NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IN AIR CRASH CASES: A NEW FLIGHT PATH?

This Recent Development discusses the tort of negligent infliction of emotional distress[1] as applied to domestic[2] air crash cases. It focuses primarily on Illinois law,[3] which has approached negligent infliction of emotional distress conflicts in a variety of ways. Special attention is paid to the most recent Illinois approach to the issue, as expressed in *Corgan v. Muehling*.[4] This Recent Development concludes with a discussion of the probable impact that *Corgan* will have on air crash litigation strategy.

I. INTRODUCTION

Major air accidents startle and worry the American public. Airline crashes often result in mass catastrophe, ending hundreds of lives in a flash. However, because air travel is one of the most common forms of transportation for Americans,[5] accidents are inevitable.[6] Modern tech-

1. This Recent Development does not address *intentional* infliction of emotional distress ("IIED"). For a general discussion of IIED, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12 (5th ed. 1984).

2. This Recent Development is limited to negligent infliction of emotional distress actions in domestic air crash cases; it does not discuss the law governing international air travel, including the Warsaw Convention. For a discussion of negligent infliction of emotional distress under international aviation law, see Gregory C. Read, *Recovery for Emotional Distress in Aviation Cases*, Litigation in Aviation 1, 3-11 (1991).

3. Although this Recent Development centers around Illinois law, the law of other jurisdictions is discussed as well. However, this Recent Development does not offer an extensive jurisdictional survey of the status of the law on negligent infliction of emotional distress. For an in-depth analysis of the law on this subject, see Douglas B. Marlowe, Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective versus Subjective Indices of Distress*, 33 VILL. L. REV. 781 (1988) [hereinafter Comment].

4. 574 N.E.2d 602 (Ill. 1991). Because many cases which arose out of the air crash disaster at Sioux City, Iowa, are pending in Chicago, the status of Illinois law is important. *Corgan* will affect all of these cases applying Illinois law.

5. In 1988, approximately 456,026,400 commercial passengers flew from America's 30 busiest airports. U.S. Bureau of the Census, Statistical Abstract of the United States 622 (110th ed. 1990) [hereinafter Statistical Abstract]. American Airlines alone flew 64.7 billion passenger miles in 1988. William Garvey, *Interview: Robert Crandall*, FLYING, June 1989, at 86, 86.

6. In 1988, for example, one air crash fatality occurred for every billion flight miles. Statistical Abstract, *supra* note 5, at 622. The 1988 fatal accident rate was 0.026 fatal accidents per hundred thousand departures, roughly one fatal accident per every four million flights. NATIONAL TRANSP. SAFETY BD., ANNUAL REVIEW OF AIRCRAFT ACCIDENT DATA: U.S. AIR CARRIER OPERATIONS CALENDAR YEAR 1988, at 3 (1991) [hereinafter NTSB Report]. The overall accident rate was 0.367, approximately one accident every three million flights. *Id.*

nological innovations minimize the potential for air mishaps.[7] Unfortunately, though, the number of flights is increasing while the accident rate remains constant.[8] Thus, the frequency of air crashes will probably continue to escalate.[9] One source predicts that by 2005 a major air crash will occur every two weeks.[10]

Commercial air crashes often spawn exceptionally complex litigation,[11] putting aviation law on the cutting edge in the areas of torts, products liability, and civil procedure.[12] For instance, creative plaintiffs' attorneys seeking a means to recover for crash victims' mental anguish often sue for negligent infliction of emotional distress.[13] In essence, a plaintiff asserting a negligent infliction of emotional distress claim will attempt to prove that the negligence of one or more of the defendants

7. For example, the Air Traffic Control system uses radar to separate air traffic. Department of Transp., AIM '92: Airman's Information Manual 94 (Aviation Supplies & Academics, Inc. ed., 1992) [hereinafter AIM 1992]. Additionally, navigational systems, such as the Instrument Landing System (ILS) allow safe approaches in inclement weather. PETER DOGAN, THE INSTRUMENT FLIGHT TRAINING MANUAL, 167-68 (2d ed. 1991). "To the uninitiated, [ILS] accuracy seems almost supernatural." *Id.* at 168. However, technology cannot master the weather and the hazards it poses to flight. "[Y]ou cannot count on the weather, because even with computers, satellites, and perhaps a little witchcraft, man simply cannot outguess it 100 percent of the time." ROBERT N. BUCK, WEATHER FLYING 2 (1988).

8. The air transportation business grew tremendously in the 1980s. From 1980 to 1988, the number of air passengers grew 53.6%. Statistical Abstract, *supra* note 5, at 622. Similarly, the number of commercial aircraft in operation grew from 2360 in 1983 to 3190 in 1989. *Id.* at 624. From 1984 to 1988, departures rose from 5,898,852 to 7,622,365. NTSB Report, *supra* note 6, at 3. In 1988 (the last year for which accident statistics are available), the accident rate declined slightly. *Id.* at 2. However, the accident rate had previously increased from 0.288 accidents per departure in 1984 to 0.367 in 1988. *Id.* at 3. The flight hour and flight mile accident rates also increased. *Id.*

9. Growth is expected to continue because an increase in air travel results in an increased potential for air crashes. If the statistics continue at this pace, Americans will witness more air accidents. *See supra* note 8.

10. Gary Stix, *Along for the Ride?*, SCI. AM., July 1991, at 94.

11. Almost every passenger aboard a crashed aircraft commences litigation. In addition, spouses of passengers often bring parasitic consortium claims. Interview with Richard Walker, Associate at Adler, Kaplan & Begy (June 1991) [hereinafter Walker Interview]. In large multi-district litigation (MDL) actions, coordination between the numerous plaintiffs, defendants, and courts stretches litigation to mammoth proportions. *Id.*

12. Aviation cases often involve other legal areas as well, including breach of warranty. *See, e.g.*, Rauch v. United Instr., Inc., 548 F.2d 452 (3d Cir. 1976); *In re* Air Crash Disaster at Metro. Airport, Detroit, Mich. on Jan. 19, 1979, 619 F. Supp. 13 (E.D. Mich. 1984) (addressing breach of warranty arising out of an air crash).

13. *See, e.g.*, In re Air Crash Disaster Near Chicago, Ill. on May 25, 1979, 507 F. Supp. 21, 22 (N.D. Ill. 1980) (plaintiff sued air carrier and aircraft manufacturer for negligent infliction of emotional distress stemming from her daughter's death in crash). Products liability and breach of warranty issues are beyond the scope of this Recent Development, which focuses on actions against air carriers, instead of manufacturers or service outfits.

approximately caused him to suffer mental anguish.[14] Airline crashes are ripe with potential negligent infliction of emotional distress actions, including "pre-impact fear" claims. Simply, "pre-impact fear" is defined as the emotional distress an airline passenger experiences while awaiting an emergency landing.[15]

II. THE PRIMARY PRINCIPLES GOVERNING NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

The development of rules governing negligent infliction of emotional distress has been far from fluid. Often contradictory rules coexist in a convoluted state.[16] Before reviewing the negligent infliction of emotional distress principles, however, it is helpful to distinguish the two basic types of emotional distress plaintiffs: direct victims and bystanders. Direct victims, the primary recipients of a tort's manifestations, are directly involved with the basic tort from which all potential liability arises.[17] For example, passengers aboard a crashed aircraft are direct victims.[18] Bystanders,[19] on the other hand, are secondary plaintiffs who allege emotional distress claims based on witnessing torts to direct victims.[20]

Direct victim cases and bystander cases should be considered separately, even if they arise out of the same incident. The legal rules governing the two types of cases often differ.[21] In addition, the fundamental distinction between direct victims and bystanders necessitates separate consideration of the cases.[22] If one legal rule governs both direct victims and bystanders, it is more appropriate to recognize that both groups coincidentally share the same rule, rather than believe that one rule neces-

14. For a general discussion of negligent infliction of emotional distress, see KEETON ET AL., *supra* note 1, § 54.

15. *See infra* notes 102-17 for a discussion of "pre-impact" fear.

16. *See* Comment, *supra* note 3 (discussing rules adopted by the various jurisdictions).

17. *See, e.g., Chicago Air Crash*, 507 F. Supp. at 23 (allowing recovery for claims based on bodily injury). *See* Williams v. Baker, 572 A.2d 1062, 1066 n.12 (D.C. App. 1990); KEETON ET AL., *supra* note 1, at 365-66 (discussing the difference between direct victims and bystanders).

18. *Chicago Air Crash*, 507 F. Supp. at 21.

