Kentucky Law Journal

Volume 99 | Issue 2 Article 6

2010

A Post-Impact Fear of Pre-Impact Fright

Meg Ellen Phillips
University of Kentucky

A Post-Impact Fear of Pre-Impact Fright

Meg Ellen Phillips[1]

> Douglas K. Beynon, Jr. . . . was driving his employer's vehicle, within the [fifty-five] m.p.h. speed limit. . . . Beynon was approximately 192 feet from the rear of Kirkland's [stopped] tractor-trailer when he became aware of, and then reacted to, the impending danger of crashing into its rear. In his attempt to avoid the collision, Beynon slammed on his brakes, as [71.5] feet of skid marks attest, and slightly veered to the right. Despite his efforts, Beynon's vehicle collided with the rear of the tractor-trailer at a speed of [forty-one] m.p.h., with the result that he was killed on impact.[2]

INTRODUCTION

We all have experienced it—that moment of fear when we anticipate rear-ending the car in front of us after a sudden stop of traffic or a moment of inattentiveness. Luckily, most of these moments are unfounded and fleeting, overcome by our next conversation or song on the radio as we continue our trip unharmed. Mr. Beynon, however, like many victims of car accidents, drownings, or plane crashes, was not so lucky. For several seconds before his car crashed into the parked truck, he recognized his dire situation and likely feared what would ultimately become his death. His fatal story became another tragedy and another lawsuit in which the deceased's family sought damages from the owner of the tractor-trailer in a wrongful death and survival action.[3] The controversial issue in this case, however, was not whether the defendant was at fault in causing the accident. Rather, in *Beynon v. Montgomery Cablevision Ltd. Partnership*,[4] the Court of Appeals of Maryland examined a topic that has left state courts greatly divided: pre-impact fright in survival actions.[5]

Pre-impact fright is a tort claim seeking damages that "are recoverable when the decedent experiences [fright] during the legitimate window

---

1 JD expected May 2011, University of Kentucky College of Law; BA in Political Science, 2008, Transylvania University.

2 Beynon v. Montgomery Cablevision Ltd. P'ship, 718 A.2d 1161, 1163 (Md. 1998).

3 *Id.* at 1163-64.

4 *Beynon*, 718 A.2d 1161.

5 Jennifer M. Kirby, *Recovery of Pre-Impact Fright Damages Allowed in Survival Actions*, TRIAL, Jan. 1999, at 92, 92; 3 DAMAGES IN TORT ACTIONS § 20.02 (2010) (stating that survival statutes "compensate[] the decedent's estate for losses sustained by the decedent between the time of injury and the time of death").

of mental anxiety."[6] It is comparable to the common law tort action for emotional distress because it seeks to "compensate a decedent's fright, not the resultant death."[7] Unlike emotional distress, however, pre-impact fright is a new cause of action.[8] It seeks to compensate an injury that is not driven by physical harm, but rather by "fear, mental anguish, and lost hope. It is a [purely] psychological injury."[9] Pre-impact fright is also unique because it awards damages for the psychological distress in survival actions, where the victim did not survive the impact that generated the victim's fear.[10] The combination of these elements, pure emotional distress and a deceased victim who experienced the fear before the accident, has made some courts hesitant to adopt the doctrine.[11]

Only recently have courts begun to recognize the concept as a valid legal claim, and uniformity is lacking.[12] While several jurisdictions have followed the trend of recognizing pre-impact fright, and thus opened the door to these speculative claims, others have refused to acknowledge the claims or have avoided the issue altogether.[13] This Note seeks to explore the recent evolution of pre-impact fright as a recoverable element in survival actions for the purpose of unraveling its vulnerability within the legal system. It will discuss the three major approaches taken by jurisdictions in deciding whether to recognize pre-impact fright, and, upon recognition, how far to extend the remedy.[14]

Part I analyzes jurisdictions that reject pre-impact fright based on the impact theory; courts utilizing this line of reasoning hold that an emotional distress claim cannot exist without prior physical impact. Part II describes the approach taken by jurisdictions that reject pre-impact fright because no physical injury is manifested prior to the physical impact that causes the decedent's death. Part III outlines jurisdictions that accept pre-impact fright. An analysis of these jurisdictions in Part IV will reveal that pre-impact fright may be theoretically and morally favorable, but practically the claim is too speculative and difficult to objectify. This section highlights the disparate and unpredictable awards granted by courts that recognize pre-impact fright. Because pre-impact fright is impractical, unpredictable

6 25A C.J.S. *Damages* § 186 (2002).

