Pre- and Post-Impact Pain and Suffering and Mental Anguish in Aviation Accidents

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PRE- AND POST-IMPACT PAIN AND SUFFERING
AND MENTAL ANGUISH IN AVIATION
ACCIDENTS

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I. INTRODUCTION

As the doomed airliner rumbled less than 30 feet above ground, Jamin Duggan could see the look of terror on the faces of passengers. "They were screaming and beating on the windows," the ten year old boy said. Moments later, United Airlines Flight 585 slammed nose first into a dry creek bed, killing all 25 aboard, but avoiding a crowded apartment complex about 150 yards away. Lavette Williams saw the same looks of horror on the passengers faces . . . "I was looking out the window. I jumped back," said Williams, a housewife. "I could see the people in the windows. At first, I thought she was waving at me. She was screaming, bamming on the window."

This tragic plane crash in Colorado Springs exemplifies the extreme mental anguish that airplane passengers experience before a crash or impact. According to all reports, these passengers were aware of their im-

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1 Michael Romano, 'They Were Screaming and Beating on the Windows' Passengers Panicked As Crash Nears, Say Those Who Saw Them Through Jet's Windows, ROCKY MTN. NEWS, Mar. 4, 1991, at 8. Strangely, the National Transportation Safety Board never reached a conclusion on the cause of this crash, although most of the board members suspected a horizontal tornado. This was only the fourth time in history that the Board found no official cause for a commercial airline crash. John Brinkley, No Final Chapter in Springs Crash: Board Suspects Horizontal Tornado, But Finds No Official Cause In Tragedy Fatal To 25, ROCKY MTN. NEWS, Dec. 9, 1992, at 10.
pending death and possibly experienced traumatic pain and suffering after impact. Many courts have recognized such post-impact physical pain and suffering, but pre-impact mental anguish has only recently been recognized by some state and federal courts. It is an emerging and controversial concept in tort law.

In today's technologically advanced world, airplane flight is a common occurrence and a necessity for most people. The increased use of air transportation heightens the possibility of airplane disasters. Commentators point to several factors that might account for a recent increase in the number of airline accidents. Airlines have been slow to replace the aging airfleet, causing accidents to result from poor maintenance. Additionally, airlines are "directing capital towards corporate survival . . . rather than replacing aging aircraft." This economically based accident theory gives the judiciary a reason to deny expensive pre- and post-impact claims. Such a judicial determination might, however, be considered contrary to the public policy of compensating injured victims.

Aviation litigation is an arena for new tort litigation and theories. Experimental theories have emerged, stretching common law tort concepts to their outward bounds. Pre- and post-impact pain and suffering and mental anguish recoveries are the newest theories expanding tort liability. First, this Comment traces the evolution of pre- and post-impact recovery theories, and second, it analyzes relevant federal and state case law. The law currently emphasizes the difficult issues surrounding mental injury, especially injury that occurs before impact. Consequently, this Comment focuses on this narrow issue. Finally, this Comment outlines emerging trends and possible predictions for the future.

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2 Id.
A. THE NATURE OF LIABILITY

In most cases involving airline accidents, the defendant airline concedes liability. While airlines typically compensate for physical injuries, plaintiffs now frequently request compensation for mental injuries and anguish.

"As a general rule an actor who negligently causes another to suffer mental or emotional distress is not subject to liability for such distress except where that type of damage is attended by physical injury or there is a physical impact upon the other." Some courts have allowed a slight impact to be a sufficient basis for recovery. Other courts permit recovery by recognizing the intentional infliction of emotional distress and the negligent infliction of emotional distress causes of action.

Recently, however, a few courts lessened this impact requirement. The Eleventh Circuit Court of Appeals, for example, upheld a passenger's right to sue for intentional infliction of emotional distress even when no crash occurred. In Floyd v. Eastern Airlines, Inc. the plane's three engines failed and the plane experienced an extreme loss in altitude. The panicked passengers were told to prepare for a crash landing. Although the plane safely landed and no impact occurred, the passengers suffered extreme mental anguish. The court recognized the passengers' right to sue for the fear that they experienced.

Physical manifestation of such mental anguish may also

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6 See Thomas D. Sydnor II, Damages For a Decedent's Pre-Impact Fear: An Element of Damages Under Alaska's Survivorship Statute, 7 ALASKA L. REV. 351, 361 (1990). Such a slight impact could include the lurching of the airliner or a jolt when the brakes are applied. Id. at 356.
7 Id. at 356.
8 872 F.2d 1462 (11th Cir. 1989), rev'd, 499 U.S. 530 (1991). This Eleventh Circuit decision was reversed by the Supreme Court under a strict application of the Warsaw Convention.
9 Id. at 1480.
be a requirement for recovery in some states. Until recently, attorneys avoided pursuit of these additional damages because of the obstacles to recovery. Serious evidentiary issues arise in pursuing claims of pre- or post-impact pain and suffering because most persons involved in airline accidents do not survive.

B. TYPES OF DAMAGES

Damages in cases resulting from aviation accidents are based on a variety of theories. While actual and compensatory damages typically redress loss of earnings and property loss, damages can also include recovery for physical injuries. This would include "losses which can readily be proven to have been sustained, and for which the injured party should be compensated as a matter of right." Pecuniary damages are available for economic

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10 The physical manifestation requirement limits recovery to plaintiffs who can prove that they experienced physical symptoms brought on by emotional distress. Such symptoms might include high blood pressure, gastric disturbances, weight loss, or sleeplessness. Farnbach, supra note 4, at 221 n.16.

11 Abraham Fuchsberg, Damages for Pre-Impact Terror, 16 TRIAL L.Q. 29, 32 (1984). Fuchsberg points out that attorneys face three common problems: "brevity of time, brevity of damages, [and] brevity of proof." Id. Sometimes such a short amount of time exists before impact that the jury might wonder if the decedent was ever aware of the danger. If there was awareness, it is up to the jury to decide if such a short time in pain and suffering should be compensable. But, as Fuchsberg states, "[i]t is the intensity of feeling rather than its duration that explains the size of recovery. It is the compression of fear within a few fleeting seconds of horror and panic." Id. at 33.

12 See WINDLE TURLEY, AVIATION LITIGATION § 4.06 (1986).

13 BARRONS LAW DICTIONARY 117 (3d ed. 1991). The Restatement (Second) of Torts states that "compensatory damages" are the damages awarded to a person as compensation, indemnity or restitution for harm sustained by him. RESTATEMENT (SECOND) OF TORTS § 903 (1977). Comment a is applicable in this discussion:

When there has been harm only to the pecuniary interests of a person, compensatory damages are designed to place him in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed. When however, the tort causes bodily harm or emotional distress, the law cannot restore the injured person to his previous position. The sensations caused by harm to the body or by pain or humiliation are not in any way analogous to a pecuniary loss, and a sum of money is not equivalent of peace of mind . . . . There is no scale by which the detriment caused by suffering can be measured and hence there can be only a very
loss, including the loss of anticipated financial support.\textsuperscript{14} They are available to accident victims or to those who suffer economic loss from the death of the decedent.\textsuperscript{15}

Punitive damages are, by contrast, excess monetary compensation awarded to the injured in instances of willful misconduct as a punishment to the wrongdoer.\textsuperscript{16} The allowance of punitive damages theoretically deters similar conduct.\textsuperscript{17}

There are four key goals of punitive damages:

punish[ing] [a] defendant, . . . deter[ing] similar wrongdoing in the future, . . . induc[ing] private persons to enforce the rules of law by rewarding them for bringing malefactors to justice . . . [and] further compensat[ing] plaintiffs whose actual damages exceed those for which the law allows recovery and whose recovery in any event has likely been substantially depleted by attorneys fees.\textsuperscript{18}

Punitive damages also protect consumers by encouraging businesses to provide safer products and services.\textsuperscript{19} "A plaintiff who obtains punitive damages both redresses a societal wrong and imposes a penalty against the defendant."\textsuperscript{20} Although punitive damages require more than just negligence, punitive liability may be easier to prove in aviation litigation due to the tragic nature of airline acci-
dents. Pre-impact pain and suffering awards may appear to be punitive in nature, but in fact they are compensating a type of injury. Yet it is foreseeable that attorneys would attempt to recover punitive damages based on such emotionally charged evidence.

C. PHYSICAL INJURIES AND MENTAL ANGUISH

There are two distinct types of injuries arising under pre- and post-impact pain and suffering: physical injuries and mental anguish. Physical injuries may occur before impact. Passengers might be injured or tossed about in the cabin as the plane falls from the sky and crashes. Physical injury may also occur from the crash impact itself, likely resulting in massive internal injuries or dismemberment. The final type of physical injury may occur after the impact. A passenger, for example, might survive the crash but die from burns and smoke inhalation while trying to escape through the crash debris. Although this post-impact, pre-death pain and suffering is compensable in theory, a problem of proof arises due to the nearly impossible task of determining who survived the impact and who did not. Forensic experts and coroners who medically determine the cause of death can heavily impact the determination of how much pain and suffering the decedent encountered or if death was instantaneous.

Pre- and post-impact pain and suffering can also include mental anguish. Courts may refer to mental anguish as pre-impact fright, pre-impact fear and ter-

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21 Paulsen, supra note 2, at 812.
22 Fuchsberg states that "[p]lain is to be thought of as the physical pain following the impact or the trauma. 'Suffering' is the mental and emotional distress arising from the pain and the other personal consequences of the trauma." Fuchsberg, supra note 11, at 31.
24 E.g., Solomon v. Warren, 540 F.2d 777, 793 (5th Cir. 1976) (allowing recovery although there was no evidence of any passenger surviving the impact), cert. denied, 434 U.S. 801 (1977).
25 Turley, supra note 12, § 4.06.
ror,\textsuperscript{27} pre-injury mental anguish,\textsuperscript{28} and pre-impact emotional distress.\textsuperscript{29} Certainly, mental anguish would result from the impact itself and would also be a part of any post-impact pain and suffering recovery.\textsuperscript{30} For example, a passenger might survive the initial impact but experience unimaginable horror and fright in the final moments before death. Mental anguish in apprehension of the impending crash is the most controversial area of recovery.