19. "Bystander" is defined as "[o]ne who stands near; a chance looker-on . . . [o]ne present but not taking part, looker-on, spectator, beholder, observer." BLACK'S LAW DICTIONARY 201 (6th ed. 1990).

20. *See, e.g.*, Rickey v. Chicago Transit Auth., 457 N.E.2d 1 (Ill. 1983). *See also* Claudia J. Wrazel, Note, *Limiting Liability for the Negligent Infliction of Emotional Distress: The "Bystander Recovery Cases,"* 54 S. CAL. L. REV. 847 (1981).

21. *See, e.g.*, Corgan v. Muehling, 574 N.E.2d 602, 606 (Ill. 1991) (stating that different rules apply to direct victim and bystander cases).

22. *See infra* notes 84-86 and accompanying text.

sarily controls both groups.[23]

A. *The "Physical Impact" Rule and the "Physical Manifestation" Requirement*

The "Physical Impact" rule states that negligent infliction of emotional distress is a *conditional* tort. It exists only in the presence of bodily contact sufficient to yield a separate and self-sustaining claim.[24] Traditionally, courts held that negligent infliction of emotional distress claims were "parasitic" to other recognized torts.[25] Many courts continue to hold that, standing alone, injuries resulting from only fear are not compensable, even if the plaintiff's fear manifested in a diagnosed mental or physical infirmity.[26] Courts refuse to recognize pure fear-induced injuries because they do not have a separate and self-sustaining tort to which to cling.[27] Given a separate tort, however, the fear-induced claim shares a partner, and the separate tort drags its fear-induced counterpart into the realm of compensability.[28]

Courts and commentators state several reasons for denying pure fear-induced injury claims, including: (1) people do not owe others a duty of

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23. *See supra* notes 84-86 and accompanying text.

24. Comment, *supra* note 3, at 783; Read, *supra* note 2, at 11-12; KEETON ET AL., *supra* note 1, at 361.

25. Comment, *supra* note 3, at 782 & n.7, 783 & n.8. "Parasitic" means "arising from the violation of another independently recognized protected interest." *Id.* at 782-83. With the passage of time, some parasitic claims become self-sustaining claims. *Id.* at 782 n.7.

The Restatement (Second) of Torts illustrates the parasitic nature of the negligent infliction of emotional distress claim. "If the actor's negligent conduct has so caused any bodily harm to another as to make him liable for it, the actor is *also* subject to liability for . . . [accompanying emotional distress]." RESTATEMENT (SECOND) OF TORTS § 456 (1965) (emphasis added). While the Restatement is helpful, its many rules regarding negligent infliction of emotional distress may create confusion. The Restatement fails to define clear, succinct rules for direct victims and bystanders. *See* RESTATEMENT (SECOND) OF TORTS §§ 313, 436, 436A, 456 (1965).

26. *See* KEETON ET AL., *supra* note 1, at 361. "Where the defendant's negligence causes only mental disturbance, without accompanying physical injury, illness or other physical consequences, and in the absence of some other independent basis for tort liability, the great majority of courts still hold that in the ordinary case there can be no recovery." *Id.* (footnotes omitted). *See* Comment, *supra* note 3, at 792 & n.59 (listing jurisdictions adhering to the Physical Impact rule). *See also* Read, *supra* note 2, at 11-12.

27. KEETON ET AL., *supra* note 1, at 361.

28. One of the most prominent cases to establish the Physical Impact rule was Mitchell v. Rochester Ry. Co. 45 N.E. 354 (N.Y. 1896); Comment, *supra* note 3, at 783. In *Mitchell*, a negligently driven carriage nearly struck a pregnant woman, causing her great anxiety and an eventual miscarriage. 45 N.E. at 354. The New York Court of Appeals held that the plaintiff failed to state a compensable claim because fear alone cannot yield compensable injuries; for recovery, the injuries must accompany a contemporaneous physical injury. *Id.* at 355.

protection against fear;[29] (2) even if such a duty existed, fear-induced injuries exceed the boundaries of proximate cause;[30] (3) allowing fear-induced claims invites a flood of litigation that would burden the judiciary;[31] (4) such a cause of action could elicit fraudulent claims;[32] (5) negligent defendants, as opposed to intentional tortfeasors, are not culpable enough to be held liable for purely mental harm;[33] and (6) the harm to plaintiffs is commonly temporary and relatively minor.[34]

In the 1898 case of *Braun v. Craven*, the Supreme Court of Illinois adopted the Physical Impact rule.[35] In *Braun*, the defendant landlord entered his tenant's residence to collect rent.[36] The landlord's abusive

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29. Ewing v. Pittsburgh, C., C. & St. L. Ry. Co., which held that a defendant owes a plaintiff no duty to protect her from fright, illustrates the rationale followed by early courts. 23 A. 340, 340 (Pa. 1892). Today the *Ewing* view is obsolete, at least in the direct victim context.

30. *Id.* The court in *Ewing* noted a lack of proximate cause:

> [The defendant had no] reason to anticipate that the result of a collision on its road would so operate on the mind of a person who witnessed it, but who sustained no bodily injury thereby, as to produce such nervous excitement and distress as to result in permanent injury . . . if the injury was one not likely to result from the collision, and one which the company could not have reasonably foreseen, then the accident was not the proximate cause. . . . [W]e regard the injury as too remote.

Id. See also Mitchell, 45 N.E. at 355 (noting that injuries from distress alone exceed proximate cause boundaries).

31. KEETON ET AL., *supra* note 1, at 360 (citing *Mitchell*, 45 N.E. 354). The *Ewing* court stated: "If mere fright, unaccompanied with bodily injury, is a cause of action, the scope of what are known as 'accident cases' will be very greatly enlarged." 23 A. at 340. *See also* Wrazel, *supra* note 20, at 847.

32. *See, e.g.*, *Mitchell*, 45 N.E. at 354-55 ("If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection . . . ."). *See also* KEETON ET AL., *supra* note 1, at 361; Comment, *supra*, note 3, at 789; Peter A. Bell, *The Bell Tolls: Toward Full Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333, 351-53 (1984); RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965).

33. Corgan v. Muehling, 574 N.E.2d 602, 608 (Ill. 1991) (rejecting the contention). *See generally* KEETON ET AL., *supra* note 1, at 361; *infra* note 34; RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965).

34. KEETON ET AL., *supra* note 1, at 360-61. Prosser and Keeton summarize the policy considerations for denying recovery:

> The temporary emotion of fright, so far from serious that it does no physical harm, is so evanescent a thing, so easily counterfeited, and usually so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence, where the elements of extreme outrage and moral blame which have had such weight in the intentional tort context are lacking.

Id. at 361. *See also* RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965); Williams v. Baker, 572 A.2d 1062, 1065 (D.C. Ct. App. 1990).

35. 51 N.E. 657, 664 (Ill. 1898).

36. *Id.* at 657-58.

language and gestures startled the tenant.[37] After developing a nervous condition, the tenant sued the landlord for her trauma-induced injuries.[38] The Illinois Supreme Court held that a plaintiff cannot sustain a negligence[39] action for personal injuries absent a showing of bodily contact.[40] The court explained that the plaintiff must show that she incurred *physical contact*, not merely fright.[41]

The court in *Braun* employed a proximate cause rationale, concluding that plaintiffs cannot reasonably foresee the consequences of the defendant's negligently frightful behavior. The court refused to extend liability to defendants for injuries to peculiarly sensitive plaintiffs.[42] According to the court, allowing an action unsupported by physical contact would present the potential for "dangerous use,"[43] and impose liability on defendants for unforeseeable injuries.[44]

Illinois continued to apply the Physical Impact rule into the 1980s.[45] In addition to Illinois, other jurisdictions[46] still adhere to it. Although the Physical Impact rule is a bright-line rule,[47] it is criticized as too harsh because it denies recovery to seriously injured plaintiffs who "luckily" avoid physical contact.[48] Consequently, the rule does not contemplate

37. *Id.*

38. *Id.* at 659.

39. Limiting its discussion to the negligent infliction of emotional distress, the court did not consider intentional infliction of emotional distress. *Braun*, 51 N.E. at 664.

40. *Id.* at 664.

41. *Id.*

42. *Id.*

43. *Id.* Presumably, "dangerous use" refers to the potential for feigned and trivial claims, and suggests concern for open-ended liability.