7 *Id.*

8 Jeffrey J. Kroll, *The Case for Making Pre-Impact Fear Compensable in Survival Actions*, 88 ILL. B.J. 462, 462 (2000) (citation omitted).

9 *Id.* at 463.

10 *Id.* at 462.

11 *See infra* Parts I–II.

12 *Id.* at 462-63.

13 *See infra* Parts I–III.

14 The author acknowledges the narrow scope of this Note as it relates to only pre-impact fright claims in mortality cases. Many other legal issues arise within the general discussion of pre-impact fright, but they are beyond the scope of this research.

in its implementation, and unsubstantiated by legal theory, Part V of this Note recommends alternative methods to use in replacing or rejecting pre-impact fright in survival actions. Ultimately, these methods should lead to more uniformity in the law and more consistent redress for plaintiffs.

I. Approach Taken by Jurisdictions that Reject Pre-Impact Fright Based on the Impact Rule

Some jurisdictions reject pre-impact fright as a valid claim because they follow the "'impact' rule."[15] This rule states that in order to file suit for an emotional distress claim, a decedent must experience physical contact or an injury (the impact) prior to the emotional distress.[16] The approach follows the early common law "idea that emotional distress, standing alone, was not actionable."[17] Opinions dating back to the nineteenth century expressed concern over awarding damages for emotional distress based upon the issue of proving causation.[18] Historically, some courts "believed that the proof necessary to establish a causal link between the distress and the allegedly responsible conduct was too speculative."[19] This thinking continues to pervade jurisdictions and stands at the center of the impact rule.[20] The basic premise is that physical contact must occur before the onset of emotional distress because the element of causation is disturbed when there is nothing tangible with which to link the mental distress.

Recently, the Supreme Court of Kentucky upheld the impact rule, reiterating the historical concern that causation requires the emotional response to be a *result of* physical contact.[21] In *Steel Technologies, Inc. v. Congleton*, the court summarized succinctly the impact theory and its concern with pre-impact fear: "The rationale for the current rule is that pre-impact fear, like other alleged negligently caused emotional distress, is possibly trivial and simply too speculative and difficult to measure unless [it is] directly linked to and caused by a physical harm."[22] In this particular case, the appellees sought to expand the requirement of physical contact to include "trivial" touching or immediate subsequent contact.[23] The appellees relied

15 *See* Kathleen M. Turezyn, *When Circumstances Provide a Guarantee of Genuineness: Permitting Recovery for Pre-Impact Emotional Distress*, 28 B.C. L. Rev. 881, 890 (1987); *id.* at 889 ("In some jurisdictions the defendant's negligence had to include physical contact or 'impact' with the plaintiff's person.").

16 *See id.* at 883.

17 *Id.* at 884 (citation omitted).

18 *Id.* at 885.

19 *Id.* (citation omitted).

20 *See* Steel Techs., Inc. v. Congleton, 234 S.W.3d 920, 929 (Ky. 2007) (citation omitted).

21 *Id.* at 929–30.

22 *Id.* at 929 (citation omitted).

