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SHOULD SHORT-TERM MENTAL DISTRESS DAMAGES BE COMPENSABLE? THE *AIR CRASH* CASE

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INTRODUCTION

Case law governing recovery for the tort of negligent infliction of emotional distress had once been viewed by some commentators as being "in an almost unparalleled state of confusion . . ."[1] That observation remains valid today. Although a gradual but distinctive trend of expanding the scope of recovery is discernable, each phase of expansion is accompanied by vigorous debate over its exact parameters. *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*[2] illustrates the debate and confusion which accompanies a court's adoption of a new standard of recovery for negligent infliction of emotional distress. At issue is whether the Illinois Supreme Court's recent abandonment of the so-called "impact standard"[3] and adoption of the "zone of danger standard"[4] will allow recovery for the mental distress allegedly experienced by passengers of a commercial jet airliner immediately prior to a fatal crash.[5] The United States District Court for the Northern District of Illinios held that the effect of the Illinois Court's adoption of the "zone of danger rule" is to permit recovery for pre-impact suffering and distress by any plaintiff who can meet the burden of proof.[6]

This comment will discuss the evolution of and spirit behind the different standards governing recovery for negligent infliction of emotional distress, focusing primarily on the "impact" and "zone of danger" rules, and analyze how the "zone of danger rule" has been broadly read to allow damages for short-term pre-impact distress in *Air Crash*. Finally, the negative implications of the *Air Crash* holding will be dis-

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1. Annot., 64 A.L.R.2d 100, 103 (1959).

2. No. MDL-391 (N.D. Ill. Sept. 15, 1983).

3. *See* section II(B), *infra*, for discussion of impact rule.

4. *See* section II(C), *infra*, for discussion of zone of danger.

5. This comment focuses only on the negligent infliction of emotional distress issue. Also at issue was whether pain and suffering damages are available in a products liability action. The court answered in the affirmative. In Re Air Crash Disaster, No. MDL-391, slip op. at 10 (N.D. Ill. Sept. 15, 1983).

6. *Id.* at 2. *See* section II(C), *infra*, for discussion of burden of proof for zone of danger.

cussed, including the likelihood of resultant fraudulent, frivolous, or speculative claims.

HISTORICAL BACKGROUND

General Considerations

Courts have traditionally been reluctant to recognize mental tranquility as a legally protected interest.[7] As a result, interference with peace of mind alone was not a basis for recovery in tort. Chief among courts' many apprehensions towards allowing such a claim were difficulty in measuring damages, opening courts to a flood of litigation, and the possibility of frivolous claims.[8] Only in the past eighty years have courts begun to deal with these apprehensions and recognize the tort of negligent infliction of emotional distress.[9] Claims based on mental distress, however, even if manifested in physical illness or injury, have been long regarded as inherently suspect by the courts.[10] To ease this suspicion, courts developed rules to limit recovery which demand that certain factors be present in the action. Confusion arises because no one rule has been followed by all the courts at anytime, and today four such limiting rules are in use by different courts.[11] Each rule, to different extents, illustrates courts' concerns with adequate proof of the genuineness of the mental suffering alleged and the fear of exposing defendants to unlimited liability.[12] Despite these common concerns, results of an action vary widely depending on which rule the court applies.

The "Impact Rule"

The "impact rule," which limits recovery for negligent infliction of emotional distress, anguish, fright, or shock to those cases where the plaintiff sustained a contemporaneous physical impact or injury, was first developed in the late nineteenth century.[13] Advocates of the rule

7. W. PROSSER, LAW OF TORTS, § 54, at 327 (4th ed. 1971).
8. *Id.*
9. *Id.* § 12 at 49-50.
10. MINZER, *et al*, DAMAGES in TORT ACTIONS, Vol. 1, Ch. 5, Matthew-Bender (1982).
11. These are the "impact rule," "zone of danger rule," the *"Dillon* expansion," and the Massachusetts rule. All will be discussed *infra.*
12. *Negligent Infliction of Emotional Distress: Liability to the Bystander—Recent Developments*, 30 MERCER L. REV. 735, 736 (1979).
13. Leading English and American cases were, respectively, Victorian Ry. Comm'rs v. Coultas, 13 App. & Cas. 22 (1888) (Plaintiffs claimed damages for mental anguish after they had been permitted to cross railroad tracks and, through the gatekeeper's negligence, were almost struck by the train. The court held there could be no recovery because the train did not strike the plaintiff's buggy); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896) (The plaintiff was alleged to

believed that an observable physical injury to the plaintiff sufficiently corroborates the claim of an unobservable mental injury so as to eliminate the danger of opening courts to a flood of fraudulent or exaggerated litigation.[14]

Adherence to the "impact rule" demands that recovery for mental distress be based on a showing that the distress be "related to, and the direct and natural result of, the physical contact or injury sustained."[15] One justification for the prerequisite of physical impact reflected the belief in the late nineteenth century that medical science was not advanced enough to prove or disprove causation between mental distress and mere fright.[16] An accompanying physical injury was believed to lend credence to the claim of distress.[17]

The requisite physical injury, or impact, was soon reduced to nothing more than a technical requirement, however.[18] Many courts which at first followed the impact rule abandoned it over the years.[19] English courts rejected the rule in 1901, only thirteen years after accepting it.[20] American courts began to follow suit, with most jurisdictions which have considered the rule since 1929 also abandoning it.[21] The rule was often viewed as erecting artificial and unwanted barriers to recovery for injuries which could be as serious or devastating as physical injuries.[22] Such barriers were seen as inconsistent with the common law premise

have suffered a miscarriage and illness when one of defendants' teams of horses was negligently managed and almost ran her over. Plaintiff was denied relief because there was no immediate personal injury and the court refused to compensate fright).