44. *Id.*

45. *See, e.g.*, Siemieniec v. Lutheran Gen. Hosp., 480 N.E.2d 1227 (Ill. App. Ct. 1985); *In re* Air Crash Disaster Near Chicago, Ill. on May 25, 1979, 507 F. Supp. 21 (N.D. Ill. 1980) (applying Illinois law); Carlinville Nat'l Bank v. Rhoads, 380 N.E.2d 63, 65 (Ill. App. Ct. 1978) (applying Physical Impact requirement). *But see* Hammond v. Lane, 515 N.E.2d 828 (Ill. App. Ct. 1987) (applying the Zone of Danger test).

46. KEETON ET AL., *supra* note 1, at 361. *See* Comment, *supra* note 3, at 792 n.59 (listing jurisdictions which still adhere to the Physical Impact rule). Indiana has recently modified its Physical Impact rule, holding that distress need not result from physical injury accompanying impact. Shuamber v. Henderson, 579 N.E.2d 452, 456 (Ind. 1991).

47. The rule also preserves judicial resources and limits the potential for trivial and fraudulent claims. *See supra* notes 31-34 and accompanying text.

48. *See* James J. Reidy, *Negligent Infliction of Emotional Distress in Illinois: Living in the Past, Suffering in the Present*, 30 DEPAUL L. REV. 295, 296 (1981) ("... [T]he physical impact rule is at variance with modern needs and concepts of justice"). *See also* Plaisance v. Texaco, Inc., 937 F.2d 1004, 1009 (5th Cir. 1991) ("This rule has been criticized ... as being arbitrarily under inclusive for there are genuine mental injuries that are not accompanied by a physical impact or injury.").

bystander recovery rendering many seriously injured people without a source of compensation.[49]

Due to the harshness of the Physical Impact rule, many courts have mitigated the bright-line limitation.[50] Specifically, courts commonly find that even the most minimal bodily contact constitutes physical impact.[51] Many courts do not address whether the physical contact supports a separate cause of action, but rather whether a physical contact exists to support the physical impact requirement of the rule.[52] In this context, negligent infliction of emotional distress is not a parasitic cause of action. Instead, it is a self-sustaining action with a bodily impact requirement.[53]

In *Braun*, the court did not address the issue of whether, upon demonstrating a requisite physical impact, any level of emotional distress may support a claim for negligent infliction of emotional distress, or whether a threshold exists.[54] In 1990, in *Allen v. Otis Elevator Co.*,[55] the Illinois Court of Appeals attached a "physical manifestation" requirement[56] to

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49. Apparently, by definition, bystanders cannot recover under the Physical Impact rule because they do not incur bodily contact. *See supra* notes 19-20.

50. Comment, *supra* note 3, at 792-94.

51. In Rickey v. Chicago Transit Auth., 457 N.E.2d 1, 4 (Ill. 1983), the Supreme Court of Illinois explained:

> A significant reason for [the Physical Impact rule's] loss of adherents was that courts quickly began to find that the impact requirement had been met through minor physical contacts which in reality were insignificant and played trivial or no part in causing harm to the plaintiff. The requirement of 'impact' often became purely formal, and it was satisfied by a slight jolt or jar . . . or 'any degree of physical impact, however slight.'

Id. (quoting Zelinsky v. Chimics, 175 A.2d 351, 354 (Pa. 1961)). *See also* KEETON ET AL., *supra* note 1, at 363 ("[C]ourts have found 'impact' in minor contacts with the [plaintiff] which often play no part in causing the real harm, and in themselves can have no importance whatever.") (footnotes omitted); Comment, *supra* note 3, at 791-94.

52. KEETON ET AL., *supra* note 1, at 363-64.

53. Prosser and Keeton discuss courts that allow recovery when: (1) bodily contact exists; or (2) another independent tort supports the general claim. KEETON ET AL., *supra* note 1, at 361. In this context, bodily contact can either: (1) yield a negligent infliction claim via a separate cause of action, making negligent infliction a parasitic action; or (2) exist as a simple limitation on the claim, just as harmful or offensive contact limits the battery claim. *Id.* at 364 ("[T]he great majority of courts have now repudiated the requirement of 'impact,' regarding as sufficient the requirement that the mental distress be certified by some physical injury, illness or other objective physical manifestation."). Under this interpretation, the Physical Impact rule does not limit negligent infliction of emotional distress to parasitic claims.

54. *See* Braun v. Craven, 51 N.E. 657 (Ill. 1898); Allen v. Otis Elevator Co., 563 N.E.2d 826, 831 (Ill. App. Ct. 1990). Further, the court in *Otis Elevator* noted that the Illinois courts have not squarely confronted the issue. *Id.* at 831-32.

55. *Otis Elevator*, 563 N.E.2d at 831.

56. Comment, *supra* note 3, at 795. The physical manifestation requirement has the greatest impact when applied to the Zone of Danger test, discussed *infra*.

the Physical Impact rule. In *Otis Elevator*, the court held that *Braun* requires plaintiffs to show physical injury resulting from the defendant's negligence.[57] If the Physical Impact rule is not trivialized, an accompanying physical manifestation requirement is redundant because every "real" bodily impact produces some kind of physical injury.[58] However, as a result of the modern tendency to minimize the effect of the physical impact component,[59] the physical manifestation requirement has become more important. Indeed, the manifestation requirement appears to limit relatively trivial actions arising from minimal "impact."[60]

The physical manifestation requirement limits the negligent defendants' liability largely through its evidentiary function. To satisfy the requirement, the plaintiff must present the fact-finders with objective physical manifestation evidence from which to conclude that the plaintiff actually suffered severe emotional trauma.[61] Plaintiffs who cannot meet the evidentiary standard are barred from recovery.[62] The physical manifestation requirement has been criticized as both over-inclusive and under-inclusive.[63] In addition, some cases suggest that the requirement

57. *Otis Elevator*, 563 N.E.2d at 831. The court held that the Physical Impact rule was still valid under Illinois law. However, the plaintiff's physical injury need not result from bodily contact; rather, it may arise from negligently inflicted fear. *Id.* at 832.

58. Prosser and Keeton note that the physical contact component of the Physical Impact rule arose from the physical manifestation requirement, suggesting that impact *shows* physical manifestation. KEETON ET AL., *supra* note 1, at 363. Under this interpretation, impact and manifestations overlap, and provide an explanation why the *Braun* court did not address the issue.

59. *See supra* notes 50-51 and accompanying text.

60. Prosser & Keeton state that the trivialization of the impact requirement has generated debate over the parameters of physical manifestations. KEETON ET AL., *supra* note 1, at 364-65. They also allude that the physical manifestation requirement takes over where the bodily contact component leaves off. *Id.* Despite this inference, they do not segregate the impact requirement from the manifestation component. *Id.* at 361-65. For example, the scholars state that, in most jurisdictions, the Physical Impact rule is satisfied where "physical injury, illness or other physical [manifestations]" exist. *Id.* at 361. Positing a general rule of law, Prosser and Keeton state the rule properly if the Physical Impact rule includes a physical manifestation requirement; they overstate the rule's parameters if it does not. The "illness or other physical [manifestations]" that Prosser and Keeton mention certainly refer to phenomena which occur *after* the plaintiff leaves the accident site, not to conditions which occur contemporaneously with the tort. A "pure" Physical Impact rule would not permit recovery for post-trauma developments. As *Otis Elevator* illustrates, not all courts have definitely concluded that the rule includes the physical manifestation requirement. *Otis Elevator*, 563 N.E.2d at 833.

61. *See* RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965); KEETON ET AL., *supra* note 1, at 363; Comment, *supra* note 3, at 795.

62. RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965). *See also* Comment, *supra* note 3, at 795.

63. Folz v. State, 797 P.2d 246, 259 (N.M. 1990) (abrogating the physical manifestation requirement).

is unnecessary given modern technology's ability to detect and diagnose the effects of emotional distress.[64]

Although its scope remains largely undefined,[65] physical manifestation appears to include any significant injury or disease resulting from terror or bodily contact occurring contemporaneously with fright.[66] It is not strictly limited to bodily problems, such as vomiting and miscarriages.[67] Rather, physical manifestation includes severe psychiatric and behavioral problems.[68] For example, plaintiffs in aviation cases often allege that they suffer from Post-Traumatic Stress Disorder (PTSD).[69]

In the aviation arena, the Physical Impact rule appears to contemplate recovery for all plaintiffs who suffer emotional injury as a result of "impacting" something during the air transportation process. In some jurisdictions the rule is limited by the requirement that the plaintiffs suffer a "physical injury" from their impact or distress.[70] While this "physical

64. *Id*. *See also* Corgan v. Muehling, 574 N.E.2d 606, 609 (Ill. 1991).

