NOTES

DAMAGES FOR A DECEDENT'S PRE-IMPACT FEAR: AN ELEMENT OF DAMAGES UNDER ALASKA'S SURVIVORSHIP STATUTE

I. INTRODUCTION

Courts have recently begun to recognize the recoverability of a new type of damages in survivorship actions: damages for the pre-impact fear[1] of decedents. This "new" element of survivorship recovery, developed from a series of cases involving aircraft crashes, is being increasingly relied upon in cases involving more commonplace occurrences such as automobile accidents. Despite the substantial liabilities which may be generated by such claims, pre-impact fear thus far received surprisingly little analytical attention.

The theory of pre-impact fear is straightforward. The aircraft cases typically involve some sort of mechanical failure that causes an aircraft to crash. At some point in time, the flight pattern of the aircraft or a warning from the pilot informs the passengers that a crash is imminent. Thus, a passenger may become aware that he or she may be killed. Even though a passenger may be killed instantly once the actual impact occurs, the passenger may have suffered extreme mental anguish prior to impact due to the knowledge of impending death.

1. The term "pre-impact fear" will be employed throughout this note. As used, it means fear, terror, and mental anguish experienced when an individual apprehends that an impending impact or injury will likely result in the death of the individual. Other terms used to describe this phenomenon include "pre-impact fright," Nye v. Commonwealth, 331 Pa. Super. 209, 216, 480 A.2d 318, 322 (1984), "pre-impact fear and terror," *In re* Air Crash Disaster near Chicago, 507 F. Supp. 21, 22 (N.D. Ill. 1980), "pre-impact mental anguish," Douglass v. Delta Air Lines, 709 F. Supp. 745, 765 (W.D. Tex. 1989), *modified on other grounds*, 897 F.2d 1336 (5th Cir. 1990), and "pre-injury mental anguish," Nelson v. Dolan, 230 Neb. 848, 857, 434 N.W.2d 25, 31 (1989). Some courts, particularly those inclined to evaluate pre-impact fear claims under an "ordeal" theory, have also referred to "pre-impact pain and suffering." *E.g.*, Lin v. McDonnell Douglas Corp., 727 F.2d 45, 53 (2d Cir. 1984). Courts using an emotional distress theory have referred to the phenomenon as "pre-impact emotional distress." *E.g.*, Fogarty v. Campbell 66 Express, Inc., 640 F. Supp. 953, 962 (D. Kan. 1986). The term "pre-impact fear" as used in this note should be considered synonymous with all such terms.

It is widely held that damages are recoverable for mental suffering and physical pain experienced by a decedent between the time of the fatal impact and death.[2] Pre-impact fear is, however, mental anguish of a very different nature. No physical harm has come to the decedent when the fear is experienced — it is a purely psychic injury. Courts confronting claims for damages from pre-impact fear have divided on how the law should treat such claims. Some have held that pre-impact fear is mental anguish which is part of a larger, ongoing ordeal. These courts have allowed recovery for pre-impact fear as part of the award of damages for conscious pain and suffering. Other courts have viewed pre-impact fear as a form of negligently-inflicted emotional distress. Jurisdictions generally allow recovery for negligently-inflicted emotional distress, but many restrict recovery to those cases in which there was a physical "impact" upon the person of the plaintiff, or require that the mental duress be "physically manifested" by some form of illness or injury.

No published Alaska case addresses the recoverability of damages for pre-impact fear. This fact would be of little importance to most practitioners if pre-impact fear claims were limited to extraordinary circumstances like those of an airplane crash. In recent cases, however, pre-impact fear claims have arisen from more common circumstances such as automobile accidents. Because nothing in Alaska law expressly proscribes pre-impact fear claims, this development offers a rewarding new frontier for plaintiff's attorneys.

This note will analyze the pre-impact fear cases from other jurisdictions and discuss the two theories which courts have used to explain the nature of pre-impact fear. It will then discuss current Alaska law and suggest which of the theories of recovery is more appropriate. The remainder of the note will discuss evidentiary issues that occur in connection with pre-impact fear claims. That section will focus on evidentiary requirements as a tool for "weeding out" inappropriate claims and will conclude with an analysis of some of the special issues that may arise if pre-impact fear claims are brought in the context of an automobile collision.

II. SHOULD ALASKA ALLOW RECOVERY FOR A DECEDENT'S PRE-IMPACT FEAR?

There is no published Alaska case addressing the recoverability of damages for a decedent's pre-impact fear in a survivorship action. This section will analyze the case law on pre-impact fear which has arisen in other jurisdictions. The section will then review current

2. *See* Solomon v. Warren, 540 F.2d 777, 793 (5th Cir. 1976), *cert. denied*, 434 U.S. 801 (1978); RESTATEMENT (SECOND) OF TORTS § 903 (1977).

Alaska law on survivorship and emotional distress and conclude that Alaska should allow recovery of damages for a decedent's pre-impact fear.

A. The Pre-Impact Fear Cases

A number of courts have addressed claims for recovery based on a decedent's pre-impact fear. Some courts have allowed recovery for damages from pre-impact fear.[3] Some have found damages for pre-impact fear to be recoverable only subject to the restrictive rules governing recovery for negligently-inflicted emotional distress.[4] Other courts have judged the pre-impact fear claim too speculative to allow recovery under the facts presented.[5] Only two courts refused to

3. *E.g., In re* Air Crash Disaster near New Orleans, 789 F.2d 1092, 1098-99 (5th Cir. 1986) (applying Louisiana law), *aff'd in relevant part*, 821 F.2d 1147 (5th Cir. 1987) (en banc), *vacated on other grounds*, 109 S.Ct. 1928 (1989); Pregeant v. Pan Am. World Airways, 762 F.2d 1245, 1248-49 (5th Cir. 1985) (applying Louisiana law); Haley v. Pan Am. World Airways, 746 F.2d 311, 313-17 (5th Cir. 1984) (applying Louisiana law); Solomon v. Warren, 540 F.2d 777, 792-93 (5th Cir. 1976) (applying Florida law), *cert. denied*, 434 U.S. 801 (1977); Platt v. McDonnell Douglas Corp., 554 F. Supp. 360, 363-64 (E.D. Mich. 1983) (applying Michigan law); Kozar v. Chesapeake & Ohio Ry. Co., 320 F. Supp. 335, 365-66 (W.D. Mich. 1970) (applying Federal Employers' Liability Act), *modified on other grounds*, 449 F.2d 1238 (6th Cir. 1971); Nelson v. Dolan, 230 Neb. 848, 856-59, 434 N.W.2d 25, 31-32 (1989) (applying Nebraska law); Yowell v. Piper Aircraft, 703 S.W.2d 630, 634 (Tex. 1986) (applying Texas law); Missouri Pac. R.R. v. Lane, 720 S.W.2d 830, 833 (Tex. Ct. App. 1986) (applying Texas law); Green v. Hale, 590 S.W.2d 231, 237-38 (Tex. Civ. App. 1979) (applying Texas law).

4. *E.g.*, Haley v. Pan Am. World Airways, 746 F.2d 311, 313-15 (5th Cir. 1984) (applying Louisiana law); Fogarty v. Campbell 66 Express, Inc., 640 F. Supp. 953, 956-63 (D. Kan. 1986) (applying Kansas law); *In re* Air Crash Disaster near Chicago, 507 F. Supp. 21, 22-24 (N.D. Ill. 1980) (applying Illinois law); Nye v. Commonwealth, 331 Pa. Super. 209, 215-16, 480 A.2d 318, 321-22 (1984).

5. *E.g.*, Moorhead v. Mitsubishi Aircraft Int'l, 828 F.2d 278, 288 n.43 (5th Cir. 1987); Shatkin v. McDonnell Douglas Corp., 727 F.2d 202, 206-07 (2d Cir. 1984); Douglass v. Delta Air Lines, 709 F. Supp. 745, 765-66 (W.D. Tex. 1989), *modified on other grounds*, 897 F.2d 1336 (5th Cir. 1990); Larsen v. Delta Air Lines, 692 F. Supp. 714, 721 (S.D. Tex. 1988); Feldman v. Allegheny Airlines, 382 F. Supp. 1271, 1301 (D. Conn. 1974).

Cases denying pre-impact fear claims as too speculative have been cited by federal courts as indicating that a state would allow a claim for pre-impact fear under different circumstances. *See, e.g.*, Lin v. McDonnell Douglas Corp., 742 F.2d 45, 53 (2d Cir. 1984) (citing Anderson v. Rowe, 73 A.D.2d 1030, 1031, 425 N.Y.S.2d 180, 181 (N.Y. App. Div. 1980)). Such an approach is questionable, since the determination that a claim is too speculative means that the court need not inquire into the underlying question of whether or not such a claim is actually cognizable. *Shatkin*, 727 F.2d at 206-07. *Cf. Feldman*, 382 F. Supp. at 1301 (dismissing a claim as speculative without inquiring as to compensability under Connecticut law).

recognize a claim for damages based on a decedent's pre-impact fear.[6] Most pre-impact fear cases have held that compensation for a decedent's pre-impact fear is an element of damages in a survival action, rather than a wrongful death action.[7]

Although the interval in which pre-impact fear is experienced is often extremely brief, substantial awards have been assessed as compensation for that fear.[8] This fact makes the pre-impact fear cases

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6. DeLong v. Schneider Nat'l Carriers, No. C2-88-359 (S.D. Ohio July 17, 1989); Case v. Norfolk & W. Ry., C.A. No. S-87-43 (Ohio Ct. App., Sept. 16, 1988). The correctness of the decisions in these two cases is highly suspect. In *Case*, a state court of appeals in Ohio was presented with a claim for pre-impact fear arising from a collision between a car and a train. The court of appeals noted that there were no Ohio cases allowing recovery for "pre-impact terror." The court did not expressly state that Ohio would not recognize a claim for damages from pre-impact fear, but it did not allow recovery either. The *DeLong* court, citing only *Case*, determined that the Ohio Supreme Court would not recognize a claim for damages based on pre-impact fear. In the alternative, it held that the evidence was insufficient to support the claim.