14. PROSSER, § 54 at 327. *See also* Columbus Fin. Inc. v. Howard, 42 Ohio St. 2d 178, 327 N.E.2d 654 (1975).

15. Deutsch v. Schein, 597 S.W.2d 141 (Ky. 1980). The court here recognized that the amount of physical contact which must be shown is minimal, and they found the physical contact requisite satisfied by exposure to X-rays.

16. MINZER, Vol. 1, Ch. 5.

17. PROSSER, § 54 at 328.

18. Porter v. Delaware, R.R. Co., 73 N.J.L. 405, 63 A. 860 (1906) (dust in eyes); Interstate Life & Acc. Co. v. Brewer, 56 Ga. App. 59, 193 S.E. 458 (Ct. App. 1932) (struck by tossed coin); Clark v. Choctawhatchee Elec. Co-op., 107 So. 2d 609 (Fla. 1958) (electrical shock which caused no burns); Deutsch v. Schein, 597 S.W.2d 141 (Ky. 1980) (exposure to X-rays); Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (Ct. App. 1928) (circus horse evacuates bowels into plaintiffs lap). *See also* PROSSER, § 54 at 331.

19. MINZER, Vol. 1, Ch. 5.

20. Dulieu v. White & Sons, 2 K.B. 669 (1901). Plaintiff suffered illness & premature birth as a result of shock when defendant negligently drove a pair-horse van into plaintiff's public house. In allowing recovery, the court stated, "That fright—where physical injury is directly produced by it—cannot be a ground of action merely because of the absence of any accompanying impact appears to me to be a contention both unreasonable and contrary to the weight of authority." *Id.* at 674.

21. *See* MINZER, Vol. 1, Ch. 5, § 5.13(1), n.11 for summary of jurisdictions abandoning the impact rule.

22. MINZER, Vol. 1, Ch. 5.

that every substantial wrong should be redressable at law.[23]

Illinois, however, did not immediately follow these jurisdictions which abandoned the "impact rule." Adopted there in 1898,[24] Illinois courts continued to insist that recovery for negligently inflicted mental distress, suffered by either a direct victim or a bystander who witnessed injury to another, be denied unless accompanied by a contemporaneous physical injury to or impact on the plaintiff.[25] By 1980, however, lower Illinois courts also began to question the impact rule which "seems inequitable and may not reflect sound public policy."[26] The lower courts, however, held that the issue was for the state supreme court and so reluctantly retained the impact rule.[27]

Finally, in 1983, the Illinois Supreme Court addressed the issue in *Rickey v. Chicago Transit Authority*.[28] Recognizing that two other holdout jurisdictions abandoned the "impact rule" in 1983 alone,[29] the Illinois Supreme Court adopted a new standard for recovery of negligent infliction of emotional distress which is commonly called the "zone of danger rule."[30]

The "Zone of Danger Rule"

The "zone of danger rule" allows a plaintiff to recover for mental distress in cases in which the "impact rule" would deny recovery by avoiding the requirement of contemporaneous physical impact or injury. It permits a plaintiff to recover for mental suffering with resultant

23. Bowman v. Williams, 164 Md. 397, 165 A. 182 (1923). This was one reason given by the court for abandonment of the "impact rule."

24. Braun v. Craven, 175 Ill. 401 (1898). Plaintiff alleged fright and mental shock causing serious physical impairment and pain as a result of defendant-landlord entering the premises, surprising and shocking plaintiff, and acting in a rude and abusive manner towards her. The court found for defendant, stating that "terror or fright, even if it results in a nervous shock which constitutes a physical injury, does not create a liability." *Id.* at 420.

25. Carlinville Nat'l Bank v. Rhoads, 63 Ill. App. 3d 502, 380 N.E.2d 63 (1978); Kaiserman v. Bright, 61 Ill. App. 3d 67, 377 N.E.2d 261 (1978); Neuberg v. Michael Reese Hosp. and Medical Center, 60 Ill. App. 3d 679, 377 N.E.2d 215 (1978). These cases illustrate Illinois' adherence to the "impact rule."

26. Cutright v. City Nat'l Bank of Kankakee, 88 Ill. App. 3d 742, 410 N.E.2d 1142 (1980). Plaintiff here was denied recovery for emotional distress resulting from her being stuck in an elevator for over an hour while water poured in. The court held that *Braun* did establish the "impact rule" in Illinois and that plaintiff therefore cannot recover even though mental distress resulted in psychological treatment.

27. *Id.*

28. 98 Ill. 2d 546, 457 N.E.2d 1 (1983). *See* text accompanying notes 38-46 for discussion and facts of *Rickey*.

29. *Id.* at 553, 457 N.E.2d at 4. These are Missouri, which abandoned the "impact rule" in Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983); and Ohio in Schultz v. Barberton Glass Co., 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983).

