circumstantial with a survivor, it is reasonable to conclude that the supreme court would allow pre-impact fear for survivors just as they have for decedents.

Although it has been established in Texas that “consciousness of approaching death is a proper element to be considered in evaluating mental suffering,” it is often not requested by plaintiffs’ attorneys. Commentators have given three reasons for the reluctance of plaintiff’s attorneys to request such damages. The first reason is the brevity of the period in which the person fears that death is imminent. Often this period is only a matter of seconds. Second, because of the brevity of the time period, the amount of damages is limited. In cases which involve fear for only a matter of seconds, awards

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determination of damages that included $10,000 for future pain and suffering. *Id.* at 361-62.

186 See infra notes 207-249 and accompanying text.

187 *Id.*

188 See Fuchsberg, *supra* note 176, at 35 for discussion of damage recovery for the decedent and the survivor. Fuchsberg states, “the award for conscious pain and suffering tends to be smaller when the victim survives: Near misses diminish the value of conscious pain and suffering.” *Id.* at 35.

189 Jenkins v. Hennigan, 298 S.W.2d 905, 911 (Tex. Civ. App.—Beaumont 1957, writ ref’d n.r.e.).

190 See Fuchsberg, *supra* note 176, at 34-35.
have ranged from $5,000 to $10,000.\textsuperscript{191} The third reason involves problems of proof. When the victim dies, eyewitness testimony may be difficult to obtain. The plaintiff must show by a preponderance of the evidence that the decedent had some knowledge or basis for anticipating the impending disaster.\textsuperscript{192} Therefore, the plaintiff must show sufficient circumstantial evidence to allow a reasonable inference that the victim suffered fear before impact. Circumstantial evidence is not necessary if the victim survives since he can describe his own fear.

Few Texas cases address the issue of recovery for the victim's fear prior to being injured or killed. In \textit{Port Terminal R.R. v. Sweet}\textsuperscript{193} the widow of a railroad employee who was killed in a railroad accident brought a wrongful death action under the Federal Employer's Liability Act. The Waco Court of Appeals held that the widow could recover for the decedent's mental anguish prior to being hit and killed by the train.\textsuperscript{194} The court stated that "[t]he jury could reasonably infer that Sweet [the decedent] suffered mental anguish caused by a terrifying realization that the train might hit him" and awarded the widow $10,000 for her husband's conscious pain and suffering and mental anguish.\textsuperscript{195}

In \textit{Green v. Hale},\textsuperscript{196} the Tyler Court of Appeals also affirmed a $5,000 award for mental suffering experienced prior to death. In \textit{Green}, a thirteen year old boy was killed when he fell from the defendant's truck and the driver accidentally ran over him.\textsuperscript{197} In upholding the award for

\textsuperscript{191} See, e.g., Hinson v. SS Paros, 461 F. Supp. 219, 222 (S.D. Tex. 1978) ( awarding $5000 for a longshoreman's fear as he fell to his death from a vessel on which he was working); Meehan v. Central R.R. Co., 181 F. Supp. 594, 625 (S.D.N.Y. 1960) ( awarding $10,000 for pre-impact terror of a train passenger during time in which train fell from drawbridge to river below).

\textsuperscript{192} Shatkin v. McDonnell Douglas Corp., 727 F.2d 202 ( 2d Cir. 1984).

\textsuperscript{193} 640 S.W.2d 362 (Tex. App.—Waco 1982), aff'd, 653 S.W.2d 291 (Tex. 1983).

\textsuperscript{194} \textit{Id.} at 367.

\textsuperscript{195} \textit{Id.}

\textsuperscript{196} 590 S.W. 2d 231 (Tex. Civ. App.—Tyler 1979, no writ).

\textsuperscript{197} \textit{Id.} at 234.
mental suffering, the court stated that conscious pain and suffering can be proven by circumstantial evidence regardless of how briefly the terror could have lasted. The jury’s function is to place a numerical value on that mental suffering.\footnote{Id. at 238.}

In addition, Texas courts have considered pre-impact fear in a few cases involving plane crashes. In \textit{Zondler},\footnote{See supra note 94-100 and accompanying text for a discussion of the \textit{Zondler} holding.} the Dallas Court of Appeals, applying Texas law, also addressed the issue of whether Zondler suffered pain or mental anguish before his death.\footnote{\textit{Zondler}, 683 S.W.2d at 774.} A surviving passenger, who knew that the plane was going to crash, testified as to the anguish Zondler must have experienced. However, the survivor did not know Zondler, and no evidence presented showed that Zondler knew that the plane was going to crash.\footnote{Id.} Additionally, the facts were unclear as to whether Zondler died instantaneously in the crash or if he suffered conscious pain before his death.\footnote{Id. at 775.} Consequently, the court held that Zondler’s family could not recover for pain and suffering prior to his death.\footnote{Id.}