The courts in both *Case* and *DeLong* based their determinations on a mere label, not analysis. It may be true that were no Ohio case in which damages for pre-impact fear were allowed. However, Ohio has been one of the few jurisdictions which has allowed a general cause of action for negligently-inflicted emotional distress. *See* Shultz v. Barberton Glass Co., 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983). Pre-impact fear is emotional distress, and it seems inconceivable that Ohio would allow a general negligence cause of action based on negligently-inflicted emotional distress, but deny all recovery if the emotional distress could be labelled "pre-impact fear." An intelligent plaintiff's attorney would simply change the label on the claim from "pre-impact fear" to "negligently-inflicted emotional distress." The *Case* court relied on a label rather than substance, and the *DeLong* court extended the error by relying on *Case*.

This note will not address at length the argument that a jurisdiction should simply disallow any claim purporting to seek damages for pre-impact fear. Allowing recovery for pre-impact fear is not allowing a "new" type of damages. Pre-impact fear claims are "new" only in that recognition of the fact that pre-impact fear is compensable under the current law is a recent development.

7. *See, e.g.*, Nelson v. Dolan, 230 Neb. 848, 853-59, 434 N.W.2d 25, 29-33 (1989). A survivorship action is usually based on a statutory provision which allows the cause of action in tort to survive an individual's death. *See* ALASKA STAT. § 9.55.570 (1983) (survivorship statute). A wrongful death action is usually based upon a statute which creates an entirely new cause of action in a personal representative of a decedent. *See id.* at § 9.55.580 (wrongful death statute). *See also* Ismael v. City Elec. of Anchorage, 91 F. Supp. 688, 690 (D. Alaska 1950) (holding that the Alaska Wrongful Death Act is not a survival statute).

8. *See In re* Air Crash Disaster near New Orleans, 789 F.2d 1092, 1098-99 ("final seconds;" $25,000 jury award lowered to $7,500), *aff'd in relevant part*, 821 F.2d 1147 (5th Cir. 1987), *vacated on other grounds*, 109 S.Ct. 1928 (1989); Pregeant v. Pan Am. World Airways, 762 F.2d 1245, 1248 n.2 (5th Cir. 1985) (20 seconds; $16,000 award not excessive); Haley v. Pan Am. Airways, 746 F.2d 311, 317-18 (5th Cir. 1984) (four to six seconds; $15,000 award not excessive); Lin v. McDonnell Douglas Corp., 742 F.2d 45, 53 (2d Cir. 1984) (30 seconds; $10,000 award not excessive); Solomon v. Warren, 540 F.2d 777, 793 (5th Cir. 1976) (time not known, but award of $10,000 for pre-impact fear was "if anything, on the very low side"), *cert. denied*, 434

particularly important. Although early pre-impact fear cases typically dealt with airliner crashes[9] or other unusual fact situations,[10] recent pre-impact fear cases have involved pre-impact fear claims resulting from more mundane situations such as automobile accidents.[11] If pre-impact fear becomes compensable in Alaska, and if it is compensable in the average automobile accident, then it will become an important "new" element of damages in many survivorship actions.

Courts have used two major theories to describe the underlying nature of pre-impact fear. Some courts have characterized it as part of

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U.S. 801 (1977); Kozar v. Chesapeake & Ohio Ry., 320 F. Supp. 335, 364 (W.D. Mich. 1970) (sufficient time to allow decedent to hear warning yell, crouch, and run a few steps before being crushed by falling refrigerator car; $500 award); Missouri Pac. R.R. v. Lane, 720 S.W.2d 830, 833 (Tex. Ct. App. 1986) (six to eight seconds; $19,500 award); Green v. Hale, 590 S.W.2d 231, 237-38 (Tex. Civ. App. 1979) (brief interval during fall under truck tire; $5,000 not excessive).

9. *See, e.g.*, Feldman v. Allegheny Airlines, 382 F. Supp. 1271, 1300-01 (D. Conn. 1974). Since the crash of an airliner often involves multiple deaths, it is not surprising that only three crashes account for most of the airliner pre-impact fear cases. Cases generated from the same accident do not, however, necessarily reach consistent conclusions. For example, five cases resulted from the crash of an American Airlines DC-10 near Chicago, Illinois on May 25, 1979. Lin v. McDonnell Douglas Corp., 742 F.2d 45, 47 (2d Cir. 1984) (using "ordeal" theory under New York law and finding sufficient evidence to support claim); Shatkin v. McDonnell Douglas Corp., 727 F.2d 202 (2d Cir. 1984) (finding evidence insufficient to support claim and holding that district court erred in denying motion for J.N.O.V.); Malacynski v. McDonnell Douglas Corp., 565 F. Supp. 105, 106-07 (S.D.N.Y. 1983) (finding pre-impact fear claim is cognizable under New York law); Platt v. McDonnell Douglas Corp., 554 F. Supp. 360, 361 (E.D. Mich. 1983) (finding that Michigan law would allow a claim for pre-impact fear under an "ordeal" theory); *In re* Air Crash Disaster near Chicago, 507 F. Supp. 21, 22 (N.D. Ill. 1980) (finding that evidence was insufficient to support the claim under Illinois law because of "impact rule" for emotional distress claims). Three other pre-impact fear cases resulted from the crash of Pan American Flight 759 on July 9, 1982. *In re* Air Crash Disaster near New Orleans, 789 F.2d at 1094 (allowing pre-impact claim but remitting amount of claim); Pregeant v. Pan Am. World Airways, 762 F.2d 1245, 1247 (5th Cir. 1985) (determining that the evidence was sufficient to support the claim); Haley v. Pan Am. World Airways, 746 F.2d 311, 313 (5th Cir. 1984) (recognizing pre-impact fear claim under Louisiana emotional distress precedent). Finally, two pre-impact cases arose from the crash of Delta Air Lines Flight 191 on August 2, 1985. Douglass v. Delta Air Lines, 709 F. Supp. 745, 748 (W.D. Tex. 1989) (determining that there was insufficient evidence that the particular decedent was aware of the impending crash), *modified on other grounds*, 897 F.2d 1336 (5th Cir. 1990); Larsen v. Delta Air Lines, 692 F. Supp. 714, 716 (S.D. Tex. 1988) (determining that there was insufficient evidence that the decedent was aware of the impending crash).

10. *See, e.g.*, Kozar v. Chesapeake & Ohio Ry., 320 F. Supp. 335, 342. (W.D. Mich. 1970) (decedent crushed by a falling railroad car), *modified on other grounds*, 449 F.2d 1238 (6th Cir. 1971).

11. *E.g.*, Fogarty v. Campbell 66 Express, Inc., 640 F. Supp. 953, 955 (D. Kan. 1986); Nelson v. Dolan, 230 Neb. 848, 849, 434 N.W.2d 25, 27 (1989); DeLong v. Schneider Nat'l Carriers, No. C2-88-359 (S.D. Ohio July 17, 1989); Nye v. Commonwealth, 331 Pa. Super. 209, 211, 480 A.2d 318, 319-20 (1985).

a tortiously-induced ordeal which is not logically separable into "pre-injury" and "post-injury" phases.[12] This theory will be referred to here as the "ordeal" theory. Other courts have held that since pre-impact fear is not caused by any sort of physical injury and exists whether or not any injury ever actually occurs, the fear is a form of negligently-inflicted emotional distress.[13] This theory will be referred to as an "emotional distress theory."

Despite their different labels, these two theories do not involve different conceptions of the nature of pre-impact fear. Rather, they express different views on how pre-impact fear should be categorized under the existing legal framework. The distinction between the two theories is important because the law treats recovery differently depending on the "category" into which pre-impact fear is placed. Courts adopting an ordeal theory might well allow a claim for pre-impact fear in a jurisdiction in which adoption of an emotional distress theory would preclude recovery of such damages.[14]

Although these two theories can lead to different results, both theories are tenable and supported by logic. Determining which theory is more appropriate under Alaska law requires an understanding of the rationale behind both theories, as well as the current state of wrongful death, survivorship and emotional distress jurisprudence in Alaska.

1. *The "Ordeal" Theory of Pre-impact Fear.* The Fifth Circuit provided one of the earliest discussions of the rationale for allowing

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12. *See, e.g.*, Lin v. McDonnell Douglas Corp., 742 F.2d 45, 53 (2d Cir. 1984); Solomon v. Warren, 540 F.2d 777, 793 (5th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977); Platt v. McDonnell Douglas Corp., 554 F. Supp. 360, 363-64 (E.D. Mich. 1983); Nelson v. Dolan, 230 Neb. 848, 857, 434 N.W.2d 25, 30-31 (1989).

13. *See, e.g.*, Haley v. Pan Am. World Airways, 746 F.2d 311, 313-15 (5th Cir. 1984) (discussing negligently-inflicted emotional distress, but citing Solomon v. Warren, 540 F.2d 777, 793-94 (5th Cir. 1976), *cert denied*, 434 U.S. 801 (1977), a case adopting an "ordeal" theory); *Fogarty*, 640 F. Supp. at 956-63; *In re* Air Crash Disaster near Chicago, 507 F. Supp. 21, 23-24 (N.D. Ill. 1980); Nye v. Commonwealth, 331 Pa. Super. 209, 215-16, 480 A.2d 318, 322 (1984).

This note refers to pre-impact fear as negligently-inflicted emotional distress because the conduct which proximately causes the death of a particular decedent is usually negligent rather than intentional. This is not meant to suggest that pre-impact fear could not be intentionally-inflicted and therefore analyzed under the rules of recovery governing intentionally-inflicted emotional distress.