II. SURVIVAL VERSUS WRONGFUL DEATH

In the past, a common law action for personal injuries abated when the injured person died. Thus, if a victim died, his or her estate and family could not recover for medical and funeral expenses or recover the loss of income that the decedent would have contributed in later years. However, legislators attempted to alleviate this problem through wrongful death and survival statutes.\textsuperscript{31} A survival action continues the injured party's claim that occurred before death, while a wrongful death action creates a new cause of action for the economic loss that the estate of the decedent suffers.\textsuperscript{32} Courts construing the Texas Survival Statute state that,

\textsuperscript{27} In re Air Crash Disaster Near Chicago, Ill. on May 25, 1979, 507 F. Supp. 21, 22 (N.D. Ill. 1980), rev'd on reconsideration, 18 Av. Cas. (CCH) 17,215 (N.D. Ill. 1983) [hereinafter Air Crash Chicago].
\textsuperscript{28} Nelson v. Dolan, 434 N.W.2d 25, 31 (Neb. 1989).
\textsuperscript{30} This includes the fright occurring during the ordeal and the crash.
\textit{Malone states that "[t]he probable origin of the rule denying a cause of action for wrongful death was the doctrine, since discarded, that where a cause of action disclosed the commission of a felony the civil action was merged into the criminal wrong. The sources of the felony merger doctrine are lost in the obscurity of Anglo-Saxon law." Malone, supra, at 1055.}
\textsuperscript{32} In re Inflight Explosion, 778 F. Supp. at 629.
[D]amages which may be recovered under the statute include consciousness of impending death and physical pain and suffering, and medical and funeral expenses . . . [In a wrongful death suit beneficiaries may recover] the monetary value of the benefit that the plaintiff reasonably expected to receive from the decedent had he [lived].

Pre-impact fear has for the most part been an element of damages in survival actions rather than in actions for wrongful death because the survival action allows the cause of action in tort to survive an individual's death. Only recently have these damages been recognized at all, due to the fact that plaintiffs often have to rely on speculative, circumstantial evidence to establish pre- or post-impact pain and suffering.

III. TYPES OF CASES AND DIFFERING THEORIES

Several courts have recognized damages for pre-impact fear, while other courts deny recovery, declaring the al-

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53 Tarrant County Hosp. Dist. v. Jones, 664 S.W.2d 191 (Tex. App.—Fort Worth 1984, no writ); see also TEX. CIV. PRAC. & REM. CODE ANN. § 71.001 (Vernon 1986).

54 See Sydnor, supra note 6, at 354.

55 See, e.g., In re Air Crash Disaster Near New Orleans, La. on July 9, 1982, 789 F.2d 1092, 1099 (5th Cir. 1986) [hereinafter Air Crash New Orleans I] (allowing recovery for pre-impact mental pain and suffering, and post-impact pain and suffering but using remittitur to lower jury award), aff'd in relevant part, 821 F.2d 1147 (5th Cir. 1987) (en banc), vacated on other grounds and remanded, 490 U.S. 1032 (1989); Solomon v. Warren, 540 F.2d 777, 792 (5th Cir. 1976) (allowing recovery for conscious pain and suffering prior to death although apprehension of death could only be presumed), cert. denied, 434 U.S. 801 (1977); Brun-Jacobo v. Pan Am. World Airways, Inc., 847 F.2d 242, 245 (5th Cir. 1988) (reinstating original verdict of $20,000 for pre-impact mental anguish after second jury's award of $25,000 was reversed by court); In re Air Crash Disaster at New Orleans, La. on July 9, 1982, 795 F.2d 1230, 1237 (5th Cir. 1986) [hereinafter Air Crash New Orleans II] (holding there was sufficient evidence of pre-impact pain and suffering to raise a jury question, but for retrial set the maximum recovery at $7500 per parent and $5000 per child); Pregeant v. Pan Am. World Airways, Inc., 762 F.2d 1245, 1249 (5th Cir. 1985) (holding that evidence was sufficient to establish pre-impact mental suffering and post-impact pain and suffering before death); Haley v. Pan Am. World Airways, Inc., 746 F.2d 311, 313 (5th Cir. 1984) (applying Louisiana law, court permitted recovery for decedents pre-impact fear, even without eyewitness testimony); Shu-Tao Lin v. McDonnell Douglas Corp., 742 F.2d 45, 49 (2d Cir. 1984) (upholding jury's award for pre-impact pain and suffering); Malacynski v. McDonnell Douglas Corp., 565 F. Supp. 105, 106 (S.D.N.Y. 1983) (stat-
leged damages too speculative.\footnote{Recently, courts have adopted differing theories that support the basis of pre-impact fear recoveries. Surprisingly, these theories are quite similar in their underlying rationale. Some courts refuse to separate the ordeal into pre-injury and post-injury, focusing instead on the tortious physical injury involved.\footnote{Other courts recognize the panic and stress of pre-impact fear as negligently in-

ing New York law does allow a claim for pre-impact pain and suffering as well as post-impact pain and suffering); Furumizo v. United States, 245 F. Supp. 981, 1015 (D. Haw. 1965) (awarding for pain and suffering “during the descent of the Piper plane, its crash to the ground, and the burning of the decedent to death.”), aff’d, 381 F.2d 965 (9th Cir. 1967); Blum v. Airport Terminal Serv., 762 S.W.2d 67, 76 (Mo. Ct. App. 1988) (upholding jury award in part because decedent sustained severe pain and suffering during conscious moments both prior to and immediately following the crash); Nelson v. Dolan, 434 N.W.2d 25, 31 (Neb. 1989) (allowing recovery for conscious pre-fatal injury, fear, and apprehension of impending death); Hurst Aviation v. Junell, 642 S.W.2d 856, 859 (Tex. App.—Fort Worth 1982, no writ) (finding evidence sufficient to establish decedent suffered mental anguish because he was conscious of approaching death).} See, e.g., Moorhead v. Mitsubishi Aircraft Int’l, 828 F.2d 278, 288 n.43 (5th Cir. 1987) (upholding district court’s denial of damages for decedents’ pre-crash conscious pain and suffering because occupants of plane were killed instantly, and because there was no evidence of what happened inside the plane before its crash); Shatkin v. McDonnell Douglas Corp., 727 F.2d 202, 206 (2d Cir. 1984) (holding it would there was no evidence that decedent suffered conscious pain and suffering prior to impact); Douglass v. Delta Air Lines, Inc., 709 F. Supp. 745, 766 (W.D. Tex. 1989) (finding insufficient evidence to support an award for pre-
impact mental anguish), modified on other grounds, 897 F.2d 1336 (5th Cir. 1990); Larsen v. Delta Air Lines, Inc., 692 F. Supp. 714, 721 (S.D. Tex. 1988) (finding conflicting testimony too speculative to award damages for any pre-impact suffering that the decedent may have experienced); Feldman v. Allegheny Airlines, Inc., 382 F. Supp. 1271, 1301 (D. Conn. 1974) (holding that it would be too speculative to award damages for conscious pain and suffering in contemplation of death), aff’d in part and rev’d in part, 524 F.2d 384 (2d Cir. 1975).

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flicted emotional distress that exists regardless of a physical injury. Both theories recognize the inevitable anguish involved in an airline crash, but the latter theory leads to larger recoveries even in the face of minimal physical harm to the plaintiff.

A. ELEMENTS AND REQUIREMENTS NECESSARY FOR RECOVERY

Under a tortious physical ordeal theory, as discussed previously, some courts establish arbitrary elements necessary to allow recovery for pre- or post-impact pain and suffering. Courts generally require a physical injury, or in the case of mental anguish, a physical manifestation of that injury before a plaintiff can recover for pre-impact injuries. Courts also might require proof of consciousness after impact for any post-impact damages.

1. Impact Rule and Physical Manifestation Requirement

The impact rule and physical manifestation requirement are common devices used to limit damages for pre-impact fear. For example, Illinois courts used to require a contemporaneous bodily injury in claims for pre-impact anguish. In *Air Crash Chicago* the court denied the plaintiffs' recovery and held that emotional distress recovery is allowed only "when the distress is caused by a physical injury" not "in anticipation of physical injury." Three years later the Illinois Supreme Court abandoned this impact rule and adopted a zone-of-danger rationale. This zone-

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59 Sydnor, *supra* note 6, at 356. The impact rule (requiring impact on the plaintiff) and the physical manifestation rule (requiring that distress must result in some physical symptom or injury) are common restrictions placed on the use of a negligent infliction of emotional distress claim. *See generally* W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 54 (5th ed. 1984 & Supp. 1988) (discussing recovery for mental disturbances).

40 507 F. Supp. 21 (N.D. Ill. 1980).

41 *Id.* at 23 (emphasis added). On reconsideration, the court held that the plaintiffs could recover for pre-impact distress if they could show "resultant physical manifestation" of the distress. *Air Crash Chicago*, 18 Av. Cas. (CCH) ¶ 17,215, at 17,217 (N.D. Ill. 1983).

of-danger rule requires that the party show some sort of physical injury as a result of the emotional distress.