30. 98 Ill. 2d at 555, 457 N.E.2d at 5.

physical injury provided he was within the zone of danger to his physical well-being at the time he sustained the fright, shock, or mental distress giving rise to his claim.[31] Simply, the "zone of danger rule" substitutes the requirement of being near the danger for the requirement of actual impact with the danger. Put another way, the "zone of danger rule" liberalizes the forseeability boundaries of the "impact rule," substituting "reasonable fear of impact" for "actual impact" as a prerequisite to recovery.[32]

The "zone of danger rule" is now adhered to by a majority of jurisdictions.[33] Although allowing recovery to much broader range of fact patterns than the "impact rule," courts using the "zone of danger rule" require limiting elements in an attempt to prevent frivolous or fraudulent claims. The most common limiting element demands that the mental distress cause, or be manifested in physical consequences, either illness or injury.[34] This limitation is best defined by the Restatement (Second) of Torts, which states:

> If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.[35]

Like the "impact rule," then, the "zone of danger rule" does not allow recovery for pure mental distress alone. Some physical injury or symptom is required. However, the "zone of danger rule" alters the sequence of events under which recovery may be allowed.[36] The "impact rule" demands that physical injury or impact occur prior to or contemporaneously with the alleged wrong giving rise to mental distress, while mental distress under the "zone of danger rule" precedes the physical manifestation and must be the cause of that illness or injury.[37]

31. MINZER, Vol. 1, Ch. 5. *See also* Towns v. Anderson, 195 Colo. 517, 579 P.2d 1163 (1978); Daley v. LaCroix, 384 Mich. 4, 179 N.W.2d 390 (1970); Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941).

32. Plummer v. United States, 580 F.2d 72 (3d Cir. 1978). The court here stated that the focal point of the "zone of danger test" is the forseeability of injury to the plaintiff. *Id.* at 76.

33. MINZER, Vol. 1, Ch.5.

34. Dailey v. LaCroix, 384 Mich. 4, 179 N.W.2d 390 (1970); Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980); Fournell v. Usher Pest Control Co., 208 Neb. 684, 385 N.W.2d 605 (1981). These cases illustrate the physical illness or injury requirement as expressed by courts of different jurisdictions.

35. RESTATEMENT (SECOND) OF TORTS § 436 A at 461 (1965).

36. MINZER, Vol. 1, Ch. 5.

37. *Id.*

Rickey v. Chicago Transit Authority[38] provides an excellent illustration of the difference between the "impact rule" and the "zone of danger rule." In *Rickey*, an eight year old witnessed the strangulation of his five year old brother when the younger boy's clothing became entangled in an escalator.[39] The younger boy has since died.[40] As a result of witnessing the accident, the eight year old sustained severe mental and emotional distress, which became manifest in physical injury, including alleged definite functional, emotional, psychiatric, and behavioral disorders, extreme depression, prolonged and continued mental disturbances, inability to attend school and engage in gainful employment and to engage in his usual and customary affairs.[41] The Circuit Court of Cook County dismissed the complaint with prejudice, stating that there is no action of emotional distress caused by another's negligence without contemporaneous physical impact upon the plaintiff.[42] The "impact rule," then, denies recovery to a bystander plaintiff who suffers from mental distress but who did not suffer the requisite physical impact or injury prior to or contemporaneous with the distress inducing event.

The Illinois Supreme Court, perhaps believing that a legitimate claim was being denied relief,[43] abandoned the "impact rule" and adopted the "zone of danger test,"[44] thereby remanding *Rickey* to a lower court for fact finding.[45] The court stated that a plaintiff bystander, like that in *Rickey*, could now recover for mental distress where he is in a zone of physical danger and who, as a result of the defendant's negligence, feared for his own safety and can show physical illness or injury as a result of the mental distress.[46]

38. 98 Ill.2d 546, 457 N.E.2d 1 (1983).

39. *Id.* at 549, 457 N.E.2d at 2. The two boys' mother was also present, but no action for mental distress was brought in her behalf. *See* Winter, *A Tort in Transition: Negligent Infliction of Mental Distress*, ABA JOURNAL, March 1984, at 62.

40. The younger boy also lost his right arm and left ear as a result of the accident. An action for his injuries was settled. *See* Winter, ABA JOURNAL.

41. The action for mental distress of the older brother was brought six years after the accident. *See* Winter, ABA JOURNAL.

42. 98 Ill.2d at 459, 457 N.E.2d at 1. The court, in denying the claim for mental distress, relied on the "impact rule."

43. *Id.* at 554, 457 N.E.2d at 4. The *Rickey* court stated that the question of recovery for negligently inflicted emotional distress should not be determined solely on whether there was a contemporaneous impact upon the plaintiff. A prime consideration against the "impact rule" has been that legitimate claims with substantial wrongs are barred from the court without an impact. *See supra* text accompanying notes 22-23.

44. 98 Ill. 2d at 555, 457 N.E.2d at 5.

45. *Id.* at 556, 457 N.E.2d at 5. The *Rickey* court allowed plaintiffs to plead again under the "zone of danger test." The plaintiff must assert the plaintiff's position on the escalator, whether he was endangered, and whether he feared for his own safety.

46. *Id.* at 555, 457 N.E.2d at 5. The court cites cases listed *supra* note 34.

Although this first use of the "zone of danger rule" by Illinois courts involved a plaintiff-bystander, other jurisdictions which follow the rule have allowed damages for mental distress to the direct victims of the defendant's negligence.[47] It is on behalf of the victims of a plane wreck, direct victims of the defendant's negligence, which the mental distress claim is brought in *Air Crash.*

Recent Expansions

Although the holding in *Air Crash* is based upon Illinois' abandonment of the "impact rule" in favor of the "zone of danger rule," two recent developments in the area should be quickly addressed to further illustrate the diverse rules used by jurisdictions regarding recovery for mental distress.