In other plane crash litigation, the Fort Worth Court of Appeals allowed recovery for a pilot’s fear of imminent death from the time of the in-air collision until impact with the ground. In \textit{Hurst Aviation v. Junell},\footnote{642 S.W.2d 856 (Tex. App.—Fort Worth 1982, no writ).} a small propeller plane hit another small plane from behind causing the small plane to crash into the ground.\footnote{Id. at 858. The second plane was able to make a safe landing.} The estate of the small plane’s pilot sued and recovered in the trial court for the mental anguish the pilot suffered before impact with the ground. The court of appeals affirmed, stating that the inferences showed that the pilot realized his plight as he was unable to control the aircraft and proba-
bly suffered emotionally before the impact.\textsuperscript{206}

Although Texas courts do not label the suffering prior to impact as "pre-impact fear," the description by Texas courts of the fear that death is imminent seems to be the same. As of yet, the Texas Supreme Court has not expressly addressed pre-impact fear, and therefore, the court's position is unclear. However, other courts have allowed recovery for pre-impact fear.

B. Aircrash Litigation

This section shifts the focus of this article to cases involving passengers and their recoveries for pain and suffering. Although the majority of these cases involve decedents of air crashes, similar principles apply to the survivors. The most significant difference is that the decedents' estates must prove their pain and suffering by circumstantial evidence, whereas the survivors may testify as to their suffering.

Airplane crash cases have considered recovery for the decedents' and survivors' pre-impact pain and suffering caused by the apprehension of death prior to the crash.\textsuperscript{207} The courts consider a pre-impact award in light of the pain and suffering damages.\textsuperscript{208} As discussed above, "pain" is thought of as physical pain following impact or trauma.\textsuperscript{209} "Suffering" is the emotional distress arising from such pain.\textsuperscript{210} Even though the suffering may continue after the pain subsides, the courts consider pain and suffering together in determining the recovery.\textsuperscript{211} Consequently, to sustain a recovery for damages as a result of pain and suffering, the courts do not require physical pain; emotional suffering will suffice for a damage award.\textsuperscript{212} As a logical extension, the impact, injury and

\textsuperscript{206} Id. at 859.
\textsuperscript{207} See infra notes 221-249 and accompanying text.
\textsuperscript{208} Fuchsberg, supra note 176, at 31.
\textsuperscript{209} Id. See supra note 174 and accompanying text.
\textsuperscript{210} Fuchsberg, supra note 176, at 31. See supra note 174 and accompanying text.
\textsuperscript{211} See Fuchsberg, supra note 176, at 31.
\textsuperscript{212} Id.
pain, becomes irrelevant, thus allowing damages for pre-impact suffering.\textsuperscript{213}

Furthermore, commentators suggest that recovery for pre-impact fear began as a result of courts allowing recovery for negligent infliction of emotional distress without requiring impact.\textsuperscript{214} As one commentator noted, by allowing recovery for pre-impact fear courts are merely affirming two established principles.\textsuperscript{215} The first principle states that one may recover damages in the absence of any impact; that is, damages for emotional distress induced by fear of one's own safety, i.e. the zone of danger rule. The second principle asserts that a decedent's heir can recover for post-impact pain and suffering. If it can be shown that the decedent regained consciousness after impact, the courts argued that it was illogical to extinguish or merge a pre-impact fear claim into a wrongful death action.\textsuperscript{216}

As noted above, pre-impact fear cases are often difficult to prove, especially if everyone on board the plane is killed.\textsuperscript{217} In addition, the claim is based on a brief period in which the passenger is fearful of death.\textsuperscript{218} As a consequence, the awards are generally not very large.\textsuperscript{219} In spite of these difficulties, plaintiffs have recovered in several cases for pre-impact fear.\textsuperscript{220}

An Illinois federal court considered pre-impact pain and suffering damage recovery as a result of the May 25, \textsuperscript{\textit{Id.}}

\textsuperscript{213} \textit{Id.}

\textsuperscript{214} \textit{Id.}

\textsuperscript{215} \textit{Id.} at 30-31 for discussion of these principles.

\textsuperscript{216} \textit{Id.}

\textsuperscript{217} All persons died who were on board the American Airlines DC-10 that crashed in Chicago, Illinois as well as those on the Pan Am flight that crashed in Kenner, Louisiana. See infra notes 221-235 & 242-249 and accompanying text.

\textsuperscript{218} Often, the time span between the realization of impending danger and impact is only thirty to sixty seconds. See Shu-Tao Lin v. McDonnell Douglas Corp., 574 F. Supp. 1407, 1417 (S.D.N.Y. 1983) (American Airlines Flight 191 was only airborne for 31 seconds before crashing).