Courts applying the impact rule usually follow the rationale in 436A of the *Restatement (Second) of Torts.* Comment B states the policies for such a rule:

One is that emotional disturbance which is not so severe and serious as to have physical consequences is normally in the realm of the trivial, and so falls within the maxim that the law does not concern itself with trifles. It is likely to be so temporary, so evanescent, and so relatively harmless and unimportant, that the task of compensating for it would unduly burden the courts and the defendants. The second is that in the absence of the guarantee of genuineness provided by resulting bodily harm such emotional disturbance may be too easily feigned, depending, as it must, very largely upon the subjective testimony of the plaintiff; and that to allow recovery for it might open too wide a door for false claimants who have suffered no real harm at all. The third is that where the defendant has been merely negligent, without any element of intent to do harm, his fault is not so great that he should be re-

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If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.

*Restatement (Second) of Torts* § 436A (1965).

Prosser and Keeton also outline some of the objections to recovery for mental disturbance: “that mental disturbance cannot be measured in terms of money, and so cannot serve in itself as a basis for the action; that its physical consequences are too remote, and so not ‘proximately caused’; that there is a lack of precedent; and that a vast increase in litigation would follow.” *Keeton et al., supra* note 39, at 360. These objections have been discredited by recent commentators and courts. But Prosser and Keeton still have three remaining vital concerns:

(1) the problem of permitting legal redress for harm that is often temporary and relatively trivial; (2) the danger that claims of mental harm will be falsified or imagined; and (3) the perceived unfairness of imposing heavy and disproportionate financial burdens upon a defendant, whose conduct was only negligent, for consequences which appear remote from the wrongful act.

*Id.* at 360-61.
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required to make good a purely mental disturbance.\(^{44}\)

This impact rule dominated the twentieth century cases, apparently because of concern over an increase in burdensome litigation, a fear of fraudulent claims,\(^ {45}\) a general suspicion of damages for emotional distress, and "a conviction that one had to bear the psychological hard knocks in life."\(^ {46}\) Courts that also require a physical manifestation of the emotional distress follow this same line of reasoning.

Some courts, however, reject this rationale. The court in Fogarty v. Campbell 66 Express, Inc.\(^ {47}\) believed that such a rule seemed "illogical and unenlightened" when there is a genuinely distressed plaintiff.\(^ {48}\) Advances in diagnostic techniques, which can accurately measure emotional distress even when there is no physical injury, eliminate the danger of fraudulent claims.\(^ {49}\) "[M]ental suffering is scarcely more difficult of proof [sic], and certainly no harder to estimate in terms of money, than the physical pain of a broken leg, which never has been denied compensation."\(^ {50}\)

The counter arguments against the imposition of such rules are very persuasive. The attempt to eliminate fraudulent claims by imposing an impact requirement may have been necessary before medical science could adequately recognize emotional distress.\(^ {51}\) Today, however, emo-

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\(^ {44}\) Restatement, supra note 43, § 436A cmt. b.
\(^ {48}\) Id. at 963.
\(^ {49}\) Id. Although the federal court in Fogarty disapproved of the anachronistic impact rule, it was forced to follow the rule until formally discarded by the Kansas Supreme Court.
\(^ {50}\) Keeton et al., supra note 39, at 55.
\(^ {51}\) Fogarty, 640 F. Supp. at 962. The court succinctly stated: Today, it is not at all clear that a physical impact is more likely to result in genuine emotional distress than are many non-impact situations. For instance, the fear of a fatal collision seems far more likely to create intense emotional distress than is a merely incidental physi-
tional damages are quantifiable and commonly recognized by medical doctors. Additionally, denying a valid claim merely to avoid burdensome litigation has been discredited.52 Finally, requiring plaintiffs to prove resulting physical injury from emotional distress can lead to injustice if proof is unavailable, or can lead to creative fact finding by plaintiffs' attorneys zealously trying to manufacture such proof.53 Therefore, the impact rule might be considered outdated and ineffective as a means of discouraging litigious behavior.

2. Proof of Consciousness

Another device courts use to limit post-impact awards is "proof of consciousness." Many courts require proof of consciousness of the decedent prior to death in order to award post-impact damages for physical injuries, and any post-impact mental anguish. For example, the Fifth Circuit Court of Appeals in Pregeant v. Pan American World Airways, Inc.,54 required proof that the decedent was conscious, however briefly, following the injury to allow post-impact pain and suffering.55 The decedent, a former flight attendant, assumed a "brace" position as the plane fell from the sky.56 The other 144 decedents died primarily from dismemberment and impact injuries. The plaintiff, on the other hand, was not dismembered but instead had third-degree burns over ninety-five percent of her body. Based on the evidence, the court held that a rea-
sonable jury could have inferred she was conscious after impact, and therefore allowed recovery to her estate for the extreme pain that she suffered.\textsuperscript{57}

\section*{B. Judicial Techniques Lessening Strict Requirements}

While most courts require a physical impact or a physical manifestation of mental anguish, other courts use a variety of techniques to circumvent the impact rule and proof of consciousness requirement. In an early leading case, \textit{Solomon v. Warren},\textsuperscript{58} the Fifth Circuit extended the time frame surrounding injury to include the inevitable physical injury of death and the mental anguish in anticipation of impact.\textsuperscript{59} The court, applying Florida law, stated that "the plaintiff must prove that the deceased was conscious between the time of injury and the time of death, so that he actually felt and appreciated the pain resulting from the injuries."\textsuperscript{60} The decedents were aboard a private plane. After running low on fuel, the pilot radioed the Barbados tower stating that the fuel gauges were reading low and that he would attempt to ditch the plane near a merchant vessel. Neither the plane nor its passengers were ever recovered. Although no evidence showed the decedents survived impact, the court found that they were probably aware of their impending death from the time of the radio transmission and thus were certain to have "experienced the most excruciating type of pain and suffering."\textsuperscript{61} The court reasoned that although the usual sequence is impact followed by pain and suffering, there is

\textsuperscript{57} \textit{Id.} Although her consciousness was not conclusively established, the possibility that she \textit{could have} experienced such pain after impact must have swayed the court in allowing post-impact recovery.

\textsuperscript{58} 540 F.2d 777 (5th Cir. 1976), \textit{cert. denied}, 434 U.S. 801 (1977).

\textsuperscript{59} \textit{Id.}; see also Carol Tener, \textit{Recovery Allowed for Pain and Suffering Experienced by Decedent Prior to Impact}, 4 W. St. L. Rev. 301 (1977); Farnbauch, \textit{supra} note 4, at 231.

\textsuperscript{60} \textit{Solomon}, 540 F.2d at 792.

\textsuperscript{61} \textit{Id.} Dissenting Judge Gee argued strongly against allowing pre-impact damages in this case because he viewed them as uncertain and immeasurable. \textit{Id.} at 797 (Gee, J., dissenting).
no logical reason to reject a claim just because the sequence was reversed. This same argument was advanced by the plaintiff in Air Crash Chicago, but to no avail.

IV. DEGREE OF EVIDENCE REQUIRED FOR RECOVERY

Many courts refuse to award pre- or post-impact damages because of lack of proof. "A damages award cannot stand when the only evidence to support it is speculative or purely conjectural." This issue arises in most avia-

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62 Id. at 793. But cf. In re Eastern Airlines, Inc., Engine Failure, Miami Int'l Airport on May 5, 1983, 629 F. Supp. 307, 310 (S.D. Fla. 1986) (applying Florida law, the court stated that "[a]bsent allegations of impact and/or direct physical contact resulting from defendant's alleged negligence, this Court concludes that there can be no recovery for emotional distress caused by simple negligence, unless Plaintiffs can establish discernible physical consequences resulting from the distress"), overruled by, Floyd v. Eastern Airlines, Inc., 872 F.2d 1462 (11th Cir. 1989) rev'd, 499 U.S. 530 (1991). Subsequently, the Eleventh Circuit held that because passengers did experience fright and terror after all three engines failed, the plaintiffs had stated a cause of action for intentional infliction of emotional distress under state law. Floyd, 872 F.2d at 1467. The court also held that the Warsaw Convention allows recovery for "purely emotional injuries unaccompanied by physical injury." Id. at 1471. The circuit decision upheld the Florida appellate court decision in King v. Eastern Airlines, Inc., 536 So. 2d 1023 (Fla. Dist. Ct. App. 1987), but acknowledged that the Florida Supreme Court was yet to hear the issue, and thus the state cause of action would be subject to a later decision. Finally the Florida Supreme Court, focusing on the intent aspect, decided that the plaintiffs had not stated a cause of action for intentional infliction of emotional distress under state law. Eastern Airlines, Inc. v. King, 557 So. 2d 574, 576 (Fla. 1990). The court did agree that there was a claim for emotional distress under Article 17 of the Warsaw Convention. Id. at 578. Subsequently, the U.S. Supreme Court granted certiorari and held that Article 17 of the Warsaw Convention did not allow recovery for mental injury when unaccompanied by physical injury. Eastern Airlines, Inc. v. Floyd, 499 U.S. 530 (1991). The court focused on the term "lesion corporelle" in the original French text of the Warsaw Convention and took it to mean "bodily injury." Floyd, 872 F.2d at 1491. They held that a narrow reading of the Warsaw Convention was a product of the original intent of the drafters who wanted to limit the liability of fledgling airlines and who never considered liability for purely psychic injury. Id. at 1498-99.

63 507 F. Supp. 21 (N.D. Ill. 1980). In this case the plaintiff tried to convince the court to extend the time frame to include the period "immediately prior to inevitable injury." Id. at 23. The court, however, rejected this analysis presumably on the basis of strict adherence to the impact rule. Id. at 24.

tion cases, creating a considerable amount of case law.