In *Dillon v. Legg*,[48] the California Supreme Court abandoned the "zone of danger rule" and allowed a mother who witnessed her child's death recovery for mental distress, even though she was not within the zone of danger.[49] Since termed the *"Dillon* expansion," this rule allows recovery based on forseeability of the injuries or distress at the time of the negligent act.[50] Although limiting factors are present,[51] this rule is considerably more expansive than the "zone of danger test."

In *Parsons v. Superior Court*,[52] a California appellate court reaffirmed a limiting factor of *Dillon* by stressing that a requisite to recovery is the plaintiff's sensory perception of the injury producing accident or event.[53] Several other jurisdictions have made use of the *Dillon* ex-

47. Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1980) (plaintiff became ill from mental distress caused by finding a foreign object in a soft drink); Savard v. Cody Chevrolet, Inc., 126 Vt. 405, 234 A.2d 656 (1967) (dump truck struck plaintiff's house); Battalla v. State, 10 N.Y. 2d 237, 176 N.E.2d 729 (1961) (plaintiff suffered distress due to fear when defendant failed to secure a chair lift safety bar); Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149 (1959) (truck struck porch of plaintiff's house).

48. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

49. *Id.* at 731, 441 P.2d at 915, 69 Cal. Rptr. at 75. Plaintiff's infant daughter was struck and killed by an automobile while she lawfully crossed a road. The plaintiff witnessed the collision, but did not state that she herself was in the "zone of danger" or feared for her own safety.

50. The court, in allowing distress damages, recognized that in some cases, a plaintiff will not be in a zone of physical risk, but bodily injury or sickness is caused by the defendant's conduct. In such cases, the *Dillon* court stated that, under general principles recovery should be had if defendant should forsee fright or shock severe enough to cause substantial injury in a person normally constituted. *Id.* at 735, 441 P.2d at 919, 69 Cal. Rptr. at 79.

51. The court will consider these factors in determining forseeability under the *Dillon* rule: (1) whether plaintiff was located near the accident, as contrasted with far away; (2) whether the plaintiff had sensory and contemporaneous observance of the accident, contrasted with learning about it later from a third party; and, (3) the relationship of plaintiff to victim. *Id.* at 735, 441 P.2d at 920, 69 Cal. Rptr. at 80.

52. 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978).

53. *Id.* In *Parsons*, plaintiffs (a mother and father), were driving some distance behind the

pansion since it was formulated by the California Supreme Court.[54]

Massachusetts, however, has gone one step further than *Dillon*. In *Dziokonski v. Babineau*[55] the Supreme Judicial Court of Massachusetts allowed a cause of action for mental distress without the sensory perception of the event required by *Dillon*.[56] Under *Dziokonski*, the plaintiff need not see, hear, or feel the accident in any way, but only must come upon the scene while the injured party is still there.[57]

Although *Dillon* and its derivatives deal only with negligent infliction of mental distress to a bystander, while the "impact rule" and "zone of danger rule" can be applied to the direct victim of a negligent act, these modern theories illustrate the ever expanding reach of recovery for mental distress. Similarily, *Air Crash* can be viewed as an expansion of the "zone of danger rule" by allowing an action for fleeting emotional distress.

THE DISTRICT COURT OPINION

On May 25, 1979, a McDonnell Douglas DC-10 jet airliner, operated by American Airlines as flight 191, crashed into an open field near O'Hare International Airport approximately thirty one seconds after takeoff.[58] All 258 passengers and 13 crewmembers were killed.[59] Vari-

defendant's auto, in which plaintiffs' two children were riding. Plaintiffs rounded a curve in the road and came upon the wreckage of defendant's car. The court denied recovery for emotional distress based on *Dillon* because there was no showing that plaintiffs saw, heard, or otherwise sensorily perceived the injury producing event.

54. Rhode Island, *see* D'Ambra v. United States, 114 R.I. 543, 338 A.2d 524 (1975); Hawaii, *see* Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974); Michigan, *see* Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140 (1973).

55. 375 Mass. 555, 380 N.E.2d 1295 (1978).

56. *Id.* In *Dziokonski*, administratrix of estates of a husband and wife brought an action alleging that the deaths of husband and wife were the result of physical injuries caused by emotional distress which was caused by the injuries to the child of the couple. The child was struck by defendant's school bus. The mother went to the scene of the accident and witnessed her daughter lying injured on the ground. The mother died while riding with the child in an ambulance, allegedly the result of physical and emotional shock brought about by the injuries to her daughter. The father, upon learning of the death of his wife and injury to his daughter, also died, allegedly from an aggravated ulcer, coronary occlusion, and emotional shock. The court held that the action was valid.

57. *Id.* The court, in formulating a rule for recovery, stated that they should not adopt a rule which absolutely denies recovery to every parent for negligently caused emotional injuries resulting from concern over safety or injury of his child. The court concluded that a parent suffering physical harm as a result of severe mental distress over peril or harm to his minor child caused by defendant's negligence states a valid action where the parent either witnesses the accident, (this is *Dillon* rule) or soon comes upon the scene while the child is still there.

58. Kennelly, *Litigation Implication of the Chicago O'Hare Airport Crash of American Airlines Flight 191*, 15 J. MAR. 273 (1982).