23 *Id.* at 929 (citation omitted) (internal quotation marks omitted).

on the *Restatement (Second) of Torts* to support this argument.[24] *Restatement* section 456(a) states that recovery is allowable for "fright, shock, or other emotional disturbance resulting from the bodily harm or from the conduct which causes it."[25] The Supreme Court of Kentucky, however, rejected the appellee's argument. It found the *Restatement's* approach to be overly broad and not an accurate depiction of Kentucky's law.[26] Specifically, the supreme court concluded that the language of the *Restatement*, which permits recovery for emotional distress resulting from conduct that causes bodily harm, "amounts to an alteration of the impact rule making it merely an accompanied-by-impact rule."[27] The court took the view, therefore, that the *Restatement* approach does not meet the strict premise of the impact requirement for emotional distress recovery under Kentucky law.[28]

Steel Technologies addresses one of the major practical problems associated with the pre-impact fright doctrine in survivorship actions: how does one prove mental distress from an event without the traumatic event (physical contact) occurring prior to the distress?[29] Not only does pre-impact fright raise a causation issue, but it also generates evidentiary concerns.[30] The impact rule ensures that a solid foundation is laid for an emotional distress claim. The causation element is easily met because the mental anxiety can be assessed post-accident, and the evidence of the person's distress can be exhibited and analyzed.[31] As the court expressed, transitioning away from the impact approach makes it more difficult to meet these elements and burdens:

> Crafting a new, reasonable rule that would still take into account the concerns about the danger of fraud and speculative nature of mental harms would be difficult without the proper case. . . .
>
> [Defining] a new rule is further exacerbated . . . by the speculative nature of the proof at trial, . . . [the lack of] scientific or medical proof of mental injury, and [that] the victim herself [is] not available to testify, having been killed by the impact.[32]

The Supreme Court of Kentucky acknowledged that the need for the impact rule may be diminished in cases where the victim survives the incident.[33] In these situations, first-hand testimony and evidence of the

---

24 *Id.* at 929.

25 RESTATEMENT (SECOND) OF TORTS § 456(a) (1965).

26 *Steel Techs.*, 234 S.W.3d at 929.

27 *See id.* at 929-30.

28 *Id.* at 929.

29 *See id.* at 929–30.

30 *See id.* at 930.

31 *See id.* at 929.

32 *Id.* at 929–30.

33 *Id.* at 930 ("[I]njury actions could well give rise to a strong challenge to the impact rule

distress are available, thus decreasing the need for a strict contact-based rule.[34] But pre-impact fright as a claim is typically associated with the fright felt by a victim directly before death, and this Note focuses on the use of pre-impact fright as a claim brought in survival actions. While the impact rule is arguably too stringent in its insistence on a narrow recognition of emotional distress, it serves a crucial function in its rejection of pre-impact fright in speculative and potentially frivolous mortal injury cases. Estates and family members may continue to seek damages for the victim's physical injuries and death; therefore, the need for the pre-impact fright emotional distress damages in survival actions is greatly lessened.

II. Approach Taken by Jurisdictions that Reject Pre-Impact Fright Based on the Physical Manifestation Requirement

Some jurisdictions either supplement the impact rule or replace it entirely with a new theory in order to reject pre-impact fright as a valid claim for recovery. One theory frequently used by courts is what is commonly known as the "physical manifestation requirement"; under this approach, emotional distress may be recognized only if the distress itself causes physical injury in the victim.[35] This is distinct and separate from any requirement under the impact theory, which states that the mental anxiety must be a result of a physical impact upon the victim. Kansas is one state that supplements the impact rule with the physical manifestation requirement by implementing the latter when an emotional distress claim is sought for the time period before an impact occurred.[36] Thus, when no physical impact occurred or when the physical impact occurred after the anxiety, a plaintiff "may recover for his emotional distress only if it results in physical injury."[37]

This theory, either in isolation from or in congruence with the impact rule, practically forecloses any claim for pre-impact fright in survival actions. Because it requires a physical injury resulting from the mental distress experienced by the victim, most pre-impact fright cases will never meet the burden of proof due to timing issues and speculation. Pennsylvania acknowledged this difficulty when it rejected a claim for pre-impact fright damages because the appellant presented no evidence that met the physical manifestation requirement.[38] In *Nye v. Commonwealth*, the court analyzed a car accident survival action for pre-impact distress damages and stated,

---

in the future if the victim can give a first-hand account . . . .").