One of the earliest aviation cases to discuss conscious pain and suffering in contemplation of death was Feldman v. Allegheny Airlines, Inc. In this case, the surviving husband brought a wrongful death action on behalf of his wife who was killed in an airplane crash. At trial, the plaintiff submitted the National Transportation Safety Board report that indicated that a fire began upon impact and totally destroyed both the upper portion of the fuselage and the cabin area of the airplane. The report noted that the crash was survivable because "the fuselage structure remained sufficiently intact to preclude the infliction of traumatic injuries to the occupants." Over one half of the deceased passengers were found near a rear door that could not be opened without a stewardess or without the passengers being able to read detailed instructions. All of the passengers, except the two survivors, died of smoke inhalation or burns. One survivor testified that he anticipated the crash when, upon looking out the window, he noticed that the plane was at an unusually low altitude.

The court analyzed all of this testimony yet found that the evidence failed "to show the existence of any nexus between the evidence that many of the passengers remained conscious after impact and the crucial question whether the decedent was likewise conscious after impact." The evidence failed to satisfy the proof of consciousness requirement, especially since there was no evidence showing where the decedent's body was found. Similarly, the evidence proved no dramatic change in alti-

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66 Id. at 1300 n.38.
67 Id. at 1300 n.39.
68 This passenger was one of the two survivors who avoided the rear door and instead climbed out over the left wing.
69 Id. at 1300.
70 Id. The court's analysis seems to hold that if the plaintiff had been found in her seat, the evidence would lean towards unconsciousness after impact. Conversely, if she had been found near the rear door with the other decedents, there
tude occurred during the plane's descent. The court found the evidence too speculative to prove that Mrs. Feldman was cognizant of the impending danger, and thus did not allow damages for conscious pain and suffering before death. It seems clear that if the plaintiff had proven that Mrs. Feldman survived the impact long enough to struggle towards the rear emergency door, the court would have likely awarded damages for her panic stricken moments inside a burning airplane.

In a unique factual situation, the Fifth Circuit reversed an award of $100,000 for pre-death pain and suffering in In re Air Crash Disaster at New Orleans, Louisiana on July 9, 1982. The Pan American plane crashed into Mrs. Giancontieri's house, killing her and her three children who were also inside. Although the evidence proved that Mrs. Giancontieri's body was found in a crawling position and that she died from third degree burns over 100 percent of her body, the court found that there was no evidence of her consciousness after the plane crashed into her house. The court stated, "[t]here is simply no direct or circumstantial evidence from which it could be inferred that Mrs. Giancontieri felt anything between the impact of the plane and her death." The court went to great lengths to distinguish this case from Pregeant v. Pan American World Airways, Inc., a similar case arising out of the same air crash, which relied on the fact that the decedent on board the plane had braced herself thus raising an "inference of continued consciousness." It seems that the

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71 Id. at 1301.
72 Id.
73 767 F.2d 1151 (5th Cir. 1985) [hereinafter Air Crash New Orleans III].
74 Id. at 1157.
75 Id.
76 762 F.2d 1245 (5th Cir. 1985).
77 Air Crash New Orleans III, 767 F.2d at 1157 n.9. Concerning pre-impact mental suffering, the Pregeant court found that there was a basis for finding that the decedent suffered for at least part of the last twenty seconds of the flight as the plane struck a tree and rolled. Pregeant, 762 F.2d at 1249.
court in *Air Crash New Orleans III* was basing its analysis of the evidence on a merciful belief in instantaneous death rather than having to acknowledge Ms. Giacontieri's unimaginable pain and mental anguish.

Courts are reluctant to allow damages for pre-death pain and suffering or mental anguish in the face of circumstantial or speculative evidence. In *Douglass v. Delta Air Lines, Inc.* the district court stated that although mental anguish prior to impact is recoverable by the estate of the deceased, it must be more than speculative or purely conjectural. The court recognized that eyewitness testimony is not necessary "because no one will ever know what was going through the mind of the decedent before the crash." Even though it did not expand on its reasoning, the court concluded: "[t]here is simply not enough evidence that the passengers seated in the front of the aircraft experienced the same fears as those in the rear, or that Mr. Douglass' feelings were more like the frightened survivors than the unfazed survivors."

Apparently, the court in *Douglass* relied on the ruling in another case arising out of the same crash. In *Larsen v. Delta Air Lines, Inc.* the wife of a deceased passenger killed in the L-1011 crash at Dallas/Fort Worth International Airport brought a wrongful death action against the airline. The district court found conflicting testimony too speculative to award damages. Two crash survivors testified they experienced "trepidation" as the plane descended and made contact with the ground, while two other survivors testified that the plane's approach was consistent with landings in stormy weather and that the plane's initial contact with the ground was rough, but did not concern them. The court stated that because of this

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79  Id. at 765.
80  Id. at 765-66.
81  Id. at 766.
83  Id. at 721.
conflicting testimony and the lack of testimony concerning what the decedent experienced, it could not award damages for pre-impact pain and suffering. The court conceded that Texas recognizes recoveries for pre-impact mental anguish, but refused to award damages when the evidence was questionable and speculative.

In contravention of the foregoing cases is the benchmark case of Haley v. Pan American World Airways, Inc. where the court upheld a $15,000 award for pre-impact fear. The only evidence offered was a videotape simulation of the takeoff and crash together with an expert witness who explained that the plane's wing struck a tree fifty-three feet above ground and then rolled, impacted, and disintegrated four to six seconds later. The plaintiff's expert expressed the opinion that "most of the people [aboard Flight 759], if not all, would be in absolute state of pandemonium, panic and extreme state of stress," probably from the beginning of the descent and roll, but definitely from the time the wing struck the tree. Even the defendant's expert conceded 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 and experienced a whole different situation." The court analyzed Louisiana law and found no cases that had previously confronted whether pre-impact fear prior to death and prior to physical impact was legally compensable. It did hold, however, that Louisiana allowed recovery during a negligently produced ordeal and believed that Louisiana courts would probably not sever such an ordeal before and after impact. Looking to the Solomon precedent, the

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84 Id.; see also George S. Petkoff, Recent Cases and Developments in Airlaw Part II, 56 J. AIR L. & CoM. 491 (1990) (discussing the rationale in the Larsen case).
85 746 F.2d 311 (5th Cir. 1984).
86 Id. at 316.
87 Id.
88 Id. at 314.
MENTAL ANGUISH DAMAGES

The court acknowledged that no one will truly ever know what the decedent understood before his death, "[t]he inference is more than 'reasonable', however, that [the decedent] apprehended his death at least from the time the plane's wing hit the tree." Concededly, the evidence in Haley was speculative, but the court refused to find the jury award too "shocking" in the face of such a horrible disaster. By affirming this award for pre-death mental anguish, the Haley court paved the way for acceptance of these types of damages based on somewhat conjectural evidence. Other courts have followed the humanistic and sympathetic reasoning underlying the Haley analysis and allowed pre-impact recovery, but only when remittitur is an added option to reduce extremely high recoveries.

Some commentators support the award of speculative pre-impact damages, such as those awarded in Haley, as long as the practice of remittitur can be used. Remittitur is the process by which a court compels a plaintiff to choose between reduction of an excess verdict or a new trial. On its face, remittitur looks to be favorable to those plaintiffs whose mental anguish claims a court might strike as too speculative. The opposite argument can be made, however, that remittitur is inappropriately used to lower jury awards that accurately compensate truly injured victims.

V. EVIDENTIARY ISSUES IN PRE-IMPACT CASES

As the air disaster near Chicago O'Hare International
Airport demonstrated, the same crash can result in very different results turning on an evidentiary issue. In fact, most of the existing case law concerning pre- and post-impact mental anguish has arisen out of only a few airline accidents. Courts have not consistently applied rules of evidence in cases arising out of the same airline crash. The most interesting manifestation of inconsistent results arose out of the DC-10 crash at Chicago O'Hare on May 25, 1979.

In *Shatkin v. McDonnell Douglas Corp.* the Second Circuit denied recovery, apparently basing its ruling on the fact that when the plane lost an engine on its left side, Mr. Shatkin was seated on the right side of the plane, unable to see the engine. Additionally, some evidence showed that the plane was not in obvious difficulty until a very short time before impact and that no one alerted Mr. Shatkin to the danger. Plaintiffs offered no proof that Mr. Shatkin experienced conscious pain and suffering. The court acknowledged that eyewitness testimony would be impossible to obtain and thus not essential for recovery. The court, however, required at least some circumstantial evidence from which a reasonable inference could be made that the passenger underwent some pre-impact suffering. Failing to find any such evidence in Mr. Shatkin's case, the court reversed the $87,500 award for conscious pain and suffering experienced prior to death.

In direct opposition to the *Shatkin* holding is *Shu-Tao Lin v. McDonnell Douglas Corp.* The Lin court concluded that New York law permits recovery for a decedent's pre-impact fear and found "no intrinsic or logical barrier to

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94 Most case law has arisen from the American Airlines crash at Chicago O'Hare, the Pan Am disaster near New Orleans, Louisiana, and the Delta crash at Dallas/Fort Worth International Airport.
95 727 F.2d 202 (2d Cir. 1984).
96 Id. at 206.
97 Id.
98 Id.
99 Id. at 204.
100 742 F.2d 45 (2d Cir. 1984); see also Winstol D. Carter, Jr., *Recent Developments in Aviation Case Law*, 51 J. AIR L. & COM. 51, 115 (1985).
recovery for the fear experienced during a period in which the decedent is uninjured but aware of impending death."101 The court distinguished *Shatkin*, apparently on the basis that Dr. Lin had been assigned a seat over the left wing, in view of the left engine, and thus was able to see a portion of the wing fall off at the beginning of the flight.102 He might have seen the engine fall off, but there was no direct evidence that he witnessed it.