59. *Id.*

ous wrongful death and survival actions were filed in the United States District Court for the Northern District of Illinois, Eastern Division.

On November 4, 1980, the court, applying Illinois law, granted in part a motion of the defendants which precluded a plaintiff's claim for damages for emotional distress and suffering experienced prior to the impact of the crash.[60] The court, summarizing the "impact rule" established in Illinois by *Braun v. Craven*,[61] stated that in Illinois an individual can recover for emotional distress or suffering only where that distress is caused by a physical injury, or impact.[62] The court went on to reason that the "impact rule" precludes recovery for the fright and terror experienced by the passengers during the final "roll" of the jet towards the ground simply because that distress occurred prior to the impact and was not caused by the impact itself.[63]

The plaintiff, reiterating an argument accepted by the Court of Appeals for the Fifth Circuit in *Solomon v. Warren*,[64] contended that the time for recovery for emotional distress should be extended to include the period immediately prior to an inevitable physical injury.[65] The court rejected this argument and held, based in part on the dissent in *Solomon*, that the effect of the "impact rule" is to impose an absolute caustion requirement which limits recovery for mental distress to that resulting from the impact of the crash.[66]

However, on June 17, 1983, the Illinois Supreme Court, in *Rickey v. Chicago Transit Authority*,[67] abandoned the "impact rule" in favor of the "zone of danger rule" and declared "the standard we adopt here shall be applied to this case and all cases not finally adjudicated."[68] In light of *Rickey*, the plaintiffs of *Air Crash* moved for a reconsideration of the court's earlier refusal to allow claims for pre-impact distress.[69] The court held that the effect of the *Rickey* court's adoption of the

60. In re Air Crash Disaster Near Chicago, Illinois On May 25, 1979, 507 F. Supp. 21 (N.D. Ill. 1980). Specifically, the court was presented the issue in the case of DeYoung v. McDonnell Douglas Corp.

61. *See supra* note 24.

62. 507 F. Supp. at 23.

63. *Id.*

64. 540 F.2d 777 (5th Cir. 1977). A light plane was lost at sea. The court allowed the jury to award distress damages for the few seconds prior to the crash.

65. 507 F. Supp. at 23. Plaintiff argues to remove the impact requirement from the "impact rule."

66. *Id.* at 24.

67. 98 Ill.2d 546, 457 N.E.2d 1 (1983). *See supra* text accompanying notes 38-46 for summary of *Rickey*.

68. *Id.* at 556, 457 N.E.2d at 5.

69. In re Air Crash, No. MDL-391, slip op. at 2 (N.D. Ill. Sept. 15, 1983). Because the earlier refusal to allow the claims was based on the use of the "impact rule" in Illinois, it follows that a new standard may provide a different result.

"zone of danger rule" is to permit recovery in Illinois for pre-impact distress by any plaintiff who can show the requisite resultant physical manifestations.[70] The court then granted plaintiffs leave to amend their complaints.[71]

The *Air Crash* court, in reconsidering the issue of pre-impact distress damages, began by summarizing its earlier holding which was based on the use of the "impact rule" by Illinois. The court then turned to *Rickey*, stating that, although very different on its facts, the adoption of the "zone of danger rule" there "squarely rejects the major premise of our November 4, 1980 decision: that an Illinois court would not allow damages for a plaintiff's fear or apprehension of danger."[72] The *Air Crash* court went on to recognize that *Rickey* did not create a broad tort of negligent infliction of emotional distress along the lines of *Dillon v. Legg*,[73] but instead allowed recovery for distress in Illinois to be governed by the "zone of danger rule."[74] The *Air Crash* court pointed out that in *Rickey*, the "zone of danger rule" was applied where a plaintiff-bystander witnesses the injury of another, but then stated that the defendants were correct in conceding that the rule will also apply where a plaintiff who is in a "zone of danger" subsequently becomes a direct victim himself.[75]

The court identified two main contentions of the defendants: first, that as a matter of law no plaintiff could show that a passenger aboard the jet suffered "resultant physical manifestations"; and second, that the interval of pre-impact distress before the passengers' deaths is too short as a matter of law to allow recovery for any emotional suffering of the decedents.[76] Defendants' claims, as summarized by the court, is that *Rickey's* "zone of danger rule" applies only in cases where there is prolonged emotional suffering.[77]

70. *Id.*

71. *Id.*

72. *Id.* at 3.

73. *See supra* § II(D) for *Dillon* discussion.

74. Slip op. at 5. The *Air Crash* court states that the Illinois Supreme Court (in *Rickey*) refused to create a broad tort of negligent infliction of emotional distress of the type in *Dillon*. The Rickey court found *Dillon* to be "a standard that is too vaguely defined to serve as a yardstick for courts to apply, and one that is excessively broad in that it would permit recovery for emotional disturbance alone." 98 Ill.2d at 554, 457 N.E.2d at 4.

75. Slip op. at 5.

76. *Id.* at 6, 7.

77. *Id. See also* Memorandum of Defendant McDonnell Douglas Corporation in Opposition to Plaintiff's Motion for Reconsideration of this Court's Order of November 4, 1980 at 6, *Air Crash*. Defendant states that plaintiffs' legal arguments and general statements as to what they intend to prove do not suggest a sufficient probability of injury or illness so as to avoid Illinois' prohibition against "speculative" damages.