65. KEETON ET AL., *supra* note 1, at 363-64. *See also Otis Elevator*, 563 N.E.2d at 833 (explaining that several courts have struggled with determining the conditions or symptoms that satisfy the requisite injury).

66. Without defining the scope of physical manifestations, the RESTATEMENT (SECOND) OF TORTS § 436A cmt. c (1965) provides a useful guide to the general principle. *See infra* note 68.

67. KEETON ET AL., *supra* note 1, at 363 & n.38.

68. *See, e.g.*, Rickey v. Chicago Transit Auth., 457 N.E.2d 1, 2 (Ill. 1983). The existence of a "physical manifestation" turns upon the specific facts the court must consider. Generally, however, fleeting fear-induced physical side effects do not constitute physical manifestations. *See* RESTATEMENT (SECOND) OF TORTS § 436A cmt. c (1965). "[T]ransitory, non-recurring physical phenomena, harmless in themselves, such as dizziness, vomiting, and the like, does not make the actor liable where such phenomena are in themselves inconsequential and do not amount to any substantial bodily harm." *Id*.

Some courts require a diagnosable ailment. For example, in Bass v. Nooney Co., the Supreme Court of Missouri abandoned the Physical Impact rule in favor of a negligence/foreseeability rule coupled with a physical manifestation requirement. 646 S.W.2d 765, 772-73 (Mo. 1983) (en banc). The court held that ". . . the emotional distress . . . must be medically diagnosable and must be of sufficient severity as to be medically significant." *Id.*

69. Understanding PTSD is a critical element of many aviation negligent infliction of emotional distress claims. *See* Read, *supra* note 2, at 15-18. *See* Polys v. Trans-Colorado Airlines, 941 F.2d 1404 (10th Cir. 1991); *In re* Air Crash Disaster Near New Orleans, La. on July 9, 1982, 764 F.2d 1082 (5th Cir. 1985).

70. Most likely, the discussion surrounding an incident will focus on the aircraft's impact. Still, passengers aboard an aircraft which experiences impact will almost always incur bodily contact themselves. Thus, passengers incur physical impact even though the aircraft does the "real" impacting. Aircraft crash will likely throw passengers forward into seats, or tear them from their seats and throw them against a wall of the cabin. Obviously, these passengers experience "impact." For example, in *Chicago Air Crash*, the court implicitly concluded that a passenger experiences impact when the aircraft in which he is traveling crashes. 507 F. Supp. 21, 23 (N.D. Ill. 1980) (discussing Solomon v. Warren, 540 F.2d 777 (5th Cir. 1976)).

impact" includes most plaintiffs in air crashes, mid-air collisions, and ground collisions, whether it encompasses "hard" landings and aircraft instability in severe turbulence is open to debate. The modern trend toward lax physical impact requirements[71] suggests that courts may well consider such events to cause "physical impact." However, *Otis Elevator*'s physical manifestation requirement would presumably eliminate trivial claims arising when passengers experience slight fright and accompanying discomfort.[72]

B. The Zone of Danger Test

As discussed above, disenchantment with the Physical Impact rule's limitations on negligent infliction of emotional distress claims has led some courts to minimize the requisite bodily impact.[73] Other courts have embraced a doctrine, the "Zone of Danger" test, which ignores the physical impact requirement completely and allows bystander recovery. The traditional formulation of the Zone of Danger test allows negligent infliction of emotional distress actions when: (1) the defendant's negligence caused the plaintiff to reasonably fear for his physical safety; (2) the plaintiff was geographically positioned in the "zone of danger" surrounding the site where the defendant's negligence manifested itself; and (3) the plaintiff developed a physical injury resulting from his fear.[74] Interestingly, the third component of the traditional Zone of Danger test is the "physical manifestation" requirement, the primary limiting device of the modified Physical Impact rule.[75]

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71. *See supra* notes 50-51 and accompanying text.

72. Examples of absurd claims include: (1) a passenger's allegation that turbulence caused him to "jump out of his seat and land on his wallet uncomfortably;" or (2) a passenger's claim that turbulence caused him to fear that the aircraft was maligned until it returned to smooth air 10 minutes later. While allowing such claims is certainly beyond belief, the "pure" Physical Impact rule, coupled with a judicial trend toward exceptionally liberal construction of the rule, may potentially support the plaintiff's claim. However, the physical manifestation requirement would preclude the claim because it is doubtful that the plaintiff could show a "physical manifestation" from his bout with turbulence. Other limiting devices, such as a "severe distress" requirement, could similarly curb the plaintiff's assertions. *See, e.g,* Johnson v. Ruark Obstetrics and Gynecology Assocs., P.A., 395 S.E.2d 85, 97 (N.C. 1990) (requiring severe distress).

73. *See supra* note 47-49 and accompanying text.

74. Robb v. Pennsylvania R.R. Co., 210 A.2d 709, 714-15 (Del. 1965); Rickey v. Chicago Transit Auth., 457 N.E.2d 1, 5 (Ill. 1983). *See also* RESTATEMENT (SECOND) OF TORTS § 436(3) (plaintiff must fear for the direct victim's safety); § 313(2) (plaintiff must fear for his own well-being); cmt. d (1965). For a discussion of the Zone of Danger test's evolution, see KEETON ET AL., *supra* note 1, at 365-66; Reidy, *supra* note 48, at 304-07.

75. *See supra* notes 55-57 and accompanying text.

In 1983, Illinois abandoned the Physical Impact rule in favor of the Zone of Danger test in *Rickey v. Chicago Transit Authority*.[76] The Supreme Court of Illinois applied the new test only to bystander cases.[77] In *Rickey*, the plaintiff stood next to his brother when an escalator drew in the brother's clothes, choking him and inducing a coma.[78] The plaintiff bystander, who developed severe psychological and behavioral problems from watching his brother's mutilation, sued to recover for his injuries.[79] The court allowed the claim because the plaintiff was within the zone of danger, reasonably feared for his physical safety, and developed physical manifestations of his fear.[80] Rejecting the Physical Impact rule as a "purely formal" test,[81] the court joined the majority of jurisdictions[82] and paved the way for bystander recovery.[83]

While the Zone of Danger test has no application in the direct victim

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76. 457 N.E.2d 1, 5 (Ill. 1983).

77. *Id.* at 5. Following *Rickey*, courts were unsure whether to apply the Zone of Danger test to direct victim cases as well. Allen v. Otis Elevator Co., 563 N.E.2d 826, 830 (Ill. App. Ct. 1990) (noting confusion on the issue). *Compare* Siemieniec v. Lutheran Gen. Hosp., 480 N.E.2d 1227 (Ill. App. Ct. 1985) (applying the Zone of Danger test to bystander cases only) *with* Hammond v. Lane, 515 N.E.2d 828 (Ill. App. Ct. 1987) (applying the Zone of Danger rule to bystander and direct victim cases). Resolving the confusion, the Supreme Court of Illinois held that the Zone of Danger test applies only to bystander cases. Corgan v. Muehling, 574 N.E.2d 602, 605 (Ill. 1991). *See infra* notes 118-38 and accompanying text for a discussion of *Corgan*.

78. *Rickey*, 457 N.E.2d at 2.

79. *Id.*

80. *Id.* The plaintiff's nervous and behavioral disorders constituted "physical manifestations" of his fear. *Id.* at 2, 5.

81. *Id.* at 4. Presumably, the term "purely formal" reflects a form-over-substance notion; in other words, the Physical Impact requirement no longer serves a realistic goal, but rather continues only out of custom. Criticizing the Physical Impact rule, the court stated: "A significant reason for its loss of adherents was that courts quickly began to find that the impact requirement had been met through minor physical contacts which in reality were insignificant and played trivial or no part in causing harm to the plaintiff." *Id.*

82. Comment, *supra* note 3, at 794, 796 n.91 (highlighting jurisdictions that apply a combination of physical manifestation requirement and Zone of Danger test).

83. *Rickey*, 457 N.E.2d at 4, 5. In contrast to Illinois, some jurisdictions remove the physical manifestation requirement from the Zone of Danger test. *See, e.g.*, Lafferty v. Manhasset Medical Ctr. Hosp., 429 N.E.2d 789 (N.Y. 1981). *See* Comment, *supra* note 3, at 798 n.92 for a discussion of the jurisdictions following this approach. Under this rule, a plaintiff must only show that: (1) he reasonably feared for his own physical safety; and (2) he was in the zone of danger.