It is amazing that the same federal court could come to such differing conclusions in these two cases ostensibly because of where the decedent was seated. This underscores the suspicion and hesitancy with which courts view evidence of pre-impact mental anguish.

VI. SURVEY OF STATES THAT HAVE ADDRESSED THE ISSUE OF PRE- AND POST-IMPACT PAIN AND SUFFERING AND MENTAL ANGUISH

Not only have federal courts disagreed on the issues surrounding pre- and post-impact pain and suffering or mental anguish, but many state courts have struggled with these issues. As a result, a variety of theories have been adopted. The following section outlines several jurisdictions that have dealt with these issues in a handful of relevant cases.

A. ILLINOIS

In Illinois, a plaintiff can bring a survival action for con-

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101 *Shu-Tao Lin*, 742 F.2d at 53. The district court gave a more expansive analysis stating:

New York provides a cause of action for the pain and suffering of a decedent before his death. In several cases it has been held that a decedent’s estate may recover for the decedent’s pain and suffering endured after the injury that led to his death. . . . From this proposition it is only a short step to the allowing of damages for a decedent’s pain and suffering before the mortal blow and resulting from the apprehension of impending death.


102 *Shu-Tao Lin*, 742 F.2d at 53.
scious pain and suffering in addition to an action for wrongful death. But, as previously discussed, Illinois courts have limited recovery for negligent infliction of emotional distress to instances when the distress results in physical injury. The court in Harrison v. Burlington Railroad found that conjectural evidence of post-impact damage was not sufficient as proof of this type of damage. Indeed, "where the death is instantaneous or where the decedent is rendered immediately unconscious, an action for pain and suffering cannot be sustained."

B. PENNSYLVANIA

Following Illinois's reasoning, Pennsylvania established tough requirements for recovery of pre-impact mental anguish. Pennsylvania denies recovery for pre-impact emotional distress unless such distress results in physical injury; an evidentiary obstacle that is almost impossible to surmount. In Nye v. Pennsylvania Department of Transportation a father brought a wrongful death action against the driver of the vehicle that ran his daughter's car off the road. The court dismissed the claim for the decedent's pre-impact fright despite testimony that after being forced off the road, the decedent driver struggled to bring her car under control before the fatal crash. The court held that "the estate may recover damages for 'pre impact fright' only upon proof that [the decedent] suffered physical harm prior to the impact as a result of her fear of impending death."

C. KANSAS

Kansas probably would not recognize recovery for pre-impact mental anguish either. Although Fogarty v. Camp-

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103 Air Crash Chicago, 507 F. Supp. 21, 23 (N.D. Ill. 1980).
106 Id. at 318.
108 Id. at 322.
bell 66 Express, Inc.\textsuperscript{109} did not involve an airplane crash, the
district court analyzed many of the precedents involving
airplane accidents. The district court predicted that the
Kansas Supreme Court would follow Illinois\textsuperscript{110} and Penn-
sylvania in denying recovery for pre-impact emotional dis-
tress not resulting in bodily harm.\textsuperscript{111} The court, however,
advocated the abolition of this rule and stressed that the
Kansas Supreme Court should follow the more prevalent
federal precedents.\textsuperscript{112}

Concerning post-impact emotional distress, the court
stated that "[u]nder Kansas law, 'pain and suffering must
be realized by the injured party before it is compensa-
tible.' "\textsuperscript{113} Yet it declined to allow a summary judgment on
that claim because the court was not convinced that the
decedent died immediately.\textsuperscript{114} The court's finding of con-
sciousness contradicted the death certificate, which stated
that the decedent had died immediately.\textsuperscript{115} Arguably, the
district court stretched its analysis to allow post-impact
damages because it determined that the decedent's estate
was owed compensation. Since pre-impact damages were
unavailable, the court’s only option was to allow post-im-
pact damages.

D. MISSOURI

In opposition to the previous three states, Missouri
courts have determined that Missouri statutorily allows
compensation for pain and suffering experienced by the
decedent prior to his death.\textsuperscript{116} In Blum v. Airport Terminal

\textsuperscript{110} See Air Crash Chicago, 507 F. Supp. 21, 23 (N.D. Ill. 1980).
\textsuperscript{111} Fogarty, 640 F. Supp. at 957. The court's analysis is seemingly predicated
upon § 436A of the Restatement (Second) of Torts.
\textsuperscript{112} Id. at 957, 962.
\textsuperscript{113} Id. at 963 (quoting Nichols v. Marshall, 486 F.2d 791, 793 (10th Cir. 1973)).
\textsuperscript{114} Fogarty, 640 F. Supp. at 964.
\textsuperscript{115} The court held that the decedent had possibly survived a first collision be-
tween two trucks and died later when his truck went through a concrete wall. Id.
Thus, the decedent experienced conscious pain and suffering until his death.
\textsuperscript{116} The Missouri wrongful death revised statute section 537.090 provides that
in addition to specified damages "[t]he mitigating or aggravating circumstances
a copilot was killed in an airplane crash, and his parents sued on his behalf. The copilot was semi-conscious at the scene of the crash but lapsed into a coma and died three days later. Looking at his substantial injuries, the court believed that he sustained "severe pain and suffering during his conscious moments." The court also focused on the fact that as an experienced pilot, he was probably uniquely aware of the impending crash. Taken together, these facts evidenced aggravating circumstances. Thus, the court recognized pre-impact mental anguish. The court, however, conditioned post-impact pain and suffering on proof of the continued consciousness of the decedent.

E. MICHIGAN

Michigan common law allows recovery for anxiety, suspense, fright, and mental suffering. In *Platt v. McDonnell Douglas Corp.* the court refused to grant a summary judgment dismissing a claim for post-impact conscious pain and suffering and pre-impact fright and terror. Apparently, the court relied on the National Transportation Safety Board Report stating that the "passengers 'suffered pain while in the air, and before the plane finally smashed them to the ground they were shocked, frightened, held in suspense; and otherwise subjected to mental and physical pain as the airplane inverted, rolled and plunged.'" Although the court acknowledged that "plaintiffs [might] have a difficult time sustaining their burden of proof on this issue," it thought that summary judgment for the defendants would be improper.

attending the death may be considered by the trier of facts. . . ." Mo. Ann. Stat. § 537.090 (Vernon 1988).

117 762 S.W.2d 67 (Mo. Ct. App. 1988).

118 Id. at 76.

119 Id.


121 Id. at 363.

122 Id. at 362-63.

123 Id. at 363.
F. Florida

Florida requires proof of consciousness between time of injury and time of death as a prerequisite to recovery, and requires pain to be conclusively shown. While Florida still clings to the impact rule, Solomon v. Warren was a unique case that side-stepped this requirement. The court reversed the usual sequence of impact followed by pain and suffering and allowed damages for the pain and suffering before an impact. Although the appellate court stated the decision complied with the requirements under the Florida survival statute and the impact doctrine, no proof of suffering was ever shown. "Therefore, Solomon stands for the theory that in cases involving an actual impact, it is reasonable to offer the plaintiff or his representatives an opportunity to prove that he experienced pain and suffering prior to impact and to allow recovery for proof of such injury." Such a theory avoids the problems that arise in cases of instantaneous death. Clearly, however, Solomon is a unique case, and the rest of the Florida jurisprudence relies on the impact doctrine.

G. Nebraska

Although Nelson v. Dolan arose out of a motorcycle and automobile crash, the Nebraska Supreme Court used this case to review pre-impact mental pain and suffering in a lengthy discussion focusing on many cases involving airplane crashes. The court held:

Nonetheless, we are persuaded that there exists no sound legal or logical distinction between permitting a decedent's estate to recover as an element of damages for a decedent's conscious post-injury pain and suffering and mental anguish and permitting such an estate to recover

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124 Tener, supra note 59, at 301.
125 540 F.2d 777 (5th Cir. 1976), cert. denied, 434 U.S. 801 (1978).
126 Id. at 793.
127 Tener, supra note 59, at 310.
128 Id.
130 Id. at 30-32.
for the conscious pre-fatal injury mental anguish resulting from the apprehension and fear of impending death.\textsuperscript{131}

Nebraska law does not allow pre-impact mental anguish damages in a wrongful death action, but does allow the decedent's estate, in a survival claim, to pursue such damages.\textsuperscript{132} In \textit{Nelson}, although there was no evidence that the decedent said anything during the impact and crash, the court held that he should be compensated for the five seconds that he was aware of his impending death.\textsuperscript{133}

H. New York

New York is a leading jurisdiction on causes of action for mental injuries. Federal courts have attempted to define existing New York state law. In applying New York law, the federal district court in \textit{Malacynski v. McDonnell Douglas Corp.}\textsuperscript{134} denied the defendant's motion to dismiss the plaintiff's claim for conscious pain and suffering and the defendant's motion for summary judgment.\textsuperscript{135} Malacynski brought this action after his wife died aboard a DC-10 that crashed at Chicago-O'Hare Airport. Relying on \textit{Anderson v. Rowe},\textsuperscript{136} the court held that a claim was proper where the plaintiff can produce evidence from which a jury could infer that the decedent was aware of the danger and suffered from pre-impact terror.\textsuperscript{137} The \textit{Malacynski} court adopted the view that pre-impact damages were recoverable based on two settled principles of New York law:

First, the New York Court of Appeals has held that a plain-

\textsuperscript{131} Id. at 31.
\textsuperscript{132} Id. at 28-29.
\textsuperscript{133} Id. at 32. This speculative time period was determined by an accident reconstructionist, but there was no conclusive proof that the decedent actually suffered for that amount of time. \textit{Id.}
\textsuperscript{134} 565 F. Supp. 105 (S.D.N.Y. 1983).
\textsuperscript{135} Id. at 106.
\textsuperscript{137} \textit{Malacynski}, 565 F. Supp. at 106. The court in Fogarty v. Campbell 66 Express, Inc., 640 F. Supp. 953, 959 (D. Kan. 1986), dismissed this wrongly placed reliance on the \textit{Anderson} dicta because, in the court's view, the dicta only "implies that recovery would be allowed if the proper evidence were available." \textit{Id.}
MENTAL ANGUISH DAMAGES

Tiff may recover damages for mental trauma induced by fear for one's physical well-being, regardless of whether physical injuries actually were incurred. Second, New York State courts clearly allow claims for post-impact pain and suffering in a wrongful death action where the plaintiff can establish that the decedent actually regained consciousness after the impact. The court established that the pre-impact claim did not merge into the wrongful death claim. Therefore, the plaintiff could pursue both the pre-impact and post-impact conscious pain and suffering claims.