14. Recovery of damages for negligently-inflicted emotional distress is often restricted. The two most common restrictions are often referred to as the "impact rule" and the "physical manifestation rule." The "impact rule" requires that the emotional distress be the result of some "impact" upon the person of the plaintiff. The "physical manifestation rule" restricts recovery to emotional distress which results in some physical symptom or injury. *See generally* PROSSER & KEETON ON THE LAW OF TORTS § 54 (5th ed. 1984 & Supp. 1988).

recovery for pre-impact fear in *Solomon v. Warren*,[15] which involved the disappearance of a small plane. The pilot's last radio communication indicated that the aircraft was low on fuel and that he was preparing to ditch the plane into the Caribbean Sea. Neither the aircraft nor its occupants were ever found.[16] The personal representative of the passengers brought an action against the pilot under, *inter alia*, a Florida survival statute.[17] After a bench trial, the district court found the pilot negligent, and awarded damages for the decedents' conscious pain and suffering, even though there was no evidence that the decedents had survived the impact or suffered any post-impact pain. The trial court reasoned that the decedents had experienced pain and suffering when they became aware of the impending crash.[18] The Fifth Circuit sustained the award.[19] Judge Gee dissented, arguing that Florida required negligently-inflicted emotional distress to be a result of some physical impact before it was compensable.[20] The majority responded:

> [Cases cited by the dissent] simply adhered to the precedent long prevailing in Florida to the effect that no recovery can be had for mental pain and suffering *unaccompanied* by any physical impact, in the absence of wantonness, wilfullness or malice . . . .
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> The question involved in all such cases is foreign to the subject here under discussion: If impact to the person is present, may it follow as well as precede conscious pain and suffering when used as the basis for recovery for such conscious pain and suffering in an action under [the] Florida [survivorship statute]?[21]

The majority answered its own question in the affirmative, stating:

> While in the garden variety of claims under survival statutes, including the Florida Statute — fatal injuries sustained in automobile accidents and the like — the usual sequence is impact followed by pain and suffering, we are unable to discern any reason based on either law or logic for rejecting a claim because in this case as to at least part of the suffering, this sequence was reversed. We will not disallow the claims for this item of damages [pain and suffering] on that ground.[22]

The *Solomon* court has not been alone in holding that pre-impact fear is simply a part of the pain and suffering experienced during a

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15. 540 F.2d 777, 793 (5th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977).
16. *Id.* at 780-81.
17. FLA. STAT. § 46.021 (1971).
18. *Solomon*, 540 F.2d at 792.
19. *Id.* at 793 (2-1 decision on this issue).
20. *Id.* at 796-97 (Gee, J., dissenting).
21. *Id.* at 793 n.21 (emphasis in original). In *Solomon*, the language quoted above terminated with the language, "in an action under Florida Statute section 46.11?". *Id.* The "46.11" is apparently a typographical error. Earlier citations are to "section 45.11," *id.*, which codifies Florida's survivorship statute.
22. *Id.* at 793 (footnote omitted).

negligently-induced ordeal. The Second Circuit in *Lin v. McDonnell Douglas Corp.*, was also reluctant to divide the ordeal into "pre-injury" and "post-injury" phases:

> A decedent's representative unquestionably may recover for pain and suffering experienced in a brief interval between injury and death. . . . We see no intrinsic or logical barrier to recovery for the fear experienced during a period in which the decedent is uninjured but aware of an impending death.[23]

Similarly, the Nebraska Supreme Court in *Nelson v. Dolan* decided not to divide the ordeal into "pre-injury" and "post-injury" phases:

> [W]e 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 postinjury pain and suffering and mental anguish and permitting such an estate to recover for the conscious prefatal-injury mental anguish resulting from the apprehension and fear of impending death.[24]

Other courts have also used an "ordeal" theory to hold that pre-impact fear is compensable as an element of conscious pain and suffering. In *Platt v. McDonnell Douglas Corp.*, a federal district court determined that Michigan would treat pre-impact fear as a form of pain and suffering associated with an injury.[25] A Texas court reached a similar conclusion in *Missouri Pacific Railroad Co. v. Lane*, which involved a decedent killed when a train failed to stop after the decedent's pickup truck stalled on the railroad tracks.[26] The jury awarded damages for the decedent's physical pain and mental anguish. On appeal, the railroad argued that the jury erred in awarding damages for physical pain and mental anguish, since the decedent was killed instantly. The Court of Appeals of Texas rejected this contention: "Such an argument fails to consider the terror and consequent mental anguish Lane faced for the six to eight seconds while he faced imminent death."[27]

The "ordeal theory" advanced in these cases has the advantage of treating pre-impact fear in a manner that comports with the "reality" of the situation. Analyzing the fatal event from the vantage point of hindsight, pre-impact fear is only an element in a larger experience. This point is best made by reference to cases upholding pain and suffering awards for the mental anguish experienced while drowning.[28]

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23. Lin v. McDonnell Douglas Corp., 742 F.2d 45, 53 (2d Cir. 1984) (citation omitted) (applying New York law).

24. Nelson v. Dolan, 230 Neb. 848, 857, 434 N.W.2d 25, 31.

25. 554 F. Supp. 360, 363-64 (E.D. Mich. 1983) (applying Michigan law).

26. 720 S.W.2d 830, 832 (Tex. Ct. App. 1986).

27. *Id.* at 833.

28. *See, e.g.*, Snyder v. Whittaker Corp., 839 F.2d 1085, 1092-93 (5th Cir. 1988) (several hours); Mitchell v. Akers, 401 S.W.2d 907, 912 (Tex. Civ. App. 1966) (two to three minutes).

The mental anguish associated with drowning is the same as the mental anguish of a passenger in an airliner spiralling towards the ground. Both situations involve a type of ordeal in which the decedent becomes aware of his or her impending demise.

A court using an emotional distress theory for pre-impact fear resulting from an airliner crash might distinguish the drowning case by arguing that pre-impact fear in the case of an airliner crash occurs at an earlier time, before the fatal impact is actually in progress, and should therefore be treated differently. This division seems arbitrary and artificial. If there is any distinction at all between the cases, it may also be a "distinction without a difference."[29] The airline passenger is not afraid because the airliner descends swiftly, and the drowning victim is not afraid because he or she is in the water. The airline passenger fears that the accident will terminate in a fatal impact. The drowning victim fears that her struggle in the water will culminate in suffocation. The ordeal theory treats mental anguish arising from either type of ordeal in the same manner. There is no need to overrule the drowning cases or draw such tenuous distinctions under an ordeal theory.

2. *The "Emotional Distress" Theory of Pre-Impact Fear.* Some courts have determined that pre-impact fear is a form of negligently-inflicted emotional distress.[30] This view was first espoused by Judge Gee, dissenting from the holding in *Solomon v. Warren*:

> We are thus presented with an award for a new element of damages, apprehension experienced *before* a death which for all we know was instantaneous. This is new Florida law conveyed by a federal court. Under Florida law, mental suffering is not recoverable in the absence of a physical trauma occasioning it . . . . The majority professes that it has not departed from the impact rule but has only reversed a sequence to allow recovery when the impact *follows* the fear, as well as when the impact *precedes* the mental suffering. But to reverse the sequence is to abandon the rationale of the impact rule: any compensated mental pain and suffering must be caused by

29. Nelson v. Dolan, 230 Neb. 848, 434 N.W.2d 25 (1984), provides some rather compelling support for this assertion. *Nelson* involved a collision between a car and a motorcycle. The defendant's car bumped Nelson's motorcycle, causing the two vehicles to lock together. They traveled, while Nelson struggled to regain control, for about five seconds before the motorcycle struck a lightpost and rolled under the car. Nelson was instantly killed. *Id.* at 849-50, 434 N.W.2d at 27. The Nebraska Supreme Court treated this as a pre-impact fear claim. *Id.* at 854-59, 434 N.W.2d at 30-32. It is difficult to determine whether a case like this is more like the drowning or the airliner crash.

30. Haley v. Pan Am. World Airways, 746 F.2d 311, 314-15 (5th Cir. 1984); Fogarty v. Campbell 66 Express, Inc., 640 F. Supp. 953, 956-63 (D. Kan. 1986); *In re* Air Crash Disaster near Chicago, 507 F. Supp. 21, 22-24 (N.D. Ill. 1980); Nye v. Commonwealth, 331 Pa. Super. 209, 215-16, 480 A.2d 318, 321-22 (1984).

> a physical impact. The airplane crash and the Levins' resulting deaths were not the "but for" cause of whatever anxiety they may have suffered prior to their deaths. Their prior fears would not have been diminished had the plane leveled off at the last moment and avoided disaster altogether. This is because the Levins' anxiety for their own safety and their children's future wellbeing was *caused* by the anticipation of death, not by the actual crash which presumably killed them. It is not enough that some impact accompany the mental suffering: the impact must cause the fears if they are to be compensable. Only then can courts measure mental duress by some means other than sheer speculation.[31]

Courts have treated pre-impact fear as emotional distress with varying results. In *Haley v. Pan American World Airways, Inc.*, the court determined that Louisiana law permitted a general cause of action for negligently-inflicted emotional distress, and that pre-impact fear could be considered negligently-inflicted emotional distress.[32] Two other cases, however, denied recovery for pre-impact fear under the circumstances presented. In *In re Air Crash Disaster near Chicago,* the district court concluded that Illinois law did not permit recovery for negligently-inflicted emotional distress unless the distress was caused by bodily injury.[33] Since the passengers in the crashing airliner had not suffered bodily injury before the pre-impact fear was experienced, the court denied recovery.[34] Recovery was also denied in *Fogarty v. Campbell 66 Express, Inc.*[35] The *Fogarty* court held that negligently-inflicted emotional distress had to result in physical injury before recovery would be allowed under Kansas law. Since there was no indication that the decedent suffered any physical injury resulting from his fear of the impending truck collision, the court denied recovery.[36] A

31. *Solomon*, 540 F.2d at 796-97 (Gee, J., dissenting) (emphasis in original) (footnote omitted).

32. 746 F.2d at 314-15 (citing Stewart v. Arkansas S. Ry., 112 La. 764, 36 So. 676 (1904)). The *Haley* court also cites and criticizes Reed v. John Deere, 569 F. Supp. 371 (M.D. La. 1983), an earlier case denying recovery for pre-impact fear and terror. 746 F.2d at 314 n.4. In *Reed* a man was killed when a lawnmower slipped into gear and backed over him. The district court held that Louisiana did not allow recovery for loss of enjoyment of future life: "Consequently, the terror that Reed no doubt experienced when he realized that the machine was going to run over his body is not compensable." *Id.* at 378. The *Haley* court thought the *Reed* analysis was flawed. *Haley*, 746 F.2d at 314 n.4. The *Reed* analysis is unquestionably *sui generis.*

33. 507 F. Supp. 21, 22-23 (N.D. Ill. 1980).

34. *Id.*

35. 640 F. Supp. 953, 961-63 (D. Kan. 1986).