Plaintiffs, on the other hand, contended that the requirement of *Rickey*, that physical manifestations resulting from the distress be shown, does not apply when there is direct physical injury to the plaintiff.[78]

The *Air Crash* court found that neither position is persuasive.[79] The court held that the short duration of distress does not make that distress totally non-compensable, and that the plaintiffs must separately plead and prove pre-impact distress and resultant physical manifestations.[80] Finally, the court held that should a plaintiff be able to prove physical manifestations of distress prior to impact,[81] through the use of expert witnesses, that plaintiff is entitled to recover damages for pre-impact distress under current Illinois law.[82]

ANALYSIS

The plaintiffs' actions to recover pre-impact emotional distress damages on behalf of their decedents presented the *Air Crash* court with a problem. *Rickey* is the only applicable Illinois case, and, in the words of the *Air Crash* court, is "very different on its facts."[83] Nevertheless, the court stated that *Rickey* squarely rejects the major premise of its earlier opinion which denied a cause of action of mental distress based on the "impact rule,"[84] and concluded that under *Rickey's* "zone of danger rule" an action for short-term pre-impact distress is now valid.[85]

In so holding, the *Air Crash* court is reading *Rickey* far too broadly. *Rickey* dealt with severe, prolonged emotional distress to a bystander, not the fleeting distress of a direct victim as does *Air Crash.* Other "zone of danger" jurisdictions have allowed actions for the mental distress of a direct victim,[86] and the *Air Crash* plaintiff's brief

78. Slip op. at 6, 7. *See also* Memorandum in Support of Plaintiff's Motion for Reconsideration of this Court's Order of November 4, 1980, and for leave to Amend, *Air Crash.*

79. Slip op. at 7.

80. *Id.* at 7, 8.

81. *Id.* at 9. *See infra* text accompanying note 103 for a list of what plaintiffs intend to offer as evidence of physical manifestations of distress.

82. Slip op. at 9. The court also holds that damages for pain and suffering are recoverable under a products liability action, and that emotional distress *and* physical manifestations are both compensable. This comment limits itself to the emotional distress issue, however.

83. Slip op. at 3.

84. *Id. See supra* text accompanying notes 60-66.

85. Slip op. at 9.

86. *See supra* note 47. Allowing an action for mental distress under the "zone of danger rule" to a direct victim is generally accepted as proper. Because a plaintiff in a zone of danger can bring an action, it would not be logical to bar the action solely because the plaintiff suffers a direct impact.

points to several of these cases to support the proposition that Illinois law would allow recovery for pre-impact distress.[87] These cases can be distinguished from *Air Crash*, however. In each, the direct victim was allowed recovery under the "zone of danger rule" for substantial, prolonged mental distress.[88] In *Air Crash*, though, any mental distress suffered by the direct victims lasted no more than thirty seconds,[89] when their death obviously ended all mental suffering.

The defendants in *Air Crash* concede that Illinois law would now allow recovery to a direct victim.[90] The defendants suggest, however, that *Rickey's* "zone of danger rule" allows recovery only in those cases where prolonged emotional suffering follows the incident.[91] The *Air Crash* court rejected this contention and found that the "zone of danger rule," as stated in *Rickey*, would allow damages for distress of a very short duration. The *Rickey* court, however, makes no such sweeping statement of the law in allowing a claim there for very severe, prolonged emotional distress.[92]

By allowing claims for fleeting mental distress, the *Air Crash* court greatly expands recovery under the "zone of danger rule." This expansion finds very little support in precedent. Although a few jurisdictions have allowed recovery for distress followed almost immediately by death, such awards are the exception and not the rule and furthermore can be distinguished from *Air Crash*. In *Kozar v. Chesapeake and Ohio Railway Company*,[93] for example, recovery for fleeting mental distress was allowed under the Federal Employees' Liability Act,[94] not the common law tort theory of recovery dealt with in *Air Crash*. In *Solomon v. Warren*,[95] recovery for fleeting mental distress was allowed under the "impact rule," not the "zone of danger rule" dealt with by *Air Crash*. Furthermore, the *Air Crash* court expressly rejected the rea-

87. *See* Plaintiff's Memorandum at 8, *Air Crash*.

88. *See supra* note 47.

89. *See* slip op. at 6. The court has accepted as fact that Flight 191 was airborn no more than thirty one seconds.

90. *See* Defendant's Memorandum at 3, *Air Crash*.

91. *Id. See supra* note 77 and accompanying text.

92. 98 Ill.2d at 549, 550, 457 N.E.2d at 2.

93. 320 F. Supp. 335 (W.D. Mich. 1970), *aff'd* 449 F.2d 1238 (6th Cir. 1971) (plaintiff's decedent killed when box car fell on him, jury awards $500 damages for emotional fright and suffering endured between the time decedent first realized car was falling and time he was struck and killed).

94. 5 U.S.C. § 6301 et. seq. (1976). The court in *Kozar* allowed the fleeting distress damages because the Supreme Court in Rogers v. Missouri Pac. R. Co., 352 U.S. 500 (1957) stated that the Act is not to be eroded by narrow and niggardly construction.