The Second Circuit in *Shu-Tao Lin v. McDonnell Douglas Corp.* followed the Anderson analysis and allowed recovery for a decedent's pre-impact fear. Subsequently, in *O'Rourke v. Eastern Air Lines, Inc.*, the Second Circuit again applied New York law concerning the relevancy of evidence concerning pre-impact pain and suffering. The court agreed that testimony of a passenger sitting ten to fifteen feet behind the decedent was too speculative to be admissible because the survivor did not see the decedent or know what happened to him. The exclusion of such evidence may be due more to the fact that such a question of relevancy is left to the trial judge's discretion and would only be overturned if a clear abuse of such discretion was found. Thus, New York allows such evidence of pre-impact mental anguish, but New York federal courts disallow purely speculative testimony.

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140 742 F.2d 45 (2d Cir. 1984). New York courts have set up criteria to use in judging a claim of this kind. "In determining damages for conscious pain and suffering experienced in the interval between injury and death, when the interval is relatively short, the degree of consciousness, severity of pain, apprehension of impending death along with duration are all elements to be considered." *Juiditta v. Bethlehem Steel Corp.*, 428 N.Y.S.2d 535, 543 (App. Div. 1980).
141 730 F.2d 842 (2d Cir. 1984).
142 Id. at 854.
143 Id.
144 Id.
I. CALIFORNIA

In 1967, an interesting case in California arose that demonstrates the great lengths courts will go in trying to satisfy a physical injury requirement.\(^{145}\) The plaintiffs alleged "great grievous mental suffering, anguish and anxiety and suffered severe shock to [their] nerves and nervous system" when they were negligently led to believe that their plane was about to crash.\(^{146}\) The court found that a nervous "shock" was distinct from mental anguish and thus a physical injury.\(^{147}\) In a rather strange analysis, the court concluded: "[s]uch a result must be regarded as an injury to the body rather than to the mind, even though the mind be at the same time injuriously affected."\(^{148}\) Recently, the court in *In re Air Crash Disaster at Sioux City, Iowa on July 19, 1989*\(^{149}\) pointed out that in California, damages for pre-death pain and suffering of a deceased are not available under section 573 of the California Probate Code, which provides for punitive damages in some instances, but are recoverable under the California wrongful death statute.\(^{150}\)

J. LOUISIANA

Although no Louisiana state court has addressed the issue, the Fifth Circuit, in *Haley v. Pan American World Airways, Inc.*,\(^{151}\) concluded that Louisiana would recognize a cause of action for pre-impact fear experienced by a decedent because Louisiana courts allow recovery for fear during a negligently produced ordeal.\(^{152}\) Article 2315 of the Louisiana Civil Code "recognize[s] that negligence, which

\(^{145}\) Vanoni v. Western Airlines, 56 Cal. Rptr. 115, 117 (Ct. App. 1967).

\(^{146}\) Id. at 116.

\(^{147}\) Id. at 116-17. At that time California did not allow recovery for "emotional distress or mental suffering unaccompanied by physical harm arising from acts which are solely negligent in nature." Id. at 116.

\(^{148}\) Id. at 117.


\(^{150}\) Id. at 1287.

\(^{151}\) 746 F.2d 311 (5th Cir. 1984).

\(^{152}\) Id. at 315.
causes fright and serious personal injury, is actionable." Anguish during an ordeal is also compensable. However, the cases in Louisiana that recognize mental anguish typically compensate for post-impact mental anguish and pain and suffering endured by a decedent. In contrast, the Haley court stated that it should not be implied that Louisiana would not recognize such pre-impact fear. Most likely, under a "negligently produced ordeal" theory, Louisiana would allow recovery.

K. Texas

Texas is another leading jurisdiction for pre- and post-impact pain and suffering and mental anguish recoveries. Texas seems to be following the federal lead in allowing such damages and has ignored the arbitrary requirements of impact and physical manifestation. When looking from a historical perspective, one can see the development of the legal reasoning.

In a 1982 case, Hurst Aviation v. Junell, the Fort Worth Court of Appeals ruled that a $20,000 award for mental anguish was not excessive. The appellants argued that there was no evidence that the pilot survived the impact of the crash after a midair collision. Although the court agreed with the appellants reiteration of the evidence, it held that there was some evidence that the pilot realized his plight and therefore suffered mental anguish prior to his death. The court stated "[c]onsciousness of approaching death is a proper element to be considered in

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153 Id. at 314. Article 2315 states in part: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." LA. CIV. CODE ANN. art. 2315 (West 1977).
154 Haley, 746 F.2d at 314-15.
155 See supra note 38 and accompanying text for discussion of the separation of ordeal theory.
156 642 S.W.2d 856 (Tex. App.—Fort Worth 1982, no writ).
157 Id. at 859.
158 Id. at 858.
159 Id. at 859. "Unable to control his craft, [the pilot] suffered the horror of his impending doom as the plane plummeted to earth." Id.
evaluating mental suffering.'" The court allowed the award to stand, holding that it was the province of the jury to translate mental anguish, however brief, into monetary compensation.

Two years later, the Fort Worth Court of Appeals again discussed these issues in *Piper Aircraft Corp. v. Yowell.* The jury in *Yowell* concluded that the decedent suffered mental anguish, and awarded $500,000. The court reversed the portion of the judgment for the decedent's mental anguish immediately prior to the destruction of the aircraft, on the grounds that it was a survival action incident to an estate, and as such must be brought in the probate court rather than in the district court. The court held that the trial court erred in exercising jurisdiction over the plaintiff's survival action. The court of appeals also stated that the trial court abused its discretion in allowing the plaintiffs to amend their pleadings on the last day of trial to include this survival action for mental anguish damages. On further appeal, the Supreme Court of Texas addressed these issues. In its opinion, the court reversed the court of appeals and held that it was proper to allow a trial amendment "to add element of recovery based upon the mental anguish the decedents suffered." Hence, the Supreme Court of Texas impliedly recognized that a cause of action for pre-impact mental anguish does exist in Texas.

160 Id.  
161 Id.  
162 674 S.W.2d 447 (Tex. App.—Fort Worth 1984), rev'd, 703 S.W.2d 630 (Tex. 1986).  
163 Id. at 455.  
164 Id. at 454.  
165 Id. at 460.  
166 Yowell v. Piper Aircraft Corp., 703 S.W.2d 630 (Tex. 1986). While the trial court awarded the decedents damages for mental anguish suffered, the court of appeals reversed the trial court's judgment on the grounds that "the decedents mental anguish is a matter incident to an estate within the exclusive jurisdiction of the probate court, and therefore, the district court had no jurisdiction over the claim." Id. at 634.  
167 Id.
In *Air Florida, Inc. v. Zondler* the plaintiffs cross-appealed from the jury’s finding that the deceased suffered no pain or mental anguish before his death. The Zondlers’ main witness was a survivor of the crash who testified that when the plane took off, “it shook so abnormally that he knew almost immediately that something was wrong.” He noticed other people were “looking around” after take-off. He also testified “that there were people crying and moaning after the crash but that these sounds stopped very quickly.” Yet, the plaintiffs could not offer any proof that the decedent had knowledge of, or reacted to the crash. In fact, in answer to the defendant’s interrogatories, plaintiffs conceded “that they did not know whether William Zondler died instantaneously in the crash or whether he suffered post-impact conscious pain before his death.” The court held that the jury’s finding of no pain or mental anguish was not against the great weight and preponderance of the evidence.

Most recently, the Fifth Circuit upheld a district court’s denial of decedent’s pre-crash conscious pain and suffering in *Moorhead v. Mitsubishi Aircraft International, Inc.* The evidence indicated that the deaths were instantaneous, and the record contained no evidence concerning what the occupants experienced before the crash. Applying Texas law, the court held that conscious pain and suffering may be established by circumstantial evidence. However, the burden is on the plaintiffs to establish it by a preponderance of the evidence.

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168 683 S.W.2d 769 (Tex. App.—Dallas 1984, no writ).
169 Id. at 774.
170 Id.
171 Id. at 775.
172 Id.
173 Id.
174 828 F.2d 278 (5th Cir. 1987).
175 Id. at 288 n.43.
176 Id.
177 Id. (citing Moore v. Lillebo, 674 S.W.2d 474, 478 (Tex. App.—El Paso 1984), rev’d on other grounds, 722 S.W.2d 683 (Tex. 1986)).
Therefore, the court was completely within its bounds when it refused to speculate on pre-impact mental anguish.

Texas leads the way in pre- and post-impact personal injury recoveries. More litigation is certain to arise alleging pre- and post-impact pain and suffering and mental anguish. Reliance on purely circumstantial evidence, which Texas courts allow, will open the door for even more recoveries.