The rule articulated in *Rickey* does not limit recovery to a certain group of plaintiffs, such as blood relatives of the direct victim. Other courts have restricted the group of bystander plaintiffs. *See, e.g.*, Thing v. La Chusa, 771 P.2d 814, 829-30 (Cal. 1989) (requiring that the bystander be "closely related" to the direct victim). *See also* RESTATEMENT (SECOND) OF TORTS § 436(3) (limiting recovery to immediate family members).

context, especially in aviation cases,[84] it is important in the bystander context.[85] Requiring that a plaintiff be in the "zone of danger" and reasonably fear for bodily safety are ridiculous restrictions when applied to air crash cases because potential plaintiffs are within the very thing which may cause them harm, and they most certainly fear injury. Because the physical manifestation requirement exists in both the Zone of Danger test and the Physical Impact rule, applying the Zone of Danger test to direct victim cases simply abrogates the physical impact component of the Physical Impact rule, essentially stripping it of its effectiveness. The bystander cases logically require a geographical limitation to taper proximate cause problems; however, the direct victim cases do not. Extending the Zone of Danger test to direct victim cases is akin to "confusing apples for oranges."[86]

In the aviation context, the *Rickey* court's "zone-of-physical-danger" rule[87] would allow limited recovery for bystanders. For example, an aircraft de-icing employee could probably recover if an out-of-control jet soared above his head. The geographical limitation at the heart of the rule, however, would preclude witnesses who see an aircraft crash several miles away from recovering.[88] In addition, "close calls" would include the scenario of a mother who, looking out an airport terminal window, viewed her daughter's aircraft burst into flames on the ramp, several hundred feet away.[89]

C. *The "Foreseeable Plaintiff" Doctrine*[90]

Some jurisdictions, most notably California, adopted the Foreseeable Plaintiff doctrine, which is a flexible proximate cause approach to bystander negligent infliction of emotional distress claims.[91] In *Dillon v.*

84. Mr. Philip Corboy, a prominent plaintiffs' attorney, asserts this view. Telephone Interview with Philip Corboy, Corboy & DeMitrio, Chicago, Ill. (Oct. 29, 1991) [hereinafter Corboy Telephone Interview].

85. *Id.*

86. *Id.*

87. *See Rickey*, 457 N.E.2d at 5.

88. *Id.* "This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact." *Id.*

89. *Id.*

90. *See* Comment, *supra* note 3, at 803 (using the term "Foreseeable Plaintiff").

91. *Id.*

Legg,[92] the genesis of the doctrine, the California Supreme Court held that the viability of a negligent infliction of emotional distress claim turns on the defendant's foreseeability of emotional injury to the plaintiff.[93] According to the *Dillon* court, foreseeability is measured by three factors: (1) the plaintiff's distance from the incident; (2) whether the plaintiff actually witnessed the incident, or whether he learned of it secondhand; and (3) the closeness of the relationship between the plaintiff and the victim.[94] Some jurisdictions additionally apply a physical manifestation requirement to the rule.[95]

Most importantly, the Foreseeable Plaintiff doctrine contains no arbitrary limitations, such as the impact requirement, and enthusiasticly endorses the proximate cause theory.[96] In essence, the doctrine states that courts may address negligent infliction of emotional distress actions with the same rules that control "traditional" negligence actions: the existence of a duty; a breach thereof; and proximate injury to the plaintiff.[97]

Although the Foreseeable Plaintiff doctrine is more flexible than the Zone of Danger test, it is criticized as too open-ended.[98] It presents the potential for almost boundless applications of proximate cause and foreseeability.[99] Even the Supreme Court of California has criticized the results of its own rule,[100] and consequently limited it to ensure that courts do not extend proximate cause notions beyond reasonable limits.[101]

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92. 441 P.2d 912 (Cal. 1968).

93. *Id.* at 919-20.

94. *Id.* at 920. For a list of jurisdictions following *Dillon*, see Comment, *supra* note 3, at 806 n.139. *See also* RESTATEMENT (SECOND) OF TORTS § 436 (1965) (creating liability where defendant negligently and foreseeably put plaintiff in fear of physical injury).

95. Comment, *supra* note 3, at 808 & n.146.

96. *See* Comment, *supra* note 3, at 804 (discussing *Dillon*'s distinction between the Zone of Danger and Foreseeable Plaintiff rules).

97. *Id*. *See infra* note 136 and accompanying text.

98. Thing v. La Chusa, 771 P.2d 814, 828-29 (Cal. 1989).

99. *Id.*

100. *Id.*

101. *Id.* at 829-30. In *Thing*, the court held that a bystander can recover only when he: (1) shares a close personal relationship with the direct victim; (2) cognizantly witnesses harm to the direct victim from a near distance; and (3) incurs "serious emotional distress." *Id.* The second element of the court's test, close proximity, appears to reinstate the Zone of Danger rule. Unlike Zone of Danger test, the bystander need not fear bodily harm to himself or to the direct victim.

D. Pre-Impact Fear

Air crash cases often also involve "pre-impact fear" claims,[102] a child of the parent tort of negligent infliction of emotional distress. Pre-impact fear claims seek compensation for the fear a victim experiences prior to his sudden death.[103] The question is whether the victim's survivor in interest can sue for mental anguish experienced prior to impact. In cases where the victim dies immediately upon impact, pre-impact fear is the only path to pain and suffering damages.[104]

Courts approach the pre-impact fear issue in two ways. The "Ordeal" approach[105] contemplates liability for a defendant's negligence over the entire time period surrounding the incident, and is thus not severable into pre-impact and post-impact phases.[106] In contrast, courts that follow the "Emotional Distress" approach[107] hold that pre-impact fear is a species of negligent infliction of emotional distress, and must therefore remain separate from post-impact claims.[108]

In *In re Air Crash Disaster Near Chicago, Ill. on May 25, 1979*,[109] the plaintiff brought a survivorship action after her daughter died in an air-

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102. Thomas D. Sydnor, II, Note, *Damages for a Decedent's Pre-Impact Fear: An Element of Damages Under Alaska's Survivorship Statute*, 7 ALASKA L. REV. 351, 355 (1990).

103. *Id.* at 351. One commentator explains typical pre-impact fear claims:

> 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.

Id.

104. Juries can award substantial amounts. One court sustained a jury award of $15,000 for damages from four to six seconds of pre-impact fear. Haley v. Pan Am. Airways, 746 F.2d 311, 317-18 (5th Cir. 1984). For a list of pre-impact awards, see Sydnor, *supra* note 102, at 354 n.8.

105. *See* Sydnor, *supra* note 102, at 356 (using the "Ordeal" approach).

106. *Id.* at 355-56. *See, e.g.*, *Haley*, 746 F.2d at 314 ("We are not prepared to conclude that the Louisiana courts would sever such an 'ordeal' into before and after impact components."); Shu-Tao Lin v. McDonnell Douglas Corp., 742 F.2d 45, 53 (2d Cir. 1984) ("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."). For a general discussion of the "Ordeal" theory and accompanying cases, see Sydnor, *supra* note 102, at 356-59.

107. *See* Sydnor, *supra* note 102, at 356, 359 (using the term "Emotional Distress").

108. *Id.* at 356. *See also* Nye v. Commonwealth, 480 A.2d 318, 322 (Pa. 1984) ("[T]he estate may recover damages for 'pre-impact fright' only upon proof that [the decedent] suffered physical harm *prior to the impact* as a result of her fear of impending death."). For a general discussion of the "Emotional Distress" approach, see Sydnor, *supra* note 102, at 359-62.

109. 507 F. Supp. 21 (N.D. Ill. 1980).

plane crash.[110] The plaintiff sought damages for the emotional distress that her daughter suffered prior to impact with the ground.[111] Applying Illinois law, the United States District Court for the Northern District of Illinois held that survivors in interest may not recover pre-impact fear damages.[112] Concluding that the victim's physical injury must coincide with her fear, the court refused to allow the plaintiff to recover pre-impact damages because the victim's physical injury occurred after her fear.[113]

The court's rationale in *Chicago Air Crash* squares with the "Emotional Distress" theory on pre-impact fear because it asserts a cause of action separate from post-impact claims. Thus, the cases turn upon the negligent infliction of emotional distress rules applied.[114] As *Chicago Air Crash* illustrates, the Physical Impact rule precludes pre-impact fear recovery.[115] If applied to direct victim cases, the traditional Zone of Danger test would likewise deny pre-impact claims because the third requirement of the test—that fear cause physical manifestations thereof—cannot be met except in the rarest of circumstances.[116] Without the physical manifestation requirement, the Zone of Danger test would permit pre-impact recovery.[117]

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110. *Id.* at 22.