95. *See supra* note 64.

soning of the *Solomon* court.[96]

Although fault cannot usually be found with the principle that the short duration of compensable damages is relevant only to the amount of the award granted, inherent in the short duration of mental distress is the inability to prove physical injury, which renders that distress non-compensable. As stated previously, recovery under the "zone of danger" rule is allowed only upon a showing that the plaintiff's distress was manifested in physical illness or injury.[97] The Restatement (Second) of Torts states that there is no liability for "transitory, non-recurring physical phenomena."[98] In adopting the "zone of danger rule," the *Rickey* court stressed the need for proof of concrete physical injury or manifestations of distress in order to recover. Where the distress lasts only thirty-one seconds, however, it is inconceivable that anything beyond transitory, non-recurring physical phenomena can be proven. Therefore, distress of such short duration is not compensable under the "zone of danger rule."

In the first Illinois case to go to trial on the issue of pre-impact distress under the *Air Crash* holding, the jury found that the plaintiff had failed to prove the requisite physical injury and so denied recovery.[99] An expert for the defense testified that thirty-one seconds of distress is too short a time period for physical injuries to occur.[100]

The Court of Appeals for the Second Circuit had earlier agreed by striking down a jury award for pre-impact distress in *Shatkin v. McDonnell Douglas*.[101] The action there arose out of the same disaster as the claims before the *Air Crash* court. The *Shatkin* court found that no evidence on record supported the contention that the decedant suffered prior to the impact which instantly killed all those on board.[102] The court found that flight 191 maintained a normal flight path, despite the

96. *See supra* text accompanying notes 64, 66.

97. *See supra* text accompanying notes 34, 35.

98. RESTATEMENT (SECOND) OF TORTS § 436A comment c (1977).

99. Moruzi v. McDonnell Douglas, No. 79 C 4805. No. MDL-391 (N.D. Ill. 1979). The case went to trial on September 17, 1984. It is important to note that the *Moruzi* case was selected by counsel for both sides as the important first case to try the issue of pre-impact distress in Illinois.

100. Dr. John C. Duffy testified for the plaintiff that everyone aboard the jet was obviously terrified during the final seconds of flight. Illinois law, however, does not compensate for terror alone. *See supra* text accompanying notes 35, 36.

101. Shatkin v. McDonnell Douglas, Nos. 83-7674, 83-7680, 83-7698 (2nd Cir. Jan. 26, 1984).

102. *Id.* Because courts will rule on the evidence before ruling on the validity of the nature of the claim itself, it is forseeable that, because of the *Air Crash* holding allowing pre-impact distress claims, defendants there will be forced to continuously challenge the evidence on such claims. In light of *Shatkin*, these challenges will be successful, but expensive for defendant and time consuming for the courts. The policy issue may never be reached.

loss of an engine, until only three seconds before it crashed.[103] The *Shatkin* court ruled that, on these facts, any pre-impact distress would be speculative.[104] The second circuit, however, later allowed recovery for a pre-impact distress claim arising out of the crash of flight 191 in *Shu-Tao Lin v. McDonnell Douglas.*[105] The court distinguished its holding here with the *Shatkin* outcome weakly, finding that because the decedent in *Shu-Tao Lin* was seated on the left side of the plane, he may have seen the engine fall off.[106] Because there can be no evidence showing that the decedent was looking out his window, was awake, or was in the correct seat, the finding of pre-impact distress here is also speculative and should be struck down.

Although the *Air Crash* court, in allowing claims for pre-impact distress, did not have the benefit of prior flight 191 trial results, it did recognize the *Rickey* court's concern with speculative damages and the need for concrete physical manifestations of distress requisite to recovery under the "zone of danger rule." The *Air Crash* court nevertheless accepted the plaintiff's contention that the requirements of *Rickey* can be met by showing "increased heart rate, sweating, pupil dilation, bladder and bowel incontinence, muscular tremors, increased respiration, restriction of coronary arteries," and hyperirritiability of the nervous system prior to death.[107] Such symptoms, however, appear to be of the type of minor physical manifestations that the *Rickey* court sought to restrict with its emphasis on the illness or injury requirement. The findings of the *Shatkin* court further illustrate that the *Rickey* court's concern with speculative damages has been violated by the *Air Crash* holding. Illinois took almost one hundred years to abandon the "impact rule," under which recovery to *Air Crash* plaintiffs would be denied, and adopt the "zone of danger rule."[108] Despite the obvious reluctance of Illinois courts' to expand recovery for mental distress, *Air Crash* reads *Rickey* as expanding such recovery to the widest possible extremes under the "zone of danger rule." That rule was adopted in *Rickey* to allow an action for very real, prolonged, and serious emotional injury.[109] It is inconceivable that the *Rickey* court intended to

103. *Id.* The court relied on the findings of the National Transportation Safety Board, which found that the plane did not go into its 90 degree plunge until 3 seconds before impact.

104. *Id.*

105. Shu-Tao Lin v. McDonnell Doulgas, Nos. 83-7909, 83-7933 (2nd Cir. July 30, 1984).

106. *Id.*

107. *See* Plaintiff's Memorandum, note 2 on 12, *Air Crash.*

108. *See supra* text accompanying notes 24-30.

109. *Id.*

allow recovery for emotional distress of so short a duration as that in *Air Crash.*

An analogy may help illustrate that the *Rickey* court would not allow recovery for emotional distress in *Air Crash.* In *Holton v. Daly,*[110] the Illinois Supreme Court held that a wrongful death action was the exclusive remedy where death resulted from tortious conduct. Almost one hundred years later, in *Murphy v. Martin Oil Co.,*[111] the court held that damages for conscious pain and suffering prior to death could be recovered as well. In *Murphy,* plaintiff's decedent was burned in an explosion and died nine days later.[112] In abandoning almost one hundred years of precedent, the *Murphy* court stated that "prolonged pain and suffering" should be actionable even where death results.[113] The court undoubtably recognized that nine days of suffering should be compensable.