36. *Id.* The *Fogarty* court clarified that its decision was not an endorsement of the state of the law in Kansas or of the "physical manifestation rule" itself. *Id.* at 962-63. It noted that "a rule denying all recovery to such a genuinely distressed plaintiff seems both illogical and unenlightened." *Id.* at 963. In dicta, the court suggested that jurisdictions should "discard most of the rules restricting recovery for emotional distress." *Id.*

Pennsylvania superior court reached a similar result in *Nye v. Commonwealth*.[37] Assuming arguendo that damages for pre-impact fear were recoverable, the court noted that Pennsylvania adhered to a "physical manifestation rule." Therefore, the court held that the estate could not recover damages for pre-impact fright because the estate did not prove that the decedent suffered physical harm *prior to the impact* as a result of her fear of impending death.[38]

Although the "impact rule"[39] can present a bar to recovery, many jurisdictions have allowed even a very minimal impact to suffice for the purposes of the "impact rule."[40] It is arguable that the lurching of a damaged airliner, or the jolt to the decedent when he or she applies the brakes, would satisfy any sort of "impact" requirement. The "physical manifestation rule,"[41] however, is very nearly a total bar to recovery of damages for pre-impact fear. Short-term emotional distress, even of a very violent nature, is unlikely to result in "seriously deleterious physical consequences."[42]

It can be argued that general principles of tort law support the notion that pre-impact fear should be treated as negligently-inflicted emotional distress. Tort recovery for negligence is allowed when there is: (1) a duty of care; (2) a breach of that duty; (3) proximate cause; and (4) an injury.[43] Pre-impact fear could therefore be treated as negligently-inflicted emotional distress if the fear constitutes an "injury" for purposes of the tort. The dissent in *Solomon* argued that the decedent's fear *was* a discrete injury — even if the crash never occurred, the fear would remain. The court in *In re Eastern Airlines Engine Failure*[44] disagreed. In that case, the crew and passengers of an airliner were preparing for a crash at sea when an engine was restarted. The flight returned safely to the Miami Airport. Passengers brought suit, claiming that their "pre-impact" fear was negligently-inflicted emotional distress.[45] The court denied recovery, holding that the passengers had not suffered injury because there had been no impact.

Both *In re Engine Failure* and *Solomon* involved an ordeal which generated fear in the minds of passengers. One ordeal terminated in

37. 331 Pa. Super. 209, 480 A.2d 318 (1984).

38. *Id.* at 215-16, 480 A.2d at 322 (emphasis in original).

39. For an explanation of the "impact rule," see *supra* note 14.

40. PROSSER & KEETON, *supra* note 14, § 54 at 363-64.

41. For an explanation of the "physical manifestation rule," see *supra* note 14.

42. Annotation, *Right to Recover for Emotional Disturbance or Its Physical Consequences, in the Absence of Impact or Other Actionable Wrong*, 64 A.L.R.2d 100, 105 (1959 & Supp. 1990).

43. *See* RESTATEMENT (SECOND) OF TORTS § 281 (1965); S. SPEISER, C. KRAUSE & A. GANS, THE AMERICAN LAW OF TORTS §§ 1:8-1:11 (1983).

44. 629 F. Supp. 307, 309-10 (S.D. Fla. 1986), *rev'd on other grounds sub nom.* Floyd v. Eastern Airlines, 872 F.2d 1462 (11th Cir. 1989).

45. *Id.* at 309.

an engine restart and a safe landing, the other in death. The nature of the experience was similar in each case, yet the majority in both *Solomon* and *In re Engine Failure* would somehow allow the termination of the ordeal to determine how the law would address mental suffering experienced during the ordeal.[46] If instead the pre-impact fear is viewed as a discrete form of injury, the approach adopted in the dissenting opinion in *Solomon*, damages for pre-impact fear would be recoverable under the theory of negligently-inflicted emotional distress.

3. *The "Emotional Distress" and "Ordeal" Theories Under the Restatement (Second) of Torts.* At first glance, the Restatement (Second) of Torts seems to support the conclusion that pre-impact fear should be treated as negligently-inflicted emotional distress. Section 313 holds a defendant liable for "unintentionally caus[ing] emotional distress" if it results in bodily injury.[47] Negligently caused pre-impact fear is undeniably "unintentionally cause[d] emotional distress." To the extent that it might result in bodily injury, it seems to fit within the recovery scheme outlined in the Restatement.

A closer examination of the Restatement, however, indicates that it would treat pre-impact fear as conscious pain and suffering if the impact or event which is feared actually results in bodily harm. Section 436A, entitled "Negligence Resulting in Emotional Disturbance Alone," sets forth the general rule that there is no liability for negligently-inflicted emotional distress, "without bodily harm or other compensable damage."[48] Section 313 states that there can be liability for negligently-inflicted emotional distress which causes illness or bodily harm.[49] Neither of these sections directly addresses the question of emotional distress which precedes, but does not result in, fatal injury. The commentary to section 313(1) seems to address this issue:

> In general, as stated in § 436A, there is no liability where the actor's negligent conduct inflicts only emotional distress, without resulting

46. In other words, if the plunge towards the ground terminated in a crash, pre-impact fear would be "conscious pain and suffering." Solomon v. Warren, 540 F.2d 777, 792-93 (5th Cir. 1976) (decided under Florida law). If the plunge terminated in an engine restart and successful recovery from the dive, then the same pre-impact fear would be "negligently-inflicted emotional distress." *In re* Eastern Airlines, Engine Failure, 629 F. Supp. at 309-10 (decided under Florida law). *Cf.* Eastern Airlines, Inc. v. King, 557 So. 2d 574, 576-77 (Fla. 1990) (arising from the same accident as *In re* Eastern Airlines, Inc., Engine Failure, this case discusses and approves the impact requirement under Florida's law of intentionally-inflicted emotional harm). This is a peculiar result. The fact that the RESTATEMENT (SECOND) OF TORTS § 436A (1965), seems to reach the same conclusion will be discussed *infra* notes 47-57 and accompanying text.

47. RESTATEMENT (SECOND) OF TORTS § 313 (1965).

48. *Id.* § 436A.

49. *Id.* § 313(1).

> bodily harm or any other invasion of the other's interests. Such emotional distress is important only in so far as its existence involves a risk of bodily harm, and as affecting the damages recoverable if bodily harm is sustained. See § 903.[50]

The commentary indicates that if bodily harm is sustained, emotional distress does affect the damages recoverable under section 903, which defines the phrase "compensatory damages" under the Restatement.[51] The commentary to section 903 states, "damages given for pain and humiliation are called compensatory. They give to the injured person some pecuniary return for what he has suffered . . . ."[52]

The Restatement therefore apparently recognizes two categories of mental anguish. First, if negligent conduct inflicts only mental anguish without bodily harm, then there will be no liability unless the mental anguish itself causes bodily injury.[53] Second, if the negligent conduct inflicts mental anguish and injury, then the compensatory damages can reflect the "pain and humiliation" caused by the emotional distress that preceded the injury.[54] This is exactly the result implicit in the decision of the *Solomon* majority: if negligent conduct causes pre-impact fear and bodily injury, treat pre-impact fear as an element in the portion of the compensatory damages attributable to pain and suffering;[55] if the negligent conduct causes only pre-impact fear, subject pre-impact fear to the restrictions on recovery for negligently-inflicted emotional distress.[56]

None of this necessarily invalidates the "emotional distress" theory. Treating pre-impact fear as negligently-inflicted emotional distress does seem plausible under our current system of tort law jurisprudence.[57] However, there are problems with the theory. The fact that the Restatement supports use of an ordeal theory does seem to weigh against use of the theory in pre-impact fear cases.

There is an even more important practical problem. Treating pre-impact fear as negligently-inflicted emotional distress subjects

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50. *Id.* § 313(1) comment a.

51. *Id.* § 903.

52. *Id.* § 903 comment a.

53. *Id.* §§ 313, 436A (this category of mental anguish is what the law calls "negligently-inflicted emotional distress").

54. *Id.* §§ 313(1) comment a, 903 (this category of mental anguish is called "pain and suffering" and is an element of compensatory damages).

55. *See* Solomon v. Warren, 540 F.2d 777, 792-93 (5th Cir. 1976), *cert. denied*, 434 U.S. 801 (1978).

56. *See In re* Eastern Airlines, Engine Failure, 629 F. Supp. 307, 309-10 (S.D. Fla. 1986), *rev'd on other grounds sub nom.* Floyd v. Eastern Airlines, Inc., 872 F.2d 1462 (11th Cir. 1989).

57. PROSSER & KEETON, *supra* note 14, § 54, at n.56 (briefly mentioning the pre-impact fear cases in the section devoted to negligently-inflicted emotional distress).

claims for damages from pre-impact fear to certain limitations on recovery of damages for negligently-inflicted emotional distress. The extent of the limitation will depend on the law of the individual jurisdiction addressing the pre-impact fear claim. With this in mind, it is appropriate to briefly survey two areas of current Alaska law to determine how it would handle such claims. First there is the threshold question of whether Alaska law would allow any recovery for pre-impact fear. Second, it is necessary to examine Alaska's law relating to negligently-inflicted emotional distress.

B. Current Alaska Law Affecting the Recognition of a Cause of Action Based on a Decedent's Pre-Impact Fear

If a claim seeking recovery for a decedent's pre-impact fear is brought in Alaska, two issues will be of crucial importance. The first issue is whether recovery for pre-impact fear should be permitted. Courts in other jurisdictions have rarely questioned the proposition that pre-impact fear could be compensable under the proper circumstances.[58] The second issue — how such a claim should be categorized under the law — is where courts differ. Some have adopted the ordeal theory and some have adopted the emotional distress theory. This categorization will be particularly important in jurisdictions which restrict recovery for negligently-inflicted emotional distress.

1. *Alaska Would Allow Recovery of Damages for a Decedent's Pre-Impact Fear in a Survivorship Action.* Alaska has never directly considered whether damages can be recovered for a decedent's pre-impact fear. One case suggests, however, that such a claim could be cognizable in a survivorship action. *Horsford v. Estate of Horsford*[59] arose when a man was killed in an aircraft crash. Wrongful death and survivorship claims were brought, and a single lump-sum settlement was paid for both claims. The superior court determined that no portion of the settlement was allocable to the survivorship claim, and the Alaska Supreme Court affirmed. "We find no error here on the superior court's part for there is nothing in the record which indicates that any pain and suffering which William Horsford may have suffered was other than momentary."[60] In a footnote, the supreme court quoted the superior court's discussion of the survivorship claim:

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58. *See, e.g.*, Fogarty v. Campbell 66 Express, Inc., 640 F. Supp. 953, 961 (D. Kan. 1986) (holding that recovery for pre-impact fear is permissible if resulting physical injury is shown). *But see* DeLong v. Schneider Nat'l Carriers, No. C2-88-359, slip op. at 1-2 (S.D. Ohio July 19, 1989) (holding that Ohio law does not recognize claims for pre-impact fear, but qualifying this conclusion by relying on the speculative nature of the claim under the facts of the case).