111. *Id.* at 22-23.

112. *Id.* at 23.

113. *Id.* "Since, under Illinois law, an individual can recover for emotional distress or suffering only when the distress is caused by a physical injury, plaintiff cannot recover for the fright and terror her daughter may have experienced in anticipation of physical injury." *Id.*

114. Interestingly, the "Ordeal" theory would reach the opposite conclusion. In totality, the defendant's negligence causes all injury to a plaintiff emanating from the negligent act. Consequently, a victim's pre-impact fear comprises part of the entire "ordeal" and therefore falls into the realm of compensable damages. *See* Sydnor, *supra* note 102, at 358.

115. Sydnor, *supra* note 102, at 361.

116. The physical manifestation requirement is "very nearly a total bar to recovery of damages for pre-impact fear." Sydnor, *supra* note 102, at 361. Plaintiffs would have extreme difficulty showing fear-induced physical manifestations of a deceased, especially where, as in many air crash cases, the victim's body suffers tremendous damage. Evidence that the victim vomited or exhibited some other manifestation will probably not qualify as a "physical manifestation." However, the physical manifestation requirement does not completely preclude recovery. For example, a victim may suffer a heart attack after he learns of aircraft trouble but before impact. Because the heart attack resulted from his fear of the impending impact, this victim, or his estate, could recover for pre-impact fear. In reality, however, plaintiffs may have trouble proving that the fear of crashing—and not the crash itself—caused the victim's heart to stop, especially where no witnesses survive.

117. Absent a physical manifestation requirement, the Zone of Danger test would allow recovery in air crash cases because it is almost undisputable that a passenger aboard an aircraft bound for an emergency landing: (1) fears for his life; and (2) is in the zone of danger.

III. CORGAN V. MUEHLING AND THE "SIMPLE NEGLIGENCE" RULE

After adopting the Zone of Danger test in *Rickey v. Chicago Transit Authority,*[118] Illinois courts struggled over whether to continue applying the Zone of Danger test to direct victim cases.[119] In 1991, in *Corgan v. Muehling*,[120] the Supreme Court of Illinois determined the issue and drastically changed Illinois law on the negligent infliction of emotional distress.

In *Corgan*, the plaintiff alleged that her psychologist negligently maintained a sexual relationship with her, causing her severe mental pain.[121] The plaintiff did not assert a Zone of Danger theory, nor did she separately allege physical manifestations of her trauma.[122] The defendant argued that the plaintiff failed to state a claim because she did not meet the *Rickey* Zone of Danger requirements.[123]

In *Corgan*, the court held that *Rickey*'s Zone of Danger test applies only to bystander cases and does not govern direct victim actions.[124] Rather than adhere to the well settled Physical Impact rule,[125] the court adopted a Simple Negligence rule for direct victim cases. The court held that direct victims of negligent infliction of emotional distress state valid causes of action when they plead negligence and accompanying liability.[126] In addition, the court noted that liability for negligence turns

118. 457 N.E.2d 1 (Ill. 1983). For a discussion of *Rickey*, see *supra* notes 76-83 and accompanying text.

119. Allen v. Otis Elevator Co., 563 N.E.2d 826, 829 (Ill. App. Ct. 1990) (noting confusion on the issue). *Compare* Siemieniec v. Lutheran Gen. Hosp., 480 N.E.2d 1227 (Ill. App. Ct. 1985) (applying the Zone of Danger test to bystander cases only) *with* Hammond v. Lane, 515 N.E.2d 828 (Ill. App. Ct. 1987) (applying the Zone of Danger rule to bystander and direct victim cases).

120. 574 N.E.2d 602 (Ill. 1991).

121. *Id.* at 603.

122. *Id.* at 604.

123. *Id.*

124. *Id.* at 605. Mr. Philip Corboy asserted that the attorneys involved in the *Corgan* case improperly emphasized *Rickey*'s test because *Rickey* is totally inapplicable to direct victim actions. Corboy Telephone Interview, *supra* note 84. In addition, he criticized the court for becoming distracted by the lawyers' *Rickey* arguments. *Id.*

125. In the period between *Rickey* and *Corgan*, Illinois appellate courts, which applied the Zone of Danger test only to bystander cases, used the Physical Impact rule for direct victim cases. *See, e.g.,* Allen v. Otis Elevator Co., 563 N.E.2d 826, 830 (Ill. App. Ct. 1990) (explaining that Braun v. Craven requires the court to apply the Physical Impact rule in direct victim cases); Siemieniec v. Lutheran Gen. Hosp., 480 N.E.2d 1227, 1232 (Ill. App. Ct. 1985) (explaining *Rickey*'s "limited exception" for bystanders).

126. *Corgan*, 574 N.E.2d at 606. The court determined that the essential question was whether the plaintiff asserted that the defendant was negligent. *Id.*

Other courts also adopted a version of the Simple Negligence rule prior to *Corgan*. *See, e.g.,*

upon policy considerations, including the likelihood of harm, the magnitude of the harm, the defendant's burden in preventing the harm, and the relationship between the parties.[127]

The *Corgan* court abandoned the physical manifestation requirement altogether,[128] stating that jurors' ability to perceive insincere mental injury claims and modern health care developments provide reliable checks on emotional distress plaintiffs who cannot offer physically demonstrable evidence of their fear.[129] Unlike other jurisdictions,[130] the Illinois court did not require the plaintiff to allege or prove *severe* emotional injury, as opposed to any injury whatsoever. Thus, the court implicitly opened the way for actual, albeit relatively trivial, negligent infliction of emotional distress claims.[131]

The new Illinois rule for negligent infliction of emotional distress in direct victim cases[132] is simple: defendants are liable if they are negligent

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Johnson v. Ruark Obstetrics, 395 S.E.2d 85, 97 (N.C. 1990) (ordinary negligence plus severe emotional distress); Molien v. Kaiser Found. Hosps., 616 P.2d 813, 821 (Cal. 1980) (same); and Bass v. Nooney, 646 S.W.2d 765, 772-73 (Mo. 1983) (adopting a simple negligence rule which includes a physical manifestation requirement). *See also* RESTATEMENT (SECOND) OF TORTS § 436(2) (1965).

127. *Corgan*, 574 N.E.2d at 606.

128. *Id.* at 609 ("The emotional distress . . . is no less real than the distress that is coupled with the physical manifestation . . . and should not be distinguishable at law.").

129. *Id.*

130. *See* Read, *supra* note 2, at 14. The Supreme Court of North Carolina established a rule similar to *Corgan*'s, but required severe emotional distress. Johnson v. Ruark Obstetrics, 395 S.E.2d 85, 97 (N.C. 1990). The court explained:

> Where a defendant's negligent act has caused a plaintiff to suffer mere fright or temporary anxiety not amounting to severe emotional distress, the plaintiff may not recover damages for his fright and anxiety on a claim for infliction of emotional distress. Where, however, such a plaintiff has established that he or she has suffered severe emotional distress as a proximate result of the defendant's negligence, the plaintiff need not allege or prove any physical impact, physical injury, or physical manifestation of emotional distress . . . .

Id.

See also Molien v. Kaiser Found. Hosps., 616 P.2d 813, 821 (Cal. 1980); Bass v. Nooney, 646 S.W.2d 765, 772-73 (Mo. 1983).

131. One justice concurred in judgment, and one justice dissented. Their opinions, however, do not directly address the question of emotional distress as discussed in this Recent Development. Rather, the justices focused on the doctor-patient relationship. Concurring, Chief Justice Miller stated that the defendant, a psychologist, was guilty of exploiting the plaintiff, not merely of being negligent. *Corgan*, 574 N.E.2d at 611 (Miller, C.J., concurring). Thus, he suggested that the court limit its holding to cases in which a health care professional exploits a patient. *Id.* Dissenting, Justice Heiple asserted that the court should not hold the psychologist liable for malpractice because the sexual relationship with the plaintiff did not constitute "treatment." *Id.* (Heiple, J., dissenting). He suggested that a court should not allow one who willfully engages in sexual conduct to sue her ex-lover when the relationship ends. *Id.*

132. The court's new rule only applies to direct victim cases; *Rickey*'s Zone of Danger test still governs bystander actions. *Corgan*, 574 N.E.2d at 605.

and if an injury proximately results. Akin to the Foreseeable Plaintiff test announced in California's *Dillon v. Legg*,[133] the Simple Negligence rule has no impact requirement, no zone of danger requirement, no physical manifestation requirement,[134] and no apparent severe distress requirement.[135] To prove simple negligence, a plaintiff need only show that: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; and (3) the plaintiff suffered injury as a result of the defendant's breach.[136] Thus, the requirements for pleading negligent infliction of emotional distress as a direct victim are identical to the elements of any other negligence action.[137] In Illinois, the *Corgan* decision killed the long-settled distinction between direct victim negligent infliction of emotional distress and traditional torts.[138]

IV. CORGAN'S IMPACT ON AIR CRASH CASES APPLYING ILLINOIS LAW

For several reasons, *Corgan* implies that plaintiffs' attorneys will garner negligent infliction of emotional distress damages in direct victim air crash cases more easily.