Likewise, the *Rickey* court, in abandoning almost one hundred years of precedent, seemed to stress that the prolonged and serious nature of the plaintiff's emotional suffering should be compensable at law. The Illinois Supreme Court, then, has consistently considered the duration of suffering, whether physical or mental, in allowing claims. The extremely short duration of distress in *Air Crash* seems very unlikely to receive the Illinois Supreme Court's blessing as being compensable. Most likely, the supreme court would consider claims for such damages frivolous and speculative, which they hoped to bar from the court.[114]

Taken in a broader perspective, the *Air Crash* result may violate the spirit behind the entire tort of negligent infliction of emotional distress. As stated previously, interference with peace of mind traditionally was not recognized as a basis for recovery in tort.[115] Once recognized as a basis for recovery, courts eased their fears of fictitious or speculative claims by erecting barriers to limit recovery.[116] A major criticism which eventually led courts to adopt less prohibitive rules was based on the fundamental premise of the common law system that one should have redress for every substantial wrong which inflicts injury upon his or her person.[117] This premise can be viewed as the basis for allowing recovery for mental distress.

110. 106 Ill. 131 (1882).
111. 56 Ill.2d 423, 308 N.E.2d 583 (1978).
112. *Id.* at 425, 308 N.E.2d at 584.
113. *Id.* at 431, 308 N.E.2d at 587.
114. 98 Ill.2d at 555, 457 N.E.2d at 5.
115. *See supra* text accompanying note 7.
116. *See supra* text accompanying notes 8-10.
117. *See supra* text accompanying note 23.

The *Air Crash* holding, however, may go beyond this common law principle of justice. There can be no doubt that severe, prolonged mental distress is a substantial wrong which should be redressable at law. Distress lasting less than thirty seconds, however, and ending forever with the death of the distressed, seems hardly substantial. By allowing recovery for such short-term distress, the *Air Crash* court has brought the tort of emotional distress further than the common law principle which justifies that tort's very existence.

Furthermore, the *Air Crash* defendant's wrong will not escape redress should the distress claims be barred. Wrongful death actions have been filed, and the parties have entered a "no contest" stipulation as to the defendant's liability.[118] The plaintiffs, then, have a guaranteed remedy for the defendant's wrong. These plaintiffs, however, are not content, and in light of the *Air Crash* holding, can now tack on more claims for the same wrong. Because plaintiffs already have redress for the defendant's wrong, and because thirty seconds, at most, of mental distress is insubstantial, pre-impact distress claims are frivolous. The *Air Crash* court has allowed the long standing apprehension of frivolous and speculative claims for mental distress, as expressed by the *Rickey* court,[119] to become reality.

In allowing pre-impact distress claims, the United States District Court for the Northern District of Illinois appears to have found a new train of thought. This same court flatly denied such claims under the prior Illinois standard of the "impact rule,"[120] but easily could have allowed them there. In the few moments prior to the crash, the aircraft's wing reached right angle to the ground, and with 258 of the 264 seats occupied, passengers were knocked against each other and the cabin walls while loose or unsecured objects in the cabin became dangerous missles. As previously stated, the requirement of physical impact under the "impact rule" had been reduced to a mere technical requirement.[121] Surely the activity within the aircraft's cabin prior to crash would satisfy this mere technical requirement of impact. The *Air Crash* court, however, saw fit to bar pre-impact distress claims under the "impact rule" only to read *Rickey* so broadly as to allow these claims under the "zone of danger rule."

It cannot be denied that *Rickey* can be construed to allow pre-impact distress claims, but such a reading ignores the spirit and intent

118. *See* slip op.
119. 98 Ill.2d at 555, 457 N.E.2d at 5.
120. 507 F. Supp. at 23 (first opinion).
121. *See supra* note 18.

of both *Rickey* and the "zone of danger rule." Furthermore, the impact of the *Air Crash* holding presents a rather bleak outlook. It is conceivable that, under the authority of *Air Crash*, courts will be faced with a flood of emotional distress claims coupled with traditional wrongful death cases. Because the *Air Crash* court refused to consider the fleeting duration of the distress as a limit to recovery,[122] the estate of any wrongful death victim who was aware of the impending accident for any length of time will have an opportunity to recover for mental distress. The *Air Crash* court has diluted the physical manifestation requirement as set forth by the *Rickey* court to allow speculative claims. The prospect of a never ending train of expert witnesses is discouraging to an already overburdened court system.

CONCLUSION

The Illinois Supreme Court in *Rickey* was faced with prolonged mental suffering. The test they adopted to allow a claim for distress there has been interpreted by the *Air Crash* court to allow actions for mental distress of extremely short duration. The Illinois Supreme Court must fine tune their *Rickey* holding to prevent a rash of actions based on fleeting mental distress. Although worded narrowly, their *Rickey* opinion has been read as paving the way for frivolous and speculative emotional distress actions. The Illinois Supreme Court must reiterate their adoption of the "zone of danger test," and in so doing limit mental distress actions to those involving prolonged suffering. By doing this, some of the confusion permeating the tort of negligent infliction of emotional distress in Illinois can be eliminated.

122. Slip op. at 7.