\textsuperscript{219} See \textit{Shu-Tao Lin}, 574 F. Supp. at 1409. (Before remittitur, the jury awarded $7,000,000 for pecuniary loss and $10,000 for pain and suffering. \textit{Id.} The court allowed the $10,000 recovery for pain and suffering, but ordered a remittitur to $4,264,500 for the pecuniary loss. \textit{Id.}

\textsuperscript{220} See \textit{infra} notes 229-231 & 236-249 and accompanying text.
1979 crash of an American Airlines DC-10 that occurred shortly after take off from Chicago’s O’Hare International Airport. In a memorandum opinion issued in 1983, the federal district court ruled that under Illinois law a complaint may state a cause of action that includes pre-impact pain and suffering. This opinion demonstrates how a court first began allowing recovery for pre-impact fear. The decision was based on a 1983 ruling by the Illinois Supreme Court in Rickey v. Chicago Transit Authority. In Rickey the court abandoned the impact rule, and adopted the zone of danger rule. As one commentator recognized, if a state has adopted a zone of danger rule, recovery for pre-impact fear could be allowed under the same theory as zone of danger. Neither an action requesting damages for pre-impact fear nor the zone-of-danger action requires impact.

Two important cases arising from the Chicago crash

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221 Shu-Tao Lin, 574 F. Supp. at 1409.
222 In re Aircrash Disaster Near Chicago, Ill. on May 25, 1979, 18 Av. Cas. (CCH) 17,215 (N.D. Ill. 1983). This memorandum opinion reversed a 1980 ruling which held that pre-impact pain and suffering was not compensable under Illinois law. Id. For the 1980 rulings, see DeYoung v. McDonnell Douglas Corp., 507 F. Supp. 21 (N.D. Ill. 1980).
223 98 Ill. 2d 546, 457 N.E.2d 1 (1983).
224 For an earlier decision relying on the impact rule, see DeYoung, 507 F. Supp. at 21. This case was decided as a result of the DC-10 crash in Chicago. Id. The court held that a survival action could not be maintained for the victim’s fright and terror allegedly experienced prior to impact. Id. at 23. The court relied on Illinois’ interpretation of the impact rule and held that the victim could recover damages for emotional distress only when it was caused by physical injury. Id. The court, however, did state that the victim could recover for any pain and suffering which she may have experienced after the plane crashed but before death. Id. at 24.
225 Rickey, 457 N.E.2d at 5. In Rickey, an eight year old witnessed an accident in which his five year old brother became entangled in an escalator. Id. at 2. The five year old never regained consciousness. Id. The Illinois Supreme Court specifically refused to create the tort of negligent infliction of emotional distress because it would allow recovery to anyone who suffered a “direct emotional impact” when he witnessed an injury to a close relative. Id. at 4 (citing Dillon, 441 P.2d at 912). However, the court did adopt the zone of physical danger rule that allows a bystander to recover if he has a reasonable fear for his own safety. Rickey, 457 N.E.2d at 5. The zone of danger rule does not require that the bystander suffer physical impact, but the bystander must show physical injury or illness as a result of the emotional distress caused by defendant’s negligence. Id.
220 See supra notes 215-216 and accompanying text.
and applying New York law for pre-impact pain and suffering are *Shu-Tao Lin v. McDonnell Douglas Corp.* and *Shatkin v. McDonnell Douglas Corp.* In *Shu-Tao Lin*, a New York federal district court allowed a $10,000 award for pre-impact pain and suffering experienced by Dr. Lin. Relying on circumstantial evidence, the court concluded that a reasonable juror might infer that Dr. Lin observed the left engine break off during takeoff since he was assigned a left rear window seat. Furthermore, even if Dr. Lin did not observe the damage, the sudden change in the plane’s altitude, from steep ascent to sharp descent would have notified him of the impending disaster.

In a second pre-impact fear case arising from the same Chicago crash, the United States Court of Appeals for the Second Circuit ruled that it would be sheer speculation to infer that a passenger on the flight was aware of his impending death. In *Shatkin*, the court noted that Mr. Shatkin was seated on the right side of the plane. From that seat he could not have seen that the left engine had fallen off. The court concluded that the evidence did not show that the passengers were notified or became aware of the danger. In comparing *Shu-Tao Lin* and *Shatkin* it becomes evident that the proof for pre-impact fear is highly circumstantial in airplane crashes which leave no survivors. As a result, recovery is dependent upon the extent of speculation in which each court will indulge.