59. 561 P.2d 722 (Alaska 1977) (2-1 decision, two justices not participating).

60. *Id.* at 729-30.

> It may very well be true that the decedent suffered substantial pain, suffering, and mental anguish arising out of the accident in question but it is equally true that this pain, suffering, and mental anguish and other elements that are usually associated with a survivorship action came quickly and decisively to a tragic termination when the plane hit the ground. . . . The court is of the opinion that any portion of the total settlement that could be allocable to the survivorship portion of the action would be insignificant in terms of the entire settlement.[61]

The language in *Horsford* might seem to suggest that "momentary" mental anguish — such as pre-impact fear — is not compensable in Alaska. Pre-impact fear is not necessarily momentary, however.[62] The cases also distinguish between pre-impact fear and the type of mental anguish and physical pain associated with the fatal injury itself.[63]

Horsford does not state that momentary mental anguish is not compensable in Alaska, however. The superior court did not merely conclude that the recovery allowable under the facts of that case was "insignificant."[64] The supreme court affirmed the superior court decision because there was no indication "on th[e] record" of pain and suffering that was other than momentary.[65]

Horsford is consistent with the proposition that, in order to justify a damages award, pre-impact fear must be more than a momentary awareness substantially contemporaneous with death.[66] It is also consistent with the proposition that a claim for pre-impact fear must be supported by sufficient evidence.[67] The case implies that if there were evidence of fear which was more than momentary, a "significant" recovery for pre-impact fear could be possible.[68]

Horsford implies that pre-impact mental anguish of short duration could be compensable in a survivorship award for pain and suffering.[69] The Alaska Supreme Court has allowed compensation for

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61. *Id.* at 730 n.22.

62. *See, e.g.*, Lin v. McDonnell Douglas Corp., 742 F.2d 45, 53 (2d Cir. 1984) (involving thirty seconds of pre-impact fear).

63. *Cf.* Fogarty v. Campbell 66 Express, Inc., 640 F. Supp. 953, 963-64 (D. Kan. 1986) (treating pain or mental anguish associated with the process of the fatal impact differently from pre-impact fear).

64. *Horsford*, 561 P.2d at 730 n.22.

65. *Id.* at 729-30.

66. *Cf.* Shatkin v. McDonnell Douglas Corp., 727 F.2d 202, 206-07 (2d Cir. 1984) (disallowing recovery for pre-impact fear when decedent could have been cognizant of danger only three seconds prior to impact).

67. *See, e.g.*, Haley v. Pan Am. World Airways, 746 F.2d 311, 316 (5th Cir. 1984).

68. *Horsford*, 561 P.2d at 729-30.

69. *Id.*

negligently-inflicted emotional distress.[70] Alaska should allow recovery for pre-impact fear. Alaska courts should not repeat the error made in *Case* and deny recovery on the ground that no previous Alaska case has used the label "pre-impact fear."[71]

2. *Alaska's Standards for Recovery of Damages for Emotional Distress.* If Alaska placed no restrictions on the recovery of damages for negligently-inflicted emotional distress, then the debate over which theory should be used to categorize pre-impact fear claims would be of little practical significance. Although Alaska law is not completely clear on the issue, it may be read as retaining a "physical manifestation requirement." As a result, the theory used to categorize pre-impact fear cases in Alaska may have significant practical ramifications.

Alaska has looked to the Restatement (Second) of Torts to determine the scope of liability for negligently-inflicted emotional distress.[72] The Restatement does not impose liability when negligent conduct inflicts only emotional distress.[73] The standard for recovery for negligently-inflicted emotional distress is set forth in Restatement section 313:

> (1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other *for resulting illness or bodily harm* if the actor
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> (a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and
>
> (b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.
>
> (2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.[74]

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70. *See, e.g.*, Tommy's Elbow Room v. Kavorkian, 727 P.2d 1038, 1043 (Alaska 1986) (allowing recovery for negligently-inflicted emotional distress).

71. *See supra* note 6.

72. *Kavorkian*, 727 P.2d at 1040-43. *Compare* Richardson v. Fairbanks N. Star Borough, 705 P.2d 454, 456 (Alaska 1985) (adopting RESTATEMENT (SECOND) OF TORTS § 46 (1965), as the standard for recovery for intentionally-inflicted emotional harm) *with Kavorkian*, 727 P.2d at 1040-43 (citing RESTATEMENT (SECOND) OF TORTS § 313, but then disagreeing with the "zone of danger" restriction set forth therein).

73. RESTATEMENT (SECOND) OF TORTS § 436A (1965) (emphasis added).

74. *Id.* § 313 (emphasis added).

The Restatement requirement that the distress result in "illness or bodily harm" is the "physical manifestation" requirement.[75] If Alaska follows section 313, then Alaska does retain a physical manifestation requirement.

In *Tommy's Elbow Room v. Kavorkian*, the Alaska Supreme Court quoted section 313.[76] Although the supreme court did not mention the "physical manifestation" requirement of the Restatement, it did discuss and reject the "zone of danger" rule which is embodied in section 313(2).[77] The cases cited during *Kavorkian*'s discussion of "zone of danger" may shed some light on the Alaska Supreme Court's views on the "physical manifestation" requirement.

The "zone of danger" rule prohibits recovery for emotional distress experienced as a result of harm inflicted on a third party unless the plaintiff was also personally threatened by the same harm which befell the decedent. After rejecting the "zone of danger" rule, the court adopted an approach, first set down by the California Supreme Court in *Dillon v. Legg*,[78] which is based on the foreseeability of the emotional harm to "bystander" plaintiffs.[79]

In *Dillon*, the California Supreme Court restricted its ruling to emotional harm to third parties which manifested itself in physical illness or injury — it required "physical manifestation."[80] Nevertheless, in the 1980 case of *Molien v. Kaiser Foundation Hospitals*,[81] the California court allowed a general cause of action for negligently-inflicted serious emotional distress, apparently eliminating the "physical manifestation" requirement. *Molien* relied on principles of foreseeability similar to those in *Dillon*,[82] but is not cited in *Kavorkian*.[83]

The Alaska Supreme Court's failure to adopt or cite the principle of *Molien* in *Kavorkian* is not an express adherence to the physical

75. *See, e.g.*, Nye v. Commonwealth, 331 Pa. Super. 209, 216, 480 A.2d 318, 322 (1984). *See generally* PROSSER & KEETON, *supra* note 14, at § 54.

76. 727 P.2d 1038, 1040 (Alaska 1986).

77. *Id.* at 1040-43.

78. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

79. Alaska has explicitly allowed recovery for the emotional distress of a family member witnessing another family member being pulled from an automobile wreck. *See Kavorkian*, 727 P.2d at 1040-43. Such "bystander" liability is inconsistent with the use of an "impact" requirement. *See* PROSSER & KEETON, *supra* note 14, at § 54.

80. *Dillion*, 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80. *See* Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 922, 616 P.2d 813, 816, 167 Cal. Rptr. 831, 834 (1980) (noting that *Dillon* required a "physical manifestation").

81. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

82. *Id.* at 921-23, 616 P.2d at 815, 167 Cal. Rptr. at 833 (referring to the analysis in *Dillon* as "apposite").

83. *See also* Croft by Croft v. Wicker, 737 P.2d 789, 791 (Alaska 1987) (discussing the *Kavorkian-Dillon* guidelines).

manifestation rule. It could be argued that the court was simply exercising judicial restraint and deciding no more than was absolutely necessary.[84] If the failure to cite *Molien* was only a result of cautious judicial restraint, then it can be argued that the Alaska Supreme Court will follow the foreseeability principle relied on in *Dillon* and adopt *Molien* when confronted with the proper case.[85] Therefore, it is not clear whether Alaska retains a physical manifestation requirement.[86]

If such a physical manifestation requirement is not retained, there would be no special barriers placed on the recovery of damages for negligently-inflicted serious emotional distress. If Alaska thus allows a general cause of action for negligently-inflicted serious[87] emotional distress, it will not be particularly important for courts to determine whether pre-impact fear is negligently-inflicted emotional distress or simply an element of pain and suffering resulting from a negligently-

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84. Some support for this argument can be gathered from the fact that two cases cited by the court did involve a rejection of a physical manifestation requirement. *See* Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433, 438 (Me. 1982); Portee v. Jaffee, 84 N.J. 88, 95, 417 A.2d 521, 525 (1980). The argument is not particularly compelling, however, because these cases were cited for the very specific proposition that "a substantial and growing minority of states" have rejected the "zone of danger" rule. *Kavorkian*, 727 P.2d at 1040-41 & n.2.

85. Some support for such an argument can be gleaned from Mattingly v. Sheldon Jackson College, where the supreme court held that damages are recoverable for "purely economic loss" in the absence of property damage or personal injury. 743 P.2d 356, 359-61 (Alaska 1987) (citing People Express Airlines v. Consolidated Rail Corp., 100 N.J. 246, 495 A.2d 107 (1985)). The court held that in that context, the principles of foreseeability would govern, rather than a blanket prohibition against liability. *Id.* at 360. Of course, the reasoning of *Mattingly* would not prohibit the court from adopting a different policy towards negligently-inflicted emotional distress.

86. Many jurisdictions do retain such a requirement. *Cf., e.g.*, PROSSER & KEETON, *supra* note 14, § 54, at 364-65 (only a "handful" of courts have permitted a "general negligence cause of action for the infliction of serious emotional distress").

87. The requirement that the emotional distress be "serious" comes from *Molien*, 27 Cal. 3d at 927-28, 616 P.2d at 819-20, 167 Cal. Rptr. at 837-38. This requirement is probably not a bar to recovery for pre-impact fear. With regard to intentionally-inflicted emotional distress, Alaska has adopted the standard set forth in section 46(1) of the Restatement (Second) of Torts. *See* Richardson v. Fairbanks N. Star Borough, 705 P.2d 454, 456 (Alaska 1985). This standard requires that the emotional distress be "severe." *See id.* at 457 n.6 (holding that the emotional distress to which the plaintiffs had attested was not "severe"). The Alaska Supreme Court has ruled that as a matter of law, a threat on another's life can foreseeably cause severe emotional distress. Teamsters Local 959 v. Wells, 749 P.2d 349, 358 (Alaska 1988).