34 *Id.*

35 Fogarty v. Campbell 66 Express, Inc., 640 F. Supp. 953, 963 (D. Kan. 1986).

36 *Id.* ("[A] plaintiff who experiences no physical impact may recover for his emotional distress only if it results in physical injury.").

37 *Id.*

38 Nye v. Commonwealth, 480 A.2d 318, 322 (Pa. Super. Ct. 1984).

"the estate may recover damages for 'pre impact fright' only upon proof that [the victim] suffered physical harm *prior to the impact* as a result of her fear of impending death."[39]

Most pre-impact fright cases, like the fatal auto crash in *Nye*, present a very brief time frame in which the fear of impending death and the consequent manifestation of physical harm could occur. Also, the subsequent physical injuries or death from the impact itself make it very difficult to determine if any proposed emotional anxiety actually caused a physical injury. For these reasons, the physical manifestation requirement makes it practically impossible that a pre-impact fright claim could succeed in most survival actions.

One might question why a jurisdiction would continue to apply this theory when it basically eliminates the potential for pre-impact fright claims in survival suits. In *Fogarty v. Campbell*, a federal court, while applying Kansas law, examined some of the policy reasons for utilizing this rule. The court stated that this approach "appears functionally equivalent" to the rule set forth in the *Restatement (Second) of Torts* section 436A: "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."[40] The comments to section 436A describe three justifications for the *Restatement's* position.[41]

First, emotional disturbance that does not result in physical manifestation is viewed as "trivial."[42] In performing a balancing test, the result is that the emotional harm "is likely to be so temporary, so evanescent, and so relatively harmless and unimportant, that the task of compensating for it would unduly burden the courts and the defendants."[43] Second, without a physical injury component, optimistic plaintiffs could bring frivolous or fraudulent claims.[44] The floodgates may open to include bogus claims because "emotional disturbance may be too easily feigned, depending . . . very largely upon the subjective testimony of the plaintiff."[45] Third, a bodily injury requirement is prescribed because pure mental injury is not deemed to be sufficient where the defendant lacks intent to cause physical harm.[46]

---

39 *Id.* at 322.

40 *Fogarty*, 640 F. Supp. at 957–58 (quoting RESTATEMENT (SECOND) OF TORTS § 436A (1965)).

41 RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965).

42 *Fogarty*, 640 F. Supp. at 958 (quoting RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965)).

43 *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965)).

44 *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965)).

45 *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965)).

46 *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965)). The *Restatement* does not require physical manifestation when a defendant acts intending to cause or in

A comparative analysis is adopted in these pre-impact fright negligence cases, and the courts feel that a physical injury tips the scales in favor of imposing liability for emotional disturbance.[47]

The *Restatement's* approach and the physical manifestation requirement adopted in Kansas, however, are subject to criticism.[48] The *Fogarty* court mentioned the viewpoint of one commentator who believed that the odds of a physical manifestation resulting from a short-term emotional trauma could be extremely rare.[49] The court also stated that the physical injury requirement runs the risk of "[barring] a truly distressed (but non-impacted) plaintiff from attempting to convince a jury that his complaints are genuine."[50] The low probability of finding a physical manifestation caused by emotional damage might also encourage potential plaintiffs to lie or fabricate a physical manifestation just to get their claims heard.[51] From this perspective, the physical manifestation requirement might be perpetuating the very actions it attempts to avoid. Despite these criticisms, the reasons set forth in the *Restatement* and in cases decided by courts following the physical manifestation requirement theory are sound. This approach, when added to or in substitution of the impact theory, prevents speculation surrounding pre-impact fright and fosters predictability within the jurisdiction.

III. Approach Taken by Jurisdictions that Recognize Pre-Impact Fright

Judicial recognition of pre-impact fright followed a long line of expansion in damages awarded for emotional distress.[52] Courts first enlarged this field by recognizing intentional infliction of emotional distress as an independent cause of action.[53] Initially, only the