The use of circumstantial evidence to prove pre-impact fear is especially significant in the Fifth Circuit’s decision

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227 574 F. Supp. at 1407.
228 727 F.2d 202 (2d Cir. 1984).
229 *Shu-Tao Lin*, 574 F. Supp. at 1417.
230 *Id.*
231 *Id.*
232 *Shatkin*, 727 F.2d at 206.
233 *Id.*
234 *Id.*
235 *Id.* The court additionally stated, "[a]s far as the record is concerned Shatkin could have dozed off in his seat." *Id.* at 207.
of *Solomon v. Warren.*\(^{236}\) *Solomon* involved a Cessna 337 Super Skymaster aircraft which was presumed lost at sea.\(^{237}\) Plaintiff, the personal representative of the Levin’s estate, brought an action under the Florida Survival Statute claiming that the Levins, passengers aboard the plane, suffered conscious pain and suffering prior to their death.\(^{238}\) The court agreed, relying on the evidence that the pilot radioed to the Barbados Tower stating that the fuel gauges on the aircraft read empty and that he intended to ditch the aircraft at sea.\(^{239}\) The court found that from this evidence a reasonable inference could be made that the plaintiffs appreciated the possibility of imminent death, at least from the time of the radio transmission,\(^{240}\) and there was no reason to doubt that the pilot did in fact ditch the plane.\(^{241}\)

The most recent case allowing damages for pre-impact fear is *Haley v. Pan Am. World Airways, Inc.*\(^{242}\) This case involved the July 9, 1982 Pan Am crash in Kenner, Louisiana, killing all 146 people on board.\(^{243}\) The court stated the issue as whether “the fear a decedent experiences prior to both death and physical impact is a legally compensable element of damages.”\(^{244}\) Defendant Pan Am argued that no evidence existed of the decedent’s “conscious” pre-impact fear because there were no survivors or eyewitnesses who saw the path or trajectory of the plane prior to the crash.\(^{245}\) The only evidence offered was a videotape simulation of the takeoff and crash, a stipulation explaining facts from the investigation, and a video-

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\(^{237}\) *Id.* at 780.

\(^{238}\) *Id.* at 792.

\(^{239}\) *Id.* at 792-93.

\(^{240}\) *Id.* at 792.

\(^{241}\) *Id.* at 793.

\(^{242}\) 746 F.2d 311 (5th Cir. 1984).

\(^{243}\) *Id.* at 313.

\(^{244}\) *Id.* (emphasis by court). The court noted the apparently undisputed fact that the Pan Am 727 disintegrated and the decedent died immediately upon impact with the ground. *Id.*

\(^{245}\) *Id.* at 315.
tape of expert testimony. In considering the evidence, the court stated, "a damages award cannot stand when the only evidence to support it is speculative or purely conjectural." However, in this case, the court found that the inference was more than "reasonable" that the decedent apprehended his death prior to the final impact. Therefore, the court allowed recovery for pre-impact fear based on circumstantial evidence.

III. APPLICATION OF EMOTIONAL DISTRESS DAMAGES TO THE BYSTANDERS AND SURVIVORS OF DELTA FLIGHT 191

A. Bystanders

The terror and tragedy of Delta Flight 191 are evident. For those who died, the pain and suffering is over. However, for the victims' families, survivors, witnesses, and rescuers, the emotional distress will last indefinitely. Because the crash occurred on a Friday evening, the high-

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246 Id. The parties stipulated that:
the Pan Am plane took off and rose to an altitude of 163 feet before beginning its fatal descent. While the plane rolled to its left, testimony indicated there was no change in gravitational forces. The plane's wing struck a tree fifty-three feet above ground, and the aircraft rolled, impacted and disintegrated some four to six seconds later.
Id. at 315-16.
247 Id. at 316.
248 Id. at 317.
249 Id. The court noted that the apprehension was at least from the time the wing struck a tree. Id. In addition, the court considered that the defendant's own expert testified that when the passengers experienced a "violent change in the plane, the last couple of seconds, [they] certainly would have been thrown about and fighting for their lives" (emphasis in original) Id. at 316. But see Feldman v. Allegheny Airlines, Inc., 382 F. Supp. 1271 (D. Conn. 1974). Where the court did not allow recovery for pre-impact pain and suffering. Id. This was in spite of the fact that two passengers and a co-pilot survived. Id. The court concluded that the survivor was alert to the situation because he was monitoring the plane's descent by looking out the window. Id. at 206. It would be too speculative, however, to award damages for decedent's pain and suffering. Id.
ways were crawling with weekend travelers driving to and from the D/FW airport. Consequently, many people witnessed the wide-bodied Delta Airlines plane struggling through the sky and skidding off Highway 114. Workers at the airport saw the crash and swarmed the wreckage to look for survivors. Additionally, relatives and onlookers saw the plane come down while waiting for its arrival.

This Comment will now apply the principles for emotional distress, specifically the impact, zone of danger and Dillon tests to the different categories of bystanders of the Delta crash. Bystanders can be grouped depending upon where they were located or their relationship to the victims of the crash. The first group of bystanders to be analyzed is the Highway 114 travelers. Second, the Comment will discuss the possible cause of actions for persons involved in the crash cleanup. Third, the possible causes of action by the passive bystanders who were not relatives of the crash victims will be analyzed. Finally, the Comment will focus on the claims by the passive bystanders who were relatives to the victims of the crash.