First, *Corgan* may allow all direct victims to plead negligent infliction of emotional distress. Because the Simple Negligence rule eliminates the physical manifestation requirement of the Physical Impact rule, plaintiffs claiming emotional distress from an aeronautical mishap need not show a

133. 441 P.2d 912 (Cal. 1968). *See supra* notes 91-94 and accompanying text for a discussion of *Dillon*. However, it is important to recall that *Dillon* applies to bystander cases, not direct victim cases. *Dillon*, 441 P.2d at 920. The Simple Negligence rule is also similar to the view asserted in § 436(2) of the Restatement (Second) of Torts. *See* RESTATEMENT (SECOND) OF TORTS, § 436(2) (1965).

134. Unlike the Simple Negligence rule, the Restatement requires physical manifestations. RESTATEMENT (SECOND) OF TORTS §§ 436(2), (3), 436A (1965).

135. *See supra* notes 128-29 and accompanying text. The current Foreseeable Plaintiff doctrine poses a severe distress requirement. Thing v. La Chusa, 771 P.2d 814, 829-30 (Cal. 1989).

136. *Corgan*, 574 N.E.2d at 606 (quoting Kirk v. Michael Reese Hosp. & Medical Ctr., 513 N.E.2d 387, 395-96 (Ill. 1987)).

137. *See, e.g.*, Parsons v. Carbondale Township, 577 N.E.2d 779, 783 (Ill. App. Ct. 1991) (restating the three basic negligence requirements: (1) existence of a duty; (2) defendant's breach of the duty; and (3) plaintiff's injury proximately resulting from the breach). For a general discussion of the basic negligence cause of action, see KEETON ET AL., *supra* note 1, at 164-68. *See also* RESTATEMENT (SECOND) OF TORTS § 281 (1965).

The only limitations placed upon the new rule exist in so-called policy considerations. *Corgan*, 574 N.E.2d at 606. In reality, these policy concerns do not impact negligent infliction of emotional distress claims, especially those against air carriers. *See infra* notes 141-43 and accompanying text for an analysis of the policy considerations' probable impact on claims.

138. Traditional torts include simple negligence and battery.

physical sign of their fear. Although this may not yield a substantially greater number of crash plaintiffs due to PTSD and other diagnosable ailments, it may produce increased litigation in cases arising from minor air accidents.

Second, airlines' status as common carriers[139] gives plaintiffs a valuable weapon in light of the new Simple Negligence rule. The law of negligence holds common carriers to the "highest duty of care" vis-á-vis their passengers.[140] Assuming that the enhanced duty applies to negligent infliction claims, aviation plaintiffs will apparently have an especially easy time garnering awards.

Third, *Corgan*'s policy considerations limitations[141] will not likely impede plaintiffs' efforts. Of the four considerations the court mentioned,[142] two factors, the gravity of harm and the relationship between the parties, weigh heavily against airlines. Undoubtedly, the potential physical and emotional harm arising from a major air crash constitutes extremely grave harm. Although the likelihood of an air crash is very low,[143] the likelihood of emotional distress occurring before, during, and after an air crash appears quite substantial. Moreover, the law requires that airlines maintain the highest duty of care for their passengers.[144] *Corgan*'s policy considerations may actually increase the probability that a court will find an airline negligent.

Fourth, and most interesting, is *Corgan*'s probable impact on pre-impact fear claims. The Simple Negligence rule appears to permit pre-impact fear claims. If this is true, plaintiffs can allege negligent infliction of emotional distress even in the absence of a crash. For example, if an airplane with three engines loses one in flight and the captain alerts his passengers to the problem, many on board may fear for their lives. After the captain safely lands the aircraft, passengers might scramble to the nearest plaintiff's attorney, claiming negligent infliction of emotional dis-

139. Kamienski v. Bluebird Air Serv., 53 N.E.2d 131, 133-34 (Ill. App. Ct. 1944); 2A C.J.S. *Aeronautics & Aerospace* § 250 (1972 & Supp. 1991).

140. Skelton v. Chicago Transit Auth., 573 N.E.2d 1315, 1327 (Ill. App. Ct. 1991); Loring v. Yellow Cab Co., 337 N.E.2d 428, 431 (Ill. App. Ct. 1975); KEETON ET AL., *supra* note 1, at 208-09.

141. *Corgan*, 574 N.E.2d at 606.

142. The considerations include: (1) likelihood of harm; (2) gravity of harm; (3) the burden on the defendant to protect against the harm; and (4) the relationship between the parties. *Corgan*, 574 N.E.2d at 606. *See supra* note 127 and accompanying text.

143. *See supra* note 5 and accompanying text.

144. *See supra* notes 139-40 and accompanying text.

tress despite an absence of significant harm.[145]

To recover, plaintiffs need only show that: (1) the airline had a duty to operate safely;[146] (2) the airline breached that duty; and (3) the plaintiff suffered some kind of emotional distress as a result.[147] Survivors can easily meet these requirements. However, if the plane crashes and the passenger dies, establishing a prima facie case can be more complicated for survivorship plaintiffs. While pleading the existence of a duty and a breach thereof is easily accomplished in air crash cases, demonstrating injury is more difficult.[148] While crash survivors can testify to their pre-impact fear,[149] fatally injured passengers cannot. Survivorship plaintiffs' attorneys, however, may be able to prove emotional distress in one of three ways. First, an attorney can use the testimony of a passenger who observed the victim and observed his fear. Second, an emergency worker or coroner may note physical manifestations of fear, such as vomit.[150] Third, an attorney can employ a version of the *res ipsa loquitur* doctrine,[151] asserting that the passenger must have known of the danger present, and the passenger must have feared for his safety.[152] Although

145. Such a situation appears consistent with Prosser and Keeton's "trivial" emotional distress. KEETON ET AL., *supra* note 1, at 361.

146. Airlines operate under an enhanced duty of care. *See supra* notes 139-40 and accompanying text.

147. *See Corgan*, 574 N.E.2d at 606. Airlines should ensure that flight crews do not unnecessarily alert passengers to aircraft problems. Where possible, airlines should stress that the problems do not affect safe flight. These precautions reduce the chance that a court would find that passengers "reasonably" feared bodily harm. Of course, such actions should be weighed against the need to inform passengers so that they can prepare for an emergency landing.

148. *See supra* notes 139-40 and accompanying text.

149. Plaintiffs' attorney Philip Corboy has stated that asserting emotional distress damages in survivor cases is very easy. The plaintiff simply alleges distress and testifies to it at trial. The only problem facing a plaintiff is convincing a jury to award for the damages alleged. Corboy Telephone Interview, *supra* note 84.

150. However, a plaintiff may have great difficulty proving that the passenger's physical manifestations resulted from fear and not from bodily injury.

151. Literally translated, *res ipsa loquitur* means "the thing speaks for itself." BLACK'S LAW DICTIONARY 1305 (6th ed. 1990). The doctrine aids plaintiffs who cannot directly prove that the defendants caused the harm. To invoke *res ipsa loquitur*, a plaintiff must usually show that: (1) the incident causing harm does not normally arise without negligence; (2) the harm was caused by something over which the defendant had control; and (3) the plaintiff did not voluntarily contribute to the incident which caused his injury. KEETON ET AL., *supra* note 1, at 244.

Most importantly the *res ipsa loquitur* doctrine assumes proof of a thing which a plaintiff cannot prove by conventional means. Thus, the doctrine operates as a gap-filler, assuming evidence that no one can "prove."