Wells involved intentionally-inflicted emotional distress, an intentional tort. It is therefore not possible to say with certainty that the concepts of "severe" and "serious" emotional distress are identical. The *Wells* court also held that foreseeability, usually a question of fact, was determinable as a matter of law. *Id.* at 357-58. Again, the transition from the context of the intentional tort in *Wells* to the context of a negligence action in the average pre-impact fear case may mean that the court would not allow the full *Wells* presumption of foreseeability. However, neither reason nor the

inflicted ordeal which terminated in death.[88] The distinction between the ordeal theory and the emotional distress theory lies in how pre-impact fear is categorized for the purposes of recovery. However, if Alaska does not retain a physical manifestation requirement, the legal consequences of this categorization are insignificant, and choosing between the two theories is not necessary. Because the current status of the physical manifestation requirement is unclear, it is impossible to say whether this is the case under current Alaska law. It is therefore necessary to suggest a resolution of the conflict between the "ordeal" and "emotional distress" theories of pre-impact fear.

C. If Alaska Retains a Physical Manifestation Requirement, It Should Adopt an Ordeal Theory of Pre-Impact Fear

An Alaska court could justify a decision to use either an emotional distress or an ordeal theory. Neither is necessarily "wrong." However, in any jurisdiction which retains special restrictions on recovery for negligently-inflicted emotional distress, the ordeal theory is the better theory to adopt, primarily because an emotional distress theory would unduly restrict recovery.

From a theoretical perspective, it can be argued that general principles of tort law support the theory that pre-impact fear should be treated as negligently-inflicted emotional distress. Not only is pre-impact fear a form of mental anguish which is inflicted negligently, but, as pointed out by the dissent in *Solomon*, it is a discrete form of injury.[89] Pre-impact fear is the fear of impending death and injury, but it exists even if the impending injury never occurs.[90] Nevertheless, the rationale for restricting recovery for negligently-inflicted emotional

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language of *Wells* requires the conclusion that the emotional effect of a threat of impending death differs depending on whether the threat of death is a result of intentional or negligent conduct.

A less conclusive presumption of the severity of emotional distress caused by a negligently-caused threat to life would be appropriately inferred from *Wells*. Such a presumption also seems implicit in the pre-impact fear cases. There is no case which questions, or even discusses, the fact that emotional distress resulting from a realization that death is imminent can be "serious" or "severe." A jury that determines that a decedent perceived an impending impact as a threat to his or her life should be able to draw an inference that the resulting emotional distress was severe. *Cf. id.*

88. This fact may support the recognition of a general negligence cause of action for emotional distress. Pre-impact fear is negligently-inflicted emotional distress, but it is artificial to sever a causally-connected chain of events into "pre-impact" and "post-impact" elements. The problem is avoided if negligently-inflicted emotional distress is subject to the same rules for recovery that govern negligently-inflicted physical injury.

89. Solomon v. Warren, 540 F.2d 777, 797 (5th Cir. 1976) (Gee, J., dissenting), *cert. denied*, 434 U.S. 801 (1977). *See In re* Eastern Airlines Engine Failure, 629 F. Supp. 307, 309-10 (1986) (imminent airplane crash averted by restarting engine).

90. *Solomon*, 540 F.2d at 797 (Gee, J., dissenting).

distress is not compelling in the context of a survivorship claim for a decedent's pre-impact fear.

Unfortunately, viewing pre-impact fear as negligently-inflicted emotional distress has adverse implications for survivorship plaintiffs. Categorizing pre-impact fear as negligently-inflicted emotional distress triggers restrictions which would bar the recovery of damages for pre-impact fear except in very unusual cases. These restrictions are appropriate in the context of pre-impact fear cases only if they bar recovery for reasons that are valid in that context.[91]

The Restatement (Second) of Torts offers the following rationale for not allowing recovery for negligently-inflicted emotional distress that does not result in physical injury:

> 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 required to make good a purely mental disturbance.[92]

At least two, and possibly all three, of these reasons for limiting recovery are less compelling in the context of a pre-impact fear claim. The third concern, and to a degree the first, rest on the notion of a "purely" mental disturbance. When the issue is a decedent's pre-impact fear, it is impossible to say that the fear experienced was, or would have remained, a purely mental injury. Psychological disorders that have objectively determinable symptoms or consequences have been held to satisfy the "physical manifestation" requirement.[93] Of course, any psychological disorder caused by pre-impact fear becomes undetectable upon the death of the plaintiff. The violent nature of

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91. The validity of the reasons given for restricting recovery for negligently-inflicted emotional distress has been questioned by both courts and commentators. *See, e.g.*, Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 921-31, 616 P.2d 813, 816-21, 167 Cal. Rptr. 831, 834-39 (1980); Comment, *Negligently Inflicted Emotional Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237 (1971). For purposes of the present note, it is assumed that the reasons given for restricting recovery for negligently-inflicted emotional distress are valid under certain circumstances.

92. RESTATEMENT (SECOND) OF TORTS § 436A comment b (1965).

93. *See, e.g.*, Towns v. Anderson, 579 P.2d 1163, 1165 (Colo. 1978); Payton v. Abbott Labs, 386 Mass. 540, 556, 437 N.E.2d 171, 181 (1982).

death in many of the pre-impact cases could erase even manifested physical illness or injury.[94] The Restatement was concerned with the unfairness of making defendants liable for "purely" emotional harm. Implicit in this concern is an assumption that time and medical examination will enable a fair assessment of whether or not the harm remained purely emotional. In the context of a pre-impact fear claim, death resulting from the defendant's negligent conduct makes it nearly impossible to determine whether the emotional distress had manifested itself in physical symptoms.

The second concern expressed in the Restatement, the lack of "guarantees of genuineness," is clearly not present in the context of pre-impact fear. Guarantees of genuineness are provided by the accident itself. No decedent "feigns" pre-impact fear. When the circumstances of death prove that the decedent's emotional distress was genuine, requiring a decedent's estate to prove "impact" or "physical manifestation" is both redundant and oppressive.[95] This is particularly true if pre-impact fear is viewed as the anticipation of death, not just the anticipation of an upcoming impact.[96] The knowledge that one is likely to die would certainly cause very severe distress.[97]

It is not clear whether rules restricting recovery for negligently-inflicted emotional distress are necessary in the modern legal system. It is certain, however, that imposing such restrictions when they serve no real purpose is arbitrary and unjust. If Alaska does still restrict recovery for negligently-inflicted emotional distress by using a "physical manifestation" requirement, then it would seem most appropriate for Alaska to view pre-impact fear as pain and suffering inflicted during the course of a negligently-inflicted ordeal.[98]

The adoption of an ordeal theory would allow the possibility of recovery in a greater number of cases. Although courts or defense attorneys may find the thought of the increase in the number and size

94. *See, e.g.*, Fogarty v. Campbell 66 Express, Inc., 640 F. Supp. 953, 955 (D. Kan. 1986) (following impact with another truck, the decedent's head and thorax were crushed by the load of steel he was transporting).

95. It would still be necessary to prove that a decedent was able to anticipate the impending accident. Shatkin v. McDonnell Douglas Corp., 727 F.2d 202, 206 (2d Cir. 1983). Once sufficient proof is provided, the accident itself provides an incontrovertible guarantee of genuineness.

96. *See, e.g.*, Solomon v. Warren, 540 F.2d 777, 797 (5th Cir. 1976) (Gee, J., dissenting) ("[T]he Levins' anxiety for their own safety and their childrens' future well-being was *caused* by the anticipation of death, not by the actual crash that presumably killed them."), *cert. denied*, 434 U.S. 481 (1977).

97. *See* Teamsters Local 959 v. Wells, 749 P.2d 349, 358 (Alaska 1988).

98. The same result can be reached by treating pre-impact fear as negligently-inflicted emotional distress, and by holding that the guarantees of genuineness associated with the fatal accident are sufficient to satisfy the requirement of "physical manifestation."

of survivorship awards alarming, such a concern does not justify the adoption of an unduly restrictive emotional distress theory. Compensation for pre-impact fear can be limited to appropriate situations by imposing carefully-tailored evidentiary requirements.

III. CONTROLLING DAMAGE AWARDS FOR PRE-IMPACT FEAR

If Alaska allows damages for a decedent's pre-impact fear under the proper circumstances, substantial liabilities may be generated by such claims,[99] which will necessitate the establishment of some limitations on pre-impact fear recovery.

A. Sufficient Evidence to Allow the Conclusion That the Decedent Experienced Such Fear

"A damage award for the decedent's pre-impact mental anguish may not be granted when the evidence is speculative or conjectural."[100] Some cases addressing claims for pre-impact fear have concluded that the evidence presented was insufficient to sustain the claim.[101] Usually, the existence of pre-impact fear is a question for the finder of fact.[102]

"Under the cases, a plaintiff, to recover for apprehension of impending death, must show that before the injury, decedent was 'aware of the danger and suffered from pre-impact terror.' "[103] Courts have been fairly generous in allowing circumstantial evidence to prove such awareness.[104] If the circumstances of an accident support an inference

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99. *See supra* note 8.

100. Larsen v. Delta Air Lines, 692 F. Supp. 714, 721 (S.D. Tex. 1988) (citing Haley v. Pan Am. World Airways, 746 F.2d 311, 316 (5th Cir. 1984)).

101. *See supra* note 5.

102. *See* Moorhead v. Mitsubishi Aircraft Int'l, 828 F.2d 278, 288 n.43 (5th Cir. 1987) (trier of fact may find pre-impact fear); *In re* Air Crash Disaster near New Orleans, 789 F.2d 1092, 1098 (5th Cir. 1986) (existence of pre-impact fear treated as a jury question); Pregeant v. Pan Am. World Airways, 762 F.2d 1245, 1249 (5th Cir. 1985) (jury question); *Haley*, 746 F.2d at 313 (jury question); Shu-Tao Lin v. McDonnell Douglas Corp., 742 F.2d 45, 53 (2d Cir. 1984) (jury question).

103. Lin v. McDonnell Douglas Corp., 574 F. Supp. 1407, 1417 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 45 (2d Cir. 1984) (quoting Anderson v. Rowe, 73 A.D.2d 1030, 1031, 425 N.Y.S.2d 180, 181 (1980)).