VII. FEDERAL RECOVERIES AND PECULIARITIES OF THE FIFTH CIRCUIT

The great wealth of case law on this subject has emerged from federal courts throughout the United States. Although federal courts are required to apply the state law in which they sit, remarkably, many federal courts delve into issues that have seen little state review. In most situations, the federal courts make analogies to existing state law in order to apply state rules to aviation accidents. Interestingly, the Fifth Circuit has seen much litigation concerning these issues. Ultimately, the Fifth Circuit established its own precedents and peculiarities.

A. Maximum Recovery Rule

The Fifth Circuit established a “maximum recovery rule” and uses that device to substantially lower jury awards or to decide whether remittitur is in order. This rule does not apply when an award is similar in proportion to at least one other case from that same relevant jurisdiction. The court in Douglass v. Delta Air Lines, Inc. gave its own definition of this rule stating:

The “maximum recovery rule” does not necessarily limit an award to the highest amount previously recognized in the state. For example, in Haley v. Pan Am. World Airways, Inc., 756 F.2d 311 (5th Cir. 1984), surviving parents were awarded $350,000 for the loss of companionship of their...

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adult child. At that time, the highest recovery under similar circumstances for a parent in Louisiana was $150,000. We reduced the award to $200,000 or 33% above the previous high. Thus, the maximum recovery rule does not become operative unless the award exceeds 133% of the highest previous recovery in the state.\textsuperscript{179}

This maximum recovery rule is a device to keep awards low, allowing them to grow at a permissible rate in all similar cases. From this analysis, it seems that the conservative Fifth Circuit is reluctant to award or uphold substantial personal injury verdicts for pre-impact mental anguish.

In \textit{Douglass} the Fifth Circuit analyzed the award for intangible damages (i.e., mental anguish over the loss of a loved one, and loss of society and companionship) and attempted to apply the maximum recovery rule. Stating that the airline had an ethical obligation to cite all relevant state wrongful death cases and all relevant federal law that was based on state substantive law, the court chastised the airline for failing to cite a case arising out of the same crash.\textsuperscript{180} Thus, all relevant cases that are similar in factual background will be used to determine the limit of the maximum recovery rule, and both parties have a duty to present all such cases to the reviewing court.\textsuperscript{181}

\section*{B. The Use of Remittitur}

"Remittitur is a process by which a court compels a plaintiff to choose between reduction of an excessive verdict and a new trial."\textsuperscript{182} Typically, courts will not set aside an award as excessive, but will order remittitur of about fifty percent.\textsuperscript{183} Most courts are reluctant to reverse a jury

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\item\textsuperscript{179} \textit{Id.} at 1344 n.14 (citation omitted).
\item\textsuperscript{180} \textit{Id.}
\item\textsuperscript{181} \textit{Id.}
\item\textsuperscript{183} David Leebron, \textit{Final Moments: Damages for Pain and Suffering Prior to Death}, 64
award;\textsuperscript{184} therefore, remittitur is a useful tool.

Although the federal courts have utilized remittitur for a substantial amount of time, few uniform procedures exist, and doubts remain about its constitutionality.\textsuperscript{185} There are five standards from which to measure a proper remittitur: "(1) fairness to the plaintiff; (2) fairness to the defendant; (3) judicial economy; (4) the constitutional preference for jury trials; and (5) non-constitutionally mandated public policy favoring trial by jury."\textsuperscript{186} It is solely up to the discretion of the trial judge to determine whether a verdict is excessive or not.\textsuperscript{187} The standard of review for such a decision is an abuse of discretion.\textsuperscript{188} The Fifth Circuit uses remittitur extensively as a device to lower jury awards for pre-impact pain and suffering and mental anguish.

Many of the Fifth Circuit cases dealing with remittitur arose out of the crash of Pan American World Airways Flight 759 from Moisant International Airport in New Orleans, Louisiana. The court combined the Trivelloni-Lorenzi and Pampin Lopez district court suits against Pan American in \textit{Air Crash New Orleans I}.\textsuperscript{189} The Trivelloni jury awarded $25,000 to each decedent for pre-impact pain

N.Y.U. L. Rev. 256, 266 (1989). The author conducted an empirical study regarding awards for pain and suffering prior to death. "In the 46 cases studied in this Article’s database where reviewing courts granted remittitur, the average remittitur was 39\% of the initial award." \textit{Id.} at 266 n.46.

\textsuperscript{184} See, e.g., Caldarera v. Eastern Airlines, Inc., 705 F.2d 778, 783 (5th Cir. 1983). The court stated:
The jury’s award is not to be disturbed unless it is entirely disproportionate to the injury sustained. We have expressed the extent of distortion that warrants intervention by requiring such awards to be so large as to "shock the judicial conscience," "so gross or inordinately large as to be contrary to right reason," so exaggerated as to indicate "bias, passion, prejudice, corruption, or other improper motive," or as "clearly exceeding that amount that any reasonable man could feel the claimant is entitled to."

\textit{Id.} at 784 (citation omitted).

\textsuperscript{185} Sann, supra note 181, at 299.

\textsuperscript{186} \textit{Id.} at 301 (citation omitted).

\textsuperscript{187} \textit{Id.} at 302.

\textsuperscript{188} \textit{Id.} at 304.

\textsuperscript{189} 789 F.2d 1092 (5th Cir. 1986), aff’d in relevant part, 821 F.2d 1147 (5th Cir. 1987) (en banc), vacated on other grounds and remanded, 490 U.S. 1032 (1989).
and suffering, as did the Pampin jury. The court of appeals found sufficient evidence for this award, apparently relying on the court’s decision to award damages in Pregeant and Haley. However, the appeals court stated that the evidence in those cases exceeded evidence presented to the Trivelloni and Pampin juries. The juries heard the testimony of two women who were on the ground near the point of impact. One woman testified that she heard one of the engines malfunction. She heard trees cracking and saw the wings of the plane perpendicular to the ground moments before it crashed and burned. The court held this evidence “provided an adequate basis from which the jury could draw reasonable inferences about the mental state of the passengers in the final seconds before the disastrous impact.” Yet the appellate court was convinced that the $25,000 award for pre-impact suffering of the decedents exceeded the maximum recovery rule, and the award should be limited to $7500 for each decedent. These awards were affirmed later the next year.

The court then discussed testimony concerning post-impact damages. Evidence was put forward that witnesses heard screams coming from the burning fuselage after the plane crashed and before it exploded. The pathologist reported that the decedent Alvarez died from third degree burns over ninety-five percent of her body. There was no limb severance and no massive traumatic injuries like the other decedents seated beside her. The court found the jury had a reasonable basis to infer that the decedent was conscious briefly and suffered post-impact pain and suffering.

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190 Id. at 1095.
191 Id. at 1099.
192 Id. at 1098.
193 Id. at 1099.
194 Air Crash New Orleans I, 821 F.2d 1147 (5th Cir. 1987). The court devoted most of its time in this second case to the issue of forum non conveniens.
195 Air Crash New Orleans I, 789 F.2d at 1099.
In *Air Crash New Orleans II* the jury awarded $1.1 million to each of the Eymard children. This general verdict included an award for pre-impact pain and suffering of their parents, who died in this crash. The court could not order a remittitur because it was a general verdict and there was no way of determining what the jury meant to award for each item of damage. The court's only option was to vacate the general award and remand for new trial. In dicta, the court restated the *Trivelloni* maximum allowable recovery of $7500 for each decedent and included that amount in its table of maximum awards for each child as a guide for the district court to follow on remand.

In *Brun-Jacobo v. Pan American World Airways, Inc.* the jury awarded $20,000 for the pre-impact mental anguish of each decedent. At the second trial, the jury returned with an award of $25,000. In its decision to reinstate the original verdict, the Fifth Circuit pointed out the plaintiff had not even complained of this part of the verdict in his original motion for new trial and, since these original verdicts were within the range of permissible awards, the district court had abused its discretion in ordering a new trial. Essentially, the court held that the original verdict was more than sufficient based upon the meager evidence provided.

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196 795 F.2d 1230 (5th Cir. 1986).
197 *Id.* at 1235.
198 *Id.* at 1237.
199 *Id.*
200 847 F.2d 242 (5th Cir. 1988).
201 *Id.*
202 This case was retried due to supposed bias and prejudice.
203 *Id.* at 246-47.
204 *Id.* at 245. The court's analysis is evident from the language that it uses to discredit the relevant testimony and justify lowering the jury award:

While, as *Pampin* illustrates, not all death cases from the same aircraft crash have the same proof on this issue, nevertheless they are usually quite similar as to pre-impact mental anguish, for the proof is generally (and was here) entirely circumstantial and only a very brief time (measured in a few seconds here) is involved.

*Id.*
Finally, in *Air Crash New Orleans III*\(^{205}\) the jury awarded $100,000 to Mr. Giancontieri for the pre-death pain and suffering of his wife, but allowed no award for pre-death pain and suffering for his deceased children.\(^{206}\) Mr. Giancontieri then accepted a remittitur of $15,000. The Fifth Circuit reversed this award claiming that there was no direct or circumstantial evidence proving pre-death pain and suffering.\(^{207}\)

Taking all of these cases together, it seems quite clear that the Fifth Circuit is trying to hold the line on pre-impact pain and suffering recoveries. Their maximum recovery rule essentially disregards jury deliberation of damages and then substitutes what the judiciary thinks is a fair and reasonable award. It can be argued that such rules have restrained the inevitable progression of pre-and post-impact pain and suffering awards.

### VII. FORECASTS AND TRENDS

As one can see from the many cases, causes of action seeking pre- and/or post-impact pain and suffering and mental anguish are increasing in number. It seems likely that most, if not all, states will eventually recognize pre-and post-impact mental anguish because these damages are now being recognized in the federal courts.

The only possible hindrance that may affect the pursuit of these damages is the physical injury or physical manifestation requirements that are necessary for recovery in a few states. The trend clearly is to abolish these archaic requirements because they inhibit the effectiveness of the tort compensation system. The historical justification of reducing fraudulent claims is not applicable, especially in the case of airline accidents where the possibility of fraudulent claims seems slight. There will also be less reliance on this physical impact requirement as more states recog-

\(^{205}\) 767 F.2d 1151 (5th Cir. 1985).  
\(^{206}\) Id. at 1153.  
\(^{207}\) Id. at 1157.
nize negligent infliction of emotional distress. Although some argue that pre-impact mental anguish is immeasurable and uncertain, emotional damages are coming to the forefront of America’s collective consciousness; therefore, more courts will likely recognize these types of damages. Logically, the expansion of the time frame to include injury before the impact, the impact itself, and any post-impact pain and suffering up until death would include both physical and mental injuries.

An increase in recovery amounts is foreseeable. As evidenced by the Fifth Circuit’s maximum recovery rule, damage awards can increase exponentially by up to 133 percent. Even though the Fifth Circuit makes a concerted effort to reduce awards by using remittitur and the maximum recovery rule, many cases with circumstantial evidence are now allowed recovery.

In allowing pre- or post-impact pain and suffering and mental anguish, courts are now more likely to accept somewhat speculative evidence that, at best, is only circumstantial. Many cases state that eyewitness testimony is not necessary for recovery since eyewitness testimony is impossible to obtain in most air crash disasters. Yet courts continue to require that evidence presented must have some reasonable basis for allowing a jury to infer that the decedent experienced pre- or post-impact pain

208 As an interesting side note, Texas has recently refused to recognize a cause of action based upon negligent infliction of emotional distress. Boyles v. Kerr, 855 S.W.2d 593, 594 (Tex. 1993).

209 Fuchsberg, supra note 11, at 34. Fuchsberg points out the obvious problems in judging pre-impact mental anguish stating:

The simple fact is that not all human beings react with fear and terror in times of peril. We humans are a spectrum and react differently in situations of danger. One man’s meat of courage is another man’s poison of fear. We have different thresholds. Some of us are more stoical than others. If a twentieth century Hamlet had been buckled to the fateful seat in [the Lin] crash, and became aware of his peril, his reaction would be uncertain. For all we know, he might be philosophically reciting the equivalent of “To be or not to be” when disaster struck.

Id.

210 See supra notes 178-207 and accompanying text.
and suffering or mental anguish. If circumstantial evidence or something greater is required in all cases, plaintiffs will be forced to explore new avenues of gathering evidence. This could lead to more extensive use of experts.

Obviously, the use of experts is necessary in establishing how the crash occurred, the impact on the passenger cabin, and any physical sensations the decedent might have experienced. The use of an accident reconstructionist can establish solid evidence meriting recovery. Also, psychological experts are used to speculate on the mental anguish such physical sensations cause and the passengers' likely reaction to such stress; they are vital participants in such a cause of action.

As a few of the cases analyzed herein have shown, plaintiffs are now relying on the National Transportation Safety Board reports as evidence to satisfy court requirements of proof. Such reports should have a justifying effect to many jurors because the reports come from an official agency that is not biased in their assessment and report of the crash. Both the jury and the judiciary will rely heavily on such reports. There are, however, some restrictions placed on the use of this report. National Transportation Safety Board determinations of probable cause are inadmissible at trial. Such a pronouncement of cause might unduly influence the jury and unconditionally validate the plaintiff's theory. Although most airlines stipulate to their own negligence, an NTSB showing of wanton or willful negligence as the cause of the crash would give more credibility to the plaintiff's request for punitive damages. In the future, punitive damages might be awarded based upon evidence of pre- or post-impact

211 49 U.S.C. app. § 1441(e) (1988) states that: "No part of any report or reports of the National Transportation Safety Board relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports." Courts have been reluctant to apply this language strictly. Usually the factual report is made public. It is the finding of ultimate or probable cause which courts will not allow into evidence.
pain and suffering. Such highly emotional evidence might sway a jury to find gross negligence.

VIII. CONCLUSION AND QUESTIONS

Some argue that judges are wisely trying to eliminate excessive awards that burden airlines economically and that the limited use of remittitur is acceptable. Financial liability for airline accidents can be enormous. As recoveries for pain and suffering or pre- and post-impact mental anguish increase, so does the cost of insurance premiums that airlines have to pay. Airlines can pass such costs on to consumers through ticket prices, or they can try to respond by cutting internal costs (i.e., lay-offs of employees, less flights, or reduction of employee benefits). In a struggling economy, less air travel by consumers can increase the impact that such cost increases have on the presently unstable airline industry. If airlines are forced to pay higher awards to each decedent’s estate, then higher pre- or post-impact pain and suffering or mental anguish awards are possibly contributing to the present airline industry crisis. Such a belief could explain why the Fifth Circuit has continually remitted such awards.

The foregoing analysis is attenuated at best, however. There is no evidence in aviation case law that supports an economic reason for remitting awards. It seems that a conservative judiciary is merely trying to control a growing area of recovery.

Others might argue that the judicial system is being compromised by eliminating, or in the very least using remittitur to lower, pre- or post-impact pain and suffering or mental anguish. As Abraham Fuchsberg explains, “We

212 In fact, recent airline disasters have resulted in staggering damage amounts. For example, Delta had claims against it totalling between $150 million and $200 million dollars arising out of the 1985 L-1011 crash at Dallas/Fort Worth International Airport. In re Air Crash at Dallas/Fort Worth Airport on Aug. 2, 1985, 720 F. Supp. 1258, 1261-62 (N.D. Tex. 1989), aff’d, 919 F.2d 1079 (5th Cir.), cert. denied, 112 S. Ct. 276 (1991).
must avoid a blind spot in our quest for full damages."\textsuperscript{213} Clearly something in our system fails when recovery is contingent upon where a passenger is seated on an airplane.\textsuperscript{214} Although remittitur is quite common in the judicial scheme today, some would argue that remittitur keeps a truly injured plaintiff from receiving just compensation. Remittitur can be a valuable tool in ending litigation by encouraging a plaintiff to settle their case or face re-trial. But the expanded use of remittitur in airline accidents could be interfering with jury awards that are reasonable and reflect common consensus. As of this date, jury awards for pre-impact pain and suffering have been somewhat conservative, usually in the amounts of $10,000 to $50,000 dollars. If awards for pre-impact or post-impact mental anguish substantially increase into the millions, then the argument for the use of remittitur would be much stronger.

It can also be argued that the act of disturbing jury verdicts disregards the moral outlook and perceptions that society holds. Awards for pre-impact fear or post-impact mental anguish reflect a humanistic desire to help those suffering such a horrible fate. The pain and suffering experienced as a result of a spectacular air crash is unimaginable. So it is juries, made up of peers, who must put a price tag upon what the decedent suffered. Clearly, their own fears weigh heavily in this determination. Although this argument could be used to support the use of remittitur, such a moral component in awarding damages must be allowed.\textsuperscript{215} The court in \textit{In re Inflight Explosion on Trans World Airlines, Inc. Aircraft Approaching Athens,}

\textsuperscript{213} Fuchsberg, supra note 9, at 29.


\textsuperscript{215} Commentators also point out that awards for conscious pain and suffering will tend to be larger when the victim dies. "Near misses diminish the value of conscious pain and suffering," Fuchsberg, supra note 9, at 35. This is possibly due to the fact that in death cases attorneys can dramatize and speculate on the decedent's terror, while a survivor might not emotionally affect the jury as much. \textit{Id.} at 36.
Greece on April 2, 1986\(^{216}\) acknowledged such fears when it allowed a pain and suffering award for the decedent, Mr. Ospina. The court stated:

The jury award represents the sublimation of our own horror and our substitution, through imagination, for Mr. Ospina in his final moments. It is as if we ourselves are falling to our deaths. This constitutes our recognition of the importance of human life and dignity up to the moment of death. The compensation owed the dying Mr. Ospina is one of his assets, which may be collected by his widow for his estate.\(^{217}\)

With advances made in modern science, mental injury and anguish are now clearly identifiable. But when a passenger dies in a plane crash, proof of mental injury is almost impossible. If no one survives the crash, then who knows what the decedent experienced immediately prior to death? Again, as the cases show, the judiciary should be willing to make concessions in this area. The physical manifestation requirement should be abolished.\(^{218}\) The decedent will never be able to testify as to what he experienced. Problems of proof arise when mental anguish prior to impact must be physically manifested in some manner.

The "impact rule" should also be abolished. Requiring a victim to be physically impacted ignores the whole concept of mental injuries. Mental anguish in contemplation of death can be more harrowing than a brief physical impact.

Some commentators argue that allowing pre-impact mental anguish would increase the likelihood of fraud. This restatement rationale is not applicable if one ana-


\(^{217}\) Id. at 641.

\(^{218}\) Clearly, a passenger on board the United Flight that crashed at Sioux City experienced unimaginable horror and terror as the plane continually circled towards the runway and prepared for a crash landing. If there was no proof of that mental anguish, the physical manifestation rule would prevent a deceased passenger from recovery.
lyzes the reality of a plane crash. Anyone who has knowledge that they are about to die most likely undergoes a tremendous amount of genuine stress.

The previous survey of states illustrates the recent pursuit and acceptance of pre-and post-impact pain and suffering and mental anguish. In recent years, use of these theories accelerated, and states are now struggling to develop their own case law. In the future, more concise rules will emerge to better define these concepts. Although the evidentiary obstacles might seem enormous, it is definitely the most advantageous time to set new precedents in this area.