152. The Fifth Circuit allowed a presumption of distress in Solomon v. Warren, 540 F.2d 777 (5th Cir. 1976). In *Solomon*, an aircraft crashed into the ocean. *Id.* at 792. The aircraft and its passengers were never found and no evidence existed to suggest that the passengers actually knew of

speculative,[153] if the attorney overcomes pleading problems, the argument may succeed if submitted to a jury.[154] However, even if juries are typically sympathetic to plaintiffs, absent the testimony of a fellow passenger or a physical manifestation of fear, a jury will never ascertain whether the victim understood the aircraft problem and actually feared impact.[155]

Although it is reasonable to assume that all passengers aboard an impaired aircraft may become hysterical, without evidence, a jury cannot understand the thoughts of a particular passenger.[156] Thus, defense attorneys should argue that pre-impact fear claims are too speculative.[157] Plaintiffs' attorneys, on the other hand, should assert that circumstantial evidence, where available, establishes enough to invoke a jury question.[158] For example, the cockpit voice recorder may show that the pilot alerted his passengers to a problem and asked the flight attendants to prepare the cabin for an emergency landing.[159] Without any direct or

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an impending crash or feared for their lives. *Id.* at 792. Despite the absence of evidence, the court sustained the jury's pain and suffering award for pre-impact fear. *Id.* at 792-93. *See also* Haley v. Pan Am. World Airways, 746 F.2d 311, 317 (5th Cir. 1984) (inferring emotional distress without direct evidence of fear). However, the arguments for fear presumption/inference were unclear in the both *Solomon* and *Haley*.

153. *See* Feldman v. Allegheny Airlines, Inc., 382 F. Supp. 1271, 1300-01 (D. Conn. 1974) (denying recovery for pain and suffering because the evidence was too speculative).

154. In *Solomon*, the jury awarded $10,000 for the pre-impact fear of each of two passengers, evidencing jury sympathy toward plaintiffs. 540 F.2d at 793.

155. Stating this concern, the Second Circuit refused to allow pre-impact fear damages in Shatkin v. McDonnell Douglas Corp. 727 F.2d 202, 206-07 (2d Cir. 1984). In *Shatkin*, an airline passenger died after the aircraft lost an engine on takeoff and, consequently, crashed. *Id.* at 204. Denying pre-impact recovery, the court stated: "[I]t must first be shown by a preponderance of the evidence that the decedent had some knowledge or other basis for anticipating the impending disaster . . . at least some circumstantial evidence must be adduced from which it can reasonably be inferred that the passenger underwent some suffering before the impact." *Id.* at 206. The court concluded that it could not reasonably infer that the passenger knew of the engine failure. *Id.* Further, the court found no evidence that the passenger feared impact during the short period between the time the airplane entered a steep bank and the time it crashed. *Id.* at 207. *See also* Feldman v. Allegheny Airlines, Inc., 382 F. Supp. 1271, 1301 (D. Conn. 1974) (pre-impact claim "too speculative"); Nye v. Commonwealth, 480 A.2d 318, 321 (Pa. 1984) (denying recovery because no evidence existed that the auto passenger was conscious before or during impact).

156. Shatkin v. McDonnell Douglas Corp., 727 F.2d 202, 206-07 (2d Cir. 1984).

157. *See supra* note 153.

158. *See supra* note 148.

159. In *Solomon*, for example, recorded communications between Air Traffic Control ("ATC") and the pilot showed that the pilot knew he had to land his aircraft in the ocean. 540 F.2d at 782 & n.5, 792-93. The court believed that this evidence supported an inference of the passengers' pre-impact fear. *Id.* at 792-93.

circumstantial evidence,[160] plaintiffs' attorneys should assert the modified *res ipsa loquitur* argument and cross their fingers.

Finally, *Corgan* may increase the damages claimed in serious air crash cases because the court abrogated the physical manifestation requirement and refused to require allegations of severe emotional harm. Two types of plaintiffs, those with relatively trivial claims, and those with feigned or imaginary claims, may benefit from the decision.[161] Plaintiffs' lawyers have no difficulty establishing "subjective" pain, such as headaches.[162] Moreover, alleging severe emotional distress in an air crash case seems simple. Although many crash victims surely suffer severe distress, a threshold fear requirement may prevent a number of trivial or minor claims.

Apparently, reinstatement of the physical manifestation requirement is unlikely in Illinois, because *Corgan* clearly held that other mechanisms ensure reliability of the claim.[163] However, because the court never addressed the issue, *Corgan*'s failure to specify a severe distress requirement does not necessarily establish that one does not exist. Defense attorneys should argue that *Corgan* does not contemplate recovery for trivial claims because the law is well settled that policy considerations preclude such actions.[164] Perhaps more importantly, other jurisdictions that apply a version of the Simple Negligence rule to direct victim cases restrict the rule to cases involving severe distress.[165] A similar construction

160. A complete lack of evidence may arise where, for example, an aircraft "disappears," or where all aboard die and authorities cannot recover recorded information. However, a complete lack of evidence apparently is a relatively rare occurrence, especially for commercial air carriers. Even where all evidence aboard an aircraft is destroyed, recorded communications between the cockpit crew and ATC provide at least some relevant information. *See, e.g., Solomon*, 540 F.2d at 792-93.

161. *See* RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965); KEETON ET AL., *supra* note 1, at 361.

162. Corboy Telephone Interview, *supra* note 84.

163. *Corgan*, 574 N.E.2d at 609 (explaining that advancements in mental health care provide more accurate evidence of genuine emotional distress).

164. *See* Braun v. Craven, 51 N.E. 657, 664 (Ill. 1898); PROSSER & KEETON, *supra* note 1, at 359-61; RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965).

165. California is the most persuasive jurisdiction to assert such a position, advancing plaintiffs' rights well before its neighbors. *See* Dillon v. Legg, 441 P.2d 912 (1968), discussed at *supra* notes 94-97 and accompanying text. In Molien v. Kaiser Found. Hosps., the Supreme Court of California held that a plaintiff may allege a cause of action for "the negligent infliction of serious emotional distress actions." 616 P.2d 813, 821 (Cal. 1980) (emphasis added). Moreover, in Thing v. La Chusa, the California court limited negligent infliction of emotional distress actions to plaintiffs who demonstrate "serious emotional distress." 771 P.2d 814, 829-30 (Cal. 1989). Although *Thing* was a bystander case, the court's restrictions indicate a desire to taper the scope of negligent defendants'

could hinder potential plaintiffs from establishing prima facie claims. Absent such a limitation, the *Corgan* court has apparently thrown open the door to recovery for negligent infliction of emotional distress in air crash cases.

V. CONCLUSION

Under the Simple Negligence rule announced in *Corgan*, several types of air crash plaintiffs may potentially recover negligent infliction of emotional distress damages: (1) all surviving passengers alleging that they were aware of an impending emergency landing and feared for their safety, whether or not they sustained physical manifestations of fear; (2) the survivors in interest of passengers killed in a crash, when direct evidence of the passenger's pre-impact fear exists, and possibly when circumstantial evidence supports fear; and (3) bystanders in the zone of danger[166] who allege fear for personal safety, and prove physical manifestations of fear. Illinois law seems to preclude claims by bystanders not in the zone of danger, and by bystanders who fail to show physical manifestations of their fear, including all plaintiffs who learn of a crash secondhand.

Whether Illinois courts facing the issue in the future will restrict *Corgan*'s Simple Negligence rule remains unclear. Perhaps a major air crash will induce a relative flood of new negligent infliction of emotional distress claims, prompting courts to place a restricting device, such as a severe distress requirement, on the seemingly open-ended Simple Negligence rule.[167] Only time will determine if the court in *Corgan* extended the rule too far.

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liability. *Id.* at 815. The court concluded that: "[C]lear judicial days [exist] on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury." *Id.* at 830.

Similar to California, the Supreme Court of North Carolina has restricted direct victim recovery to plaintiffs who successfully prove "severe emotional distress." Johnson v. Ruark Obstetrics, 395 S.E.2d 85, 97 (N.C. 1990). For an in-depth discussion of *Johnson*, see Tracy L. Hamrick, *A Clear Judicial Day in North Carolina*—Johnson v. Ruark Obstetrics *Smooths the Way for Plaintiffs' Claims for Negligent Infliction of Emotional Distress*, 69 N.C. L. REV. 1714 (1991).

166. The zone of danger in air crash cases is quite expansive, especially where the aircraft appears to be out of control or where the crash causes a large explosion.

167. "The pending litigation arising out of the air crash disaster at Sioux City, Iowa, in July of 1987, may provide opportunities for both the Illinois appellate courts and the Seventh Circuit to interpret *Corgan*." Walker Interview, *supra* note 11.