104. *See, e.g.*, Lin v. McDonnell Douglas Corp., 742 F.2d 45, 53 (2d Cir. 1984); Solomon v. Warren, 540 F.2d 777, 792-93 (5th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977). In a jurisdiction using an "emotional distress" theory of pre-impact fear, it may be necessary to prove more than just awareness of impending impact. Restrictions on recovery for emotional distress may also require the plaintiff to prove an impact on the decedent, *In re* Air Crash Disaster near Chicago, 507 F. Supp. 21, 23 (N.D. Ill. 1980), a physical manifestation of the pre-impact fear, Fogarty v. Campbell 66 Express, Inc., 640 F. Supp. 953 (D. Kan. 1986), or that the pre-impact fear constituted "severe" emotional distress, Teamsters Local 959 v. Wells, 749 P.2d 349, 358 (Alaska 1988).

that a decedent would have been aware of the impending impact, courts generally hold that a question of fact exists.[105] This willingness to accept circumstantial evidence probably stems from the fact that fatal accidents often eliminate eyewitnesses or other direct evidence.[106]

Various types of evidence have been used to allow the inference that a particular decedent was aware of the impending impact. Courts have allowed accident reenactments or reconstructions,[107] testimony from observers,[108] expert testimony,[109] and physical evidence[110] as circumstantial proof of pre-impact fear.

While courts have been consistent in allowing proof of pre-impact fear through circumstantial evidence, they have not been consistent with regard to what constitutes sufficient circumstantial evidence to create a question of fact as to whether a given decedent experienced pre-impact fear. The *Solomon* case allowed recovery based on only a single piece of circumstantial evidence: a radio communication from the pilot which could presumably have been heard by other passengers in the small plane.[111] The communication indicated that the pilot believed that the fuel was running out, and that he intended to ditch the

105. *See, e.g., Lin*, 742 F.2d at 53.

106. *See* Douglass v. Delta Air Lines, 709 F. Supp. 745, 765-66 (W.D. Tex. 1989) (plaintiff must present "some evidence" of pre-impact fear, but eyewitness testimony is not necessary); Larsen v. Delta Air Lines, 692 F. Supp. 714, 721 (S.D. Tex. 1988) (same).

107. Pregeant v. Pan Am. World Airways, 762 F.2d 1245, 1248-49 (5th Cir. 1985) (reenactment of timing of accident with stopwatch); Haley v. Pan Am. World Airways, 746 F.2d 311, 315 (5th Cir. 1984) (videotape simulation of crash); Shatkin v. McDonnell Douglas Corp., 727 F.2d 202, 204 (2d Cir. 1984) (report of National Transportation Safety Board based on flight recorder data); Malacynski v. McDonnell Douglas Corp., 565 F. Supp. 105, 107 (S.D.N.Y. 1983) (same); Nelson v. Dolan, 230 Neb. 848, 849-50, 434 N.W.2d 25, 27 (1989) (accident reconstructionist's testimony).

108. *E.g., In re* Air Crash Disaster near New Orleans, 789 F.2d 1092, 1098 (5th Cir. 1985) (testimony from eyewitnesses who heard and observed crash from the ground). *Cf.* Malacynski v. McDonnell Douglas Corp., 565 F. Supp. 105, 107 (S.D.N.Y. 1983) (offer to produce eyewitness to crash prevented "summary dismissal" of claim).

109. Pregeant v. Pan Am. World Airways, 762 F.2d 1245, 1248 (5th Cir. 1985) (testimony of psychiatrist on effects of stress); Haley v. Pan Am. World Airways, 746 F.2d 311, 316 (5th Cir. 1984) (same); Nelson v. Dolan, 230 Neb. 848, 849-50, 434 N.W.2d 25, 27 (1989) (testimony of accident reconstructionist and psychiatrist). *See also In re* Air Crash Disaster near New Orleans, 789 F.2d 1092, 1099 (5th Cir. 1986) (criticizing lack of psychiatric testimony as to condition of passengers), *aff'd in relevant part*, 821 F.2d 1147 (5th Cir. 1987) (en banc), *vacated on other grounds*, 109 S.Ct. 1928 (1989).

110. Solomon v. Warren, 540 F.2d 777, 792-93 (5th Cir. 1976), *cert. denied*, 434 U.S. 481 (1977) (pilot's transmission informing passengers of impending crash); Fogarty v. Campbell 66 Express, Inc., 640 F. Supp. 953, 963 (D. Kan. 1986) (skid marks allowed inference that decedent was aware of the impending crash).

111. *Solomon*, 540 F.2d at 781-82.

plane in the sea near a merchant ship he had sighted.[112] Although this communication could certainly support an inference that the passengers were aware that the pilot intended to set the plane down in the water, it is questionable whether knowledge of an impending landing at sea in the vicinity of a ship is knowledge of impending death. As the dissent noted, "the truth may involve a confident approach to ditch alongside a freighter which was assumed to have seen the aircraft, followed by a sudden stall and instant death."[113]

Solomon is uniquely generous in allowing such limited circumstantial evidence to support recovery, and it may be driven by its own unique facts.[114] Contrasting with *Solomon*'s lax standard are the fairly stringent requirements for the sufficiency of circumstantial evidence set forth in *Shatkin v. McDonnell Douglas Corp.*[115] In *Shatkin*, although the left engine and a portion of the left wing of an airliner broke away twenty or thirty seconds before the airliner crashed, the plane's flight pattern did not become alarming until only three seconds before the crash.[116] The court of appeals held that the district court erred in not granting J.N.O.V. to the defendants on the issue of the decedent's pre-impact fear:

> There is no evidence permitting an inference that Shatkin was aware that the left engine had been lost on take-off; since he was seated on the right side of the wide-bodied plane, it would be sheer speculation to infer that he knew of the incident. There was no evidence that the pilot or anyone else called the danger to the passenger's attention. As far as the record is concerned Shatkin could have dozed off in his seat.[117]

The *Shatkin* court may have overstated the extent to which circumstantial evidence must show that a decedent was aware of the impending impact before the jury is allowed to infer awareness from the circumstances.[118] However, many courts have required evidence that

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112. *Id.* at 782 n.5.

113. *Id.* at 797 (Gee, J., dissenting).

114. Despite an extensive search, the aircraft and its passengers were never found. Therefore, the only evidence from which any inferences could be drawn was the radio transmission from the pilot. *See id.* at 782.

115. 727 F.2d 202, 206-07 (2d Cir. 1984).

116. *Id. See also* Lin v. McDonnell Douglas Corp., 742 F.2d 45, 53 (2d Cir. 1984).

117. *Shatkin*, 727 F.2d at 206-07. The statement that there was no proof that Shatkin was even awake is in dicta. *Id.* at 204. In cases such as *Shatkin*, it might be reasonable to allow, but not require, the jury to infer that the passenger would have been awake upon take-off. *See Lin*, 742 F.2d at 53 (allowing recovery for pre-impact fear without particularized proof that the decedent was actually awake).

118. In this respect, the comparison between *Lin* and *Shatkin* is particularly relevant. In these two cases, the same circuit, addressing two deaths caused by the same airliner crash, reached very different conclusions on the sufficiency of the evidence. *Compare Shatkin*, 727 F.2d at 206-07 (insufficient evidence) *with Lin*, 742 F.2d at 53

the *particular* decedent was aware of the accident.[119] The fact that some passengers might have known of an impending impact has not been sufficient to allow an inference that other passengers were similarly aware.[120]

Alaska should take care to enforce these evidentiary requirements to insure that pre-impact fear claims succeed only under appropriate circumstances. Alaska should require sufficient proof that it was more likely than not that the *particular* decedent at issue was aware. In cases in which flight patterns, screeching brakes, or a warning from another party do not allow such an inference, courts should be cautious.[121]

(sufficient evidence). The *Lin* case acknowledges the result in *Shatkin*, but distinguishes that case by noting that, unlike the *Shatkin* decedent, the deceased Dr. Lin sat on the side of the plane from which the wing and engine detached, thus allowing the jury to infer that he might have been looking out the window as the engine broke away. *See Lin*, 742 F.2d at 53. There was no more evidence showing that Dr. Lin was actually looking out the window than there was evidence showing that Mr. Shatkin was actually awake. However, the *Lin* court allowed the inference to be drawn. *Lin*, 742 F.2d at 53.

119. *See* Pregeant v. Pan Am. World Airways, 762 F.2d 1245, 1248 (5th Cir. 1985) (cockpit conversations audible only to cockpit crew could not be used to establish passenger's state of mind); Haley v. Pan Am. World Airways, 746 F.2d 311, 317 (5th Cir. 1984) (flight pattern and roll of airliner allowed inference that individual decedent was aware of his approaching death); *Lin*, 742 F.2d at 53 (particular decedent was seated in a position which allowed him to see wing and engine as it was torn away); *Shatkin*, 727 F.2d at 207 (disallowing recovery when there was no evidence that the specific decedent was aware of an impending crash).

120. *See* Douglass v. Delta Air Lines, Inc., 709 F. Supp. 745, 759-60 (W.D. Tex. 1989) (conflicting testimony from survivors in the rear of an airliner could not provide evidence of the state of mind of a decedent seated in the front of the airliner); Feldman v. Allegheny Airlines, 382 F. Supp. 1271, 1301 (D. Conn. 1974) (testimony of survivor who was looking out window and aware of plane's danger did not justify inference as to the state of mind of a different passenger). Neither of these cases seem to involve evidence of a passenger or crew member aware of the impending impact who actually attempted to alert the others. In such a situation, it might be reasonable for evidence of the warning to allow the jury to infer that a particular decedent was aware. *Cf.* Solomon v. Warren, 540 F.2d 777, 792-93 (5th Cir. 1976), *cert. denied*, 434 U.S. 481 (1977) (In discussing the passengers' awareness of impending impact, the court stated that the "inference was reasonable, almost compelling, that they appreciated that possibility at least from the time of the radio transmission.").

121. The *Lin* case may go too far in allowing circumstantial evidence to create a question of fact. *Lin* held that it was sufficient that the passenger's window could have provided a view of the damaged wing. There is no indication that evidence was presented which allowed an inference that it was more likely than not that Dr. Lin was in fact looking out the window. *See Lin*, 574 F. Supp. at 1417. It is possible that evidence regarding the general behavior of passengers with window seats during takeoff could have provided sufficient evidence that Dr. Lin was looking out the window. It is also possible that evidence could have been presented to show that the fire and destruction on the wing would have been sufficient to draw attention.