1. **Highway 114 Travelers**

The first category of bystanders include all drivers on Highway 114 who witnessed the crash. A giant landing wheel slammed into one of the bystander’s car, although the driver apparently was not injured. However, a Texas court may consider this an “impact” or at least find that the driver was in the zone of danger. He may therefore have a claim for negligent infliction of emotional distress against the party held liable for the crash. To

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252 Id.  
253 See supra notes 21-23 and accompanying text.  
254 See supra notes 42-60 and accompanying text.  
255 See supra note 70 and accompanying text for a discussion of the Dillon factors.  
256 NEWSWEEK, supra note 3, at 30.  
257 See also supra notes 89-109 and accompanying text. It must also be noted that whether physical manifestations must arise as a result of the infliction of emotional distress is presently unsettled under Texas law. Id. At the writing of this Comment, it has not been determined who, if anyone, will be held liable for the
satisfy the "impact" test, the driver will be required to prove that the defendant set some force in motion that "contacted" him. This will include proving that the contact to his car was sufficient to constitute contact to his person.\textsuperscript{258} If this bystander is unable to prove that he was "impacted", he might be successful in a suit for negligent infliction of emotional distress by showing that he was in the zone of danger. If the court finds that he was in the zone of danger, then it will not be necessary to show that he meets the \textit{Dillon} requirements. The bystander will only have to prove, according to the San Antonio Court of Appeals' holding in \textit{Perez}, that he reasonably feared for his own safety when the landing gear struck his car.\textsuperscript{259}

The other drivers can also claim to have been in the zone of danger depending on their location on Highway 114 at the exact moment the plane skidded across the highway.\textsuperscript{260} Three vehicles smashed into each other while watching the horror and at least twelve other minor accidents occurred.\textsuperscript{261} Those who suffered emotional distress but were not personally injured may also have a cause of crash; that case is now presently set for trial on April 27, 1987. However Delta Airlines has offered to settle with the plaintiffs if they do not claim punitive damages. See supra note 11. The transcript of the conversation between the crew of Delta 191, other airplanes in the area, and the controller suggests that wind shear was the cause of the crash. However, the captain of Delta 191, Connors, stated prior to the crash, "[h]e's sleeping; get him out of bed." It is unclear whether he was referring to the controller or the flight engineer. Dallas Times Herald, Oct. 1, 1985, at A8, col. 3. Consequently, there may be a claim that the controllers were not aware of the weather (some of the weather observers at the control center were out for dinner) or that they did not communicate the weather situation to the crew of Flight 191. \textit{Id.} at col. 2. However, it is reported that pilots who landed just seconds before Flight 191 crashed had recognized the bad storm conditions but did not report them in time. \textit{Id.} at col. 1.

\textsuperscript{258} See supra notes 21-23 and accompanying text for a discussion of the "impact" rule.

\textsuperscript{259} See supra note 43 and accompanying text for a definition of the zone of danger rule.

\textsuperscript{260} Behind the Toyota, whose occupant was decapitated, the drivers of two cars and a tractor trailer rig "watched the developing scene in horror as they slammed on their brakes to avoid the plunging jet." Dallas Times Herald, Aug. 3, 1985, at A23, col. 2.

\textsuperscript{261} \textit{Id.} Some of these accidents resulted from the blinding rain as well as the plane crash. \textit{Id.}
action for negligent infliction of emotional distress. If they actually feared for their safety then their cause of action can be proven by showing they were in the zone of danger. If they cannot prove they were in the zone of danger they will have to meet all three Dillon factors as adopted by Landreth. Courts may also consider the expanded rules of Dillon. These include Grizzle and Davis which extend contemporary perception and Baber and Vlach which do not require physical manifestations for claims of mental anguish. However, the lack of a relationship between these drivers and the passengers (unless of course the drivers were picking up a relative at the airport who was on the plane) will probably preclude recovery in Texas.

2. Bystanders Participating in the Crash Cleanup

Another class of bystanders may attempt to bring suit for negligent infliction of emotional distress. These bystanders were not in the zone of danger, and satisfying the foreseeability test of Dillon and Landreth will be difficult.262 These bystanders arrived after the crash occurred to search for survivors, clean up debris263 or film the tragedy.264 Because the helpers were probably not relatives, the relationship factor of the foreseeability requirement will not be met and therefore a cause of action for negligent infliction of emotional distress will be difficult to prove.

Many people started helping officials look through debris for survivors immediately following the crash. Reverend Gregory Schweer vividly recalls seeing "badly burned bodies, grotesquely intertwined with expressions of hor

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262 See supra note 60 and accompanying text for a discussion of the Dillon factors of foreseeability. See also supra notes 80-88 and accompanying text for the adoption of the Dillon factors by the Landreth court.

263 See infra notes 265-275 and accompanying text.

264 See, e.g., Dallas Times Herald, Aug. 7, 1985, at A10, col. 5. A television cameraman who filmed the 1978 San Diego collision of a Pacific Southwest Airline and a small aircraft reported seeing wreckage and bodies every time he subsequently tried to look through the camera lens. Id.
ror on the faces." A paramedic and lawyer, Jack Ayers, said "[i]t wasn't the appearance of the scene or the injuries that bothered me. The hardest part was...being unable to do anything for most of the victims." Another volunteer from Orion Air Service collapsed with chest pains while searching in tall weeds for survivors.

The emotional distress that results from a tragic crash lingers long afterwards. Since many rescuers have been trained to handle disasters, they feel the need to hide their feelings. However, within five days of the Delta crash, the Dallas Police Department psychologists consulted with thirty-two officers or paramedics who had experienced flashbacks, depression, and insomnia. The courts may have to consider whether these "bystanders" have a valid cause of action for negligent infliction of emotional distress.

In deciding whether to permit claims by rescuers, courts may ultimately look to the Fifth Circuit decision in Leconte for guidance. In Leconte, rescue workers were not allowed to recover damages for mental distress that they suffered while searching for dead bodies at the crash site because the court held that Louisiana law prohibited any type of bystander recovery for mental anguish. While it would seem that Leconte is authority for dismissing claims by rescue workers, it should be noted that the Fifth Circuit applied Louisiana's general rule against bystander recovery without taking into account the unique fact situation that case presented.

A court applying Texas law will probably apply the Dillon factors to determine whether the emotional distress

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266 Id. Ayers also stated that "[t]here were things I did out there I don't think I'll ever tell anyone about—things one human being doesn't tell another human being." Id. at col. 6.
267 Id. John Dandois spent more than 20 hours in the coronary care unit of a local hospital before being released. Id.
269 Id.
270 See supra notes 163-165 and accompanying text for a discussion of Leconte.
271 See supra note 165 and accompanying text.
suffered by rescue workers is foreseeable.\textsuperscript{272} The second factor of the \textit{Dillon} test requires that the plaintiff suffer a direct emotional impact from the sensory and contemporaneous observance of the accident.\textsuperscript{273} Since many of the Delta rescue workers were near the scene when the crash occurred and their shock resulted from either observing the crash contemporaneously or from being "brought so close to the reality of the accident", they will be able to satisfy \textit{Dillon}'s second requirement.\textsuperscript{274} However, the third factor, the existence of a close relationship between the plaintiff and the victim, may be difficult to prove.\textsuperscript{275} Therefore, based on an analysis of the \textit{Dillon} factors, it is most likely that a Texas court will find that it was not foreseeable that "bystanders" who came to the aid of victims and cleaned up debris would suffer emotional distress.

3. \textit{Passive Bystanders — Non-relatives}

The third category of bystanders that may seek damages for negligent infliction of emotional distress includes those who were at some distance from the scene of the Delta crash but were not related to the passengers or crew aboard the flight.\textsuperscript{276} One witness who watched the crash stated, "[i]t was . . . the most frightening thing I ever seen [sic]"\textsuperscript{277} and some felt that the crash scene looked like a "disaster on a movie set."\textsuperscript{278} People in nearby hotels saw the tragedy occur and felt the earth shake from impact.\textsuperscript{279} Others were at work at the airport and ob-

\textsuperscript{272} See \textit{supra} note 70 and accompanying text for the factors espoused in \textit{Dillon}.
\textsuperscript{273} Id.
\textsuperscript{274} See \textit{supra} note 125 and accompanying text for the application of the second \textit{Dillon} factor in \textit{Davis}.
\textsuperscript{275} See \textit{supra} note 70 and accompanying text.
\textsuperscript{276} Carol Thompson walked outside her Grapevine, Texas home to take a picture of a rainbow. Instead, she was just in time to watch Delta 191 descending in the southeast sky through a violent rain squall. But this flight was different from the many others she had seen. Mrs. Thompson observed it plunge abruptly downward to the ground. \textit{Id.} See, e.g., \textit{Newsweek}, \textit{supra} note 3, at 30.
\textsuperscript{277} Dallas Times Herald, Aug. 3, 1985, at A24, col. 1.
\textsuperscript{278} \textit{Id.}
\textsuperscript{279} \textit{Id.} at col. 3. Brock Minton, who watched from the tenth floor of the airport hotel said, "[t]here was a heavy downpour and several bolts of lightening . . . .
served the catastrophic ball of fire and commotion that followed the crash.\textsuperscript{280} These people may attempt to bring a cause of action for negligent infliction of emotional distress, although it is unlikely they will recover under the \textit{Dillon} and \textit{Landreth} analysis. Most will not meet the requirement that a close relationship exists between the victim and the bystander.\textsuperscript{281}

4. \textit{Passive Bystanders — Relatives}

The final category of bystanders is comprised of the relatives of the crew and passengers of Delta 191. The relatives, who waited at the Delta terminal for the arrival of their loved ones on Flight 191, may satisfy all three of the \textit{Dillon} and \textit{Landreth} factors.\textsuperscript{282} In applying the \textit{Dillon} factors to actions brought by relatives, Texas courts will probably find that a sufficiently close relationship existed in each case between the plaintiff and the victim so as to satisfy \textit{Dillon}’s third requirement.\textsuperscript{283} Once the close relationship is established, the jury will decide whether the other two requirements are met: first, that the plaintiff was located near the accident\textsuperscript{284} and second that the plaintiff contemporaneously observed the accident.\textsuperscript{285} It is likely that a jury would find that the relatives were located near enough to the accident to satisfy that aspect of the \textit{Dillon} analysis. However, each case will have to be examined on

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\textsuperscript{280} See Dallas Times Herald, Aug. 5, 1985, at A5, col. 5. One witness, a Vietnam veteran, was working on the runway. He stated “[w]hen you've got people out there screaming and hollering, you move. I saw mass confusion. There was not enough spontaneous reaction.” Dallas Times Herald, Aug. 3, 1985, at A24, col. 3.

\textsuperscript{281} See supra note 70 and accompanying text.

\textsuperscript{282} See supra note 70 & 83-88 and accompanying text.

\textsuperscript{283} Id.

\textsuperscript{284} Id.

\textsuperscript{285} Id.
its own set of facts to determine whether the relative “by-
stander” contemporaneously experienced the accident,
or, instead, was notified by Delta officials that the crash
had occurred. Whether each relative will have a cause
of action for negligent infliction of emotional distress, will
turn on his or her testimony concerning how knowledge
of the accident was actually experienced.

If any of the relatives received erroneous information
from Delta officials that loved ones were not on board
Flight 191, when in fact they were, then they may have
claims for emotional distress similar to the ones ad-
dressed in Wood. They may also claim that Delta negli-
gently caused them mental anguish by delays in the
release of information regarding the fate of the passen-
gers. However, it is questionable that in cases where rela-
tives are mistakenly told that a loved one was aboard an
ill-fated flight, when in fact he or she was not, that a court
would allow recovery for mental distress. It seems that
the relatives should simply be thankful that their loved
one was not a victim of the crash.

Unlike the Wood case, which was decided under Utah
law and only allows recovery for intentional infliction of
emotional distress if there no proof of physical injury,
Texas may allow recovery for negligent infliction of emo-
tional distress without proof of bodily physical injury.
Therefore, a relative in Texas who was given wrong infor-
mation may need only prove that the mental anguish was
foreseeable, using the Dillon analysis outlined above, and
that the act was the proximate cause of his distress.
Furthermore, since a relative’s emotional trauma is cer-
tainly foreseeable under these circumstances, the relatives
will probably have a good cause of action for negligent
infliction of emotional distress.

286 See supra notes 70 & 110-125 and accompanying text.
287 See supra notes 110-133 and accompanying text for a discussion of the Wood
case.
288 See supra notes 101-105 and accompanying text.
289 See supra note 70 and accompanying text.
Other relatives of the victims or survivors, having discovered the news of the crash through a third party may attempt to recover damages for emotional distress. In similar cases such as *Saxton* and *Saunders*, courts have denied recovery. By applying the *Dillon* factors Texas courts would probably hold that plaintiffs who learned of the incident second-hand have an unforeseeable claim.

For any bystander, recovery will depend upon whether there are any physical manifestations that result from the emotional distress. In Texas, it is still unsettled whether a plaintiff may recover for mental anguish without accompanying physical injury or physical manifestations. However, the Texas Supreme Court will probably uphold the *Baber* decision which states that no physical injury is required to recover for damages for emotional distress. If the supreme court holds otherwise, a plaintiff may feign headaches, insomnia and flashbacks in order to recover.

B. Survivors

Unlike Chicago, Illinois and Kenner, Louisiana plane crashes, several people miraculously survived the Delta Flight 191 crash. Survivors made statements to news reporters shortly after the crash indicating their fears. One of the more publicized survivors is Jay Slusher, a computer programmer from Phoenix, Arizona. Slusher stated: "The ride got rougher and rougher. It seemed like there was something on top of the plane, pushing it to the ground. The pilot tried to pull out of it. The speed of the engines increased. We started rocking back and forth. Then we were tossed all around. I saw an orange streak
coming toward me on the left side of the floor. I thought we were going to explode. At that point, I said, ‘well, it’s all over.’ Slusher also stated “we started making some pretty drastic turns [sic] but I thought that was to maneuver around the thunder storms.” Another survivor stated, “I saw the ground. I thought we were landing. There was one bump, then another bump, and the plane fell apart. I can’t explain it.”

Survivors of tragic accidents commonly receive larger recoveries than those who die instantly. The reason for the disparity is that survivors recover for their mental and physical pain and suffering in addition to reimbursement for medical bills and lost earnings. Survivors may endure several common forms of emotional scars, including sleeplessness, nightmares, anxiety, and recurrent thoughts of the crash. In addition, many survivors experience feelings of guilt because they survived while so many others died. This area of recovery for survivors is confusing because it can additionally be argued that survivors are bystanders who suffer mental anguish as a result of their position in the zone of danger and observation of others being killed.

The Delta survivors may recover damages for personal injuries, including pain and suffering. In addition, courts applying Texas law will have to consider recovery of a survivor’s emotional damages due to pre-impact fear. Port Terminal and Zondler can be persuasive

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295 TIME, supra note 1, at 18.
298 Dallas Times Herald, Aug. 7, 1985, at A17, col. 3.
299 Id.
301 Id. Initially, survivors try to deny emotional responses. However, the depression and flashbacks set in within 3-4 weeks. Id. A sense of loneliness makes it difficult for survivors to cope. Normally the whole community is involved in a disaster i.e. a flood or hurricane. In a plane crash, however, only scattered members of a community are injured or killed. Id. at col. 2.
302 See supra notes 172-185 and accompanying text.
303 See supra notes 186-206 and accompanying text.
304 Port Terminal, 640 S.W.2d at 367.
in this area. Both cases held that a decedent's estate can recover for the time the decedent feared he would die. However, the courts will have to extend this potential damage recovery to airplane crash survivors.

The question of whether the survivors suffered pre-impact fear is a question for the trier of fact. Where the plaintiff was sitting or any remarks made before impact will be considered as circumstantial evidence in determining pre-impact fear for decedents and survivors. As in Lin, Shatkin and Solomon, a court's determination of recovery of these damages will depend upon the particular situation and facts surrounding each plaintiff.

Pre-impact fear is a new issue for Texas courts in the context of a major commercial air crash. However, "suffering" during the time a person thinks he is going to die (or knows it) can be more intense than suffering that results from an injury. In this author's opinion, the courts will have to expressly confront this issue and should allow for pre-impact pain and suffering in order to compensate the survivors.

IV. CONCLUSION

The horror of Flight 191 is not over. Many will suffer emotional damages from the memories of witnessing the crash, cleaning up the wreckage, and surviving the tragedy. Although these people can potentially bring lawsuits to recover for their damages, courts will most likely construe the claims in light of foreseeability. The courts wish to protect defendants from voluminous litigation, specu-

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506 Zondler, 683 S.W.2d at 775.
507 In Texas, damage issues are determined by the trier of fact. Fuchsberg, supra note 176, at 31.
508 Shu-Tao Lin, 574 F. Supp. at 1407.
509 Shatkin, 727 F.2d at 202.
510 Solomon, 540 F.2d at 777.
511 However, they have considered the issue in a different context and allowed recovery. See infra notes 186-206 and accompanying text.
512 Although it is more difficult to prove, it is likely that those who died also suffered pre-impact fear and the plaintiff bringing the claim under the Survival Act should recover.
lative claims and burdensome unlimited liability. Unless a claim for negligent infliction of emotional distress by a bystander, family member or other affected party meets the foreseeability standards in Dillon, a Texas court will probably deny recovery. But, once a plaintiff satisfies the Dillon factors, Texas will probably not require a showing of physical manifestations resulting from the distress. If the courts do require a showing of physical manifestation, plaintiffs will be encouraged to fabricate headaches, nausea, or insomnia to secure recovery.

Texas courts will also probably allow monetary awards for pre-impact pain and suffering to the survivors of the crash. Negligent infliction of emotional distress broadens the scope of pain and suffering. Pre-impact fear is where the two theories overlap. The survivors, who realized that death was near, themselves suffered pre-impact fear and as a "bystander" in the zone of danger observed others experiencing injury. Therefore, a survivor should be able to recover damages for pre-impact fear or damages for the action of negligent infliction of emotional distress. With the multitude of claims that will likely result from the Delta crash, the litigation will provide an opportunity for the courts to define the area of damage recoveries for mental anguish. The author hopes that the courts will clarify the ambiguities created in the past.

\[312\] The allocation of the economic risk is an important consideration for the court in determining whether these potential plaintiffs should recover. However, that issue is discussed elsewhere. See Note, Loss Shifting and Quasi-negligence: A New Interpretation of the Palsgraf Case, 8 U. CHI. L. REV. 729 (1941).
Casenotes and Statute Notes