B. A Substantial Interval During Which the Decedent Was Aware of Impending Death

Under Alaska law, "[i]t is true that no award should be made for any pain and suffering 'substantially contemporaneous with death or mere incidents to it.' "[122] This assertion is consistent with the cases from other jurisdictions allowing recovery for pre-impact fear. The intervals deemed sufficient to support a claim of pre-impact fear have been quite small, but not inconsequential.[123] The *Shatkin* court refused to allow a claim for pre-impact fear when the decedent would have been aware of the impending peril only three seconds prior to impact.[124] It is clear that the court's selection of this interval was somewhat arbitrary,[125] but it is also clear that such an interval does need to be established. A plaintiff must prove not only that the decedent was aware of his or her danger, but also that there was a significant interval of time between the apprehension of danger and death.[126] A court addressing this issue could take one of two tacks. As in *Shatkin*, the court could simply use a predetermined interval of time, even if a rather arbitrary one. A second approach might be to allow expert psychological testimony as to whether or not the decedent had sufficient time to perceive and understand the consequences of the impending impact.

C. Pre-Impact Fear in the Context of Automobile Collisions or Other Accidents Less Likely to Result in Death

Claims for pre-impact fear may have originally been generated by unusual factual circumstances such as airliner crashes, but recent

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122. Northern Lights Motel v. Sweeney, 561 P.2d 1176, 1190 (Alaska 1977) (citing St. Louis, Iron Mountain & S. Ry. v. Craft, 237 U.S. 648 (1915)), *aff'd*, 563 P.2d 256 (Alaska 1977).

123. *See, e.g., In re* Air Crash Disaster near New Orleans, 789 F.2d 1092, 1098 (5th Cir. 1986) ("final seconds"); Pregeant v. Pan Am. World Airways, 762 F.2d 1245, 1248 n.2 (5th Cir. 1985) (20 seconds); Haley v. Pan Am. World Airways, 746 F.2d 311, 317 (four to six seconds); Lin v. McDonnell Douglas Corp., 742 F.2d 45, 53 (2d Cir. 1984) (30 seconds); Missouri Pac. R.R. v. Lane, 720 S.W.2d 830, 833 (Tex. Ct. App. 1986) (six to eight seconds). *But see* Green v. Hale, 590 S.W.2d 231, 237-38 (Tex. Civ. App. 1979) (allowing recovery for mental anguish which was apparently virtually contemporaneous with death).

124. 727 F.2d at 206 (disallowing a claim for pre-impact fear because there was no evidence that the decedent was aware of the impending disaster, despite the fact that the airliner went into a "90-degree left plunge" three seconds before the crash).

125. *Haley* allowed recovery for pre-impact fear of four to six seconds in duration. 746 F.2d at 317-18.

126. *Cf. Shatkin*, 727 F.2d at 206-07.

claims have been raised by the estates of decedents killed in more common events such as automobile accidents.[127] The courts addressing such claims have often looked to the earlier airliner cases.[128] Although no case has been found which attempts to address the point, there may be a reason to treat claims for pre-impact fear differently when an automobile accident is involved.

Aviation accidents usually result in deaths. A study of major United States airline accidents from 1970 to 1984 examined data regarding 3108 persons involved in the crash of airplanes. Of those 3108 persons, 2373 were killed, 626 were injured and 108 were not injured.[129] Such a high fatality rate is in sharp contrast to the very low fatality rate in automobile collisions.[130] In the context of pre-impact fear, this difference in fatality rates may be significant. If most persons aboard an airliner are killed when a crash occurs, then it is reasonable to draw the inference that awareness of impending impact caused a decedent to experience severe fear and anxiety from the contemplation of approaching death. The same inference cannot be so readily drawn from an automobile accident.

Current Alaska law may provide some support for this proposition. *Teamsters Local 959 v. Wells* held that it is foreseeable that a person whose life is threatened would experience severe emotional distress.[131] There are really two issues of foreseeability settled as a matter of law in *Wells*. First, a threat to life will foreseeably cause emotional distress, and second, the emotional distress caused will be severe.[132]

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127. *See, e.g.*, DeLong v. Schneider Nat'l Carriers, No. C2-88-359, slip op. at 1-2 (S.D. Ohio July 17, 1989) (auto-truck collision); Fogarty v. Campbell 66 Express, Inc., 640 F. Supp. 953, 955 (D. Kan. 1986) (truck collision); Nye v. Commonwealth, 331 Pa. Super. 209, 215-16, 480 A.2d 318, 321-22 (1984) (automobile collision).

128. *See, e.g.*, Fogarty v. Campbell 66 Express, Inc., 640 F. Supp. 953, 957-61 (D. Kan. 1986) (surveying cases).

129. J. KALALIK, E. KING, M. TRAYNOR, P. EBENER & L. PICUS, AVIATION ACCIDENT LITIGATION SURVEY: DATA COLLECTION FORMS 2 (1988) (indicating a fatality rate of approximately 76%). This survey was undertaken by the Institute for Civil Justice, a division of the RAND Corporation.

130. *See* NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 48 (1988) (surveying motor vehicle accident rates for the United States in 1987). This study does not contain data on the total number of persons involved in all types of motor vehicle accidents, so it is impossible to determine from the study exactly what percentage of persons involved in all motor vehicle accidents are killed. The study does, however, allow a determination of what percentage of those accidents studied resulted in a fatality. Of 20,800,000 accidents, 43,300 involved a fatality. Therefore, there was approximately a 0.48% chance that a motor vehicle accident reported to the National Safety Council involved a fatality.

131. 749 P.2d at 358.

132. *See id.* The *Wells* court identified four separate elements for the tort of intentionally-inflicted emotional harm. Two of the elements were: (1) that conduct cause emotional distress and (2) that the emotional distress so caused be "severe." *Id.* at 357

The question then becomes how relevant this intentional-tort presumption is to conduct which is merely negligent. *Wells* involves an intentional tort, so the court may have been more willing to find foreseeability than it would in the case of mere negligence.[133] At the least, it can be argued that *Wells* has some relevance in the context of a similar threat to life in a negligence action.[134] If this is the case, then the *Wells* presumption of foreseeability can be construed as at least *allowing* the jury to infer from the fact of the perceived threat to life that the decedent experienced fear for his life, and resulting serious distress.[135]

When an automobile accident is analyzed under *Wells*, the threat of death is not as certain. It would be consistent with both *Wells* and the concept of pre-impact fear to hold that the threat of death in an automobile accident is uncertain. Evidence of knowledge of an impending accident is not sufficient, without more, to allow an inference that the knowledge caused serious emotional distress. Put another way, the grim circumstances of the early pre-impact fear cases provided a sufficient guarantee of genuineness that the emotional distress experienced by anyone aware of the fact that they were trapped in such circumstances was both real and serious.[136]

This does not mean that it should be impossible for a plaintiff to recover for pre-impact fear stemming from less frequently fatal types of accidents such as those involving automobiles. Plaintiffs would need to make a more detailed showing regarding the circumstances of the accident. It would not be sufficient to show that the decedent was generally aware that an accident might be imminent.[137] However, it

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(citing Malandris v. Merrill Lynch, Pierce, Fenner & Smith, 703 F.2d 1152, 1158 (10th Cir. 1981), *cert. denied*, 464 U.S. 824 (1983)).

133. *See* PROSSER & KEETON, *supra* note 14, § 54, at 360.

134. *Cf., e.g.*, Fogarty v. Campbell 66 Express, Inc., 640 F. Supp. 953, 962 (D. Kan. 1986) (viewing the Kansas Supreme Court's treatment of intentional infliction of emotional harm as relevant to that court's approach to negligently-inflicted emotional harm); Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 921-31, 616 P.2d 813, 816-21, 167 Cal. Rptr. 831, 834-39 (1980) (examining guarantees of genuineness under the law of intentionally-inflicted emotional distress in the context of a discussion of guarantees of genuineness under the law of negligently-inflicted emotional distress).

135. *See supra* note 87.

136. *See, e.g.*, Feldman v. Allegheny Airlines, 382 F. Supp. 1271, 1301 (D. Conn. 1974) (airliner crash); Kozar v. Chesapeake & Ohio Ry., 320 F. Supp. 335, 364-66 (W.D. Mich. 1970) (train accident); Furumizo v. United States, 245 F. Supp. 981, 1015 (D. Hawaii 1965) (small plane crash).

137. The pre-impact skid marks left by the decedent's truck in *Fogarty* are an example of evidence sufficient to allow an inference that the decedent was generally aware that a collision might be imminent. 640 F. Supp. at 963. The argument presented above would require the plaintiff to prove more than the type of general awareness indicated by the skid marks. It would be necessary to prove that the decedent had some knowledge that the circumstances of the particular impending accident

would still be possible for the estate to present evidence that the facts and circumstances of the accident would have allowed the decedent to realize that his or her life was in particular danger.[138]

IV. CONCLUSION

Alaska should allow a survivorship action to recover damages for a decedent's pre-impact fear. The real question is the theory under which such damages should be recoverable. The conflict between the "ordeal" and "emotional distress" theories is really a result of restrictions on recovery for emotional distress. Restrictions such as the "physical manifestation" requirement do more harm than good in the context of pre-impact fear. By using the ordeal theory, or modifying the restrictions governing recovery for negligently-inflicted emotional distress, this problem can be avoided.

To be sure, attorneys and judges concerned with allowing "yet another" method for recovery of tort damages are not without valid arguments. Pre-impact fear claims should not be an "open door" to increased liability. Concerns about the proliferation of claims for pre-impact fear can be addressed through evidentiary requirements and a careful consideration of when the circumstances of a negligently-produced death warrant the conclusion that the decedent was likely to be aware of his or her approaching demise. These requirements will adequately insure that recovery for pre-impact fear can be recognized without fear that it will be subject to overuse and abuse.

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were such that he or she would probably be killed. In the context of *Fogarty*, the fact that the decedent was driving a truck loaded with steel, and the fact that the vehicle with which impact was imminent was also a truck might be sufficient to allow such an inference. *Id.* at 955.

138. *See* Nelson v. Dolan, 230 Neb. 848, 859, 434 N.W.2d 25, 32 (1989) (facts of case sufficient to warrant inference that decedent apprehended and feared his approaching death); Green v. Hale, 590 S.W.2d 231, 238 (Tex. Civ. App. 1979) (circumstances of fall from truck would have made a person of decedent's age and intelligence aware of "inevitability" of being crushed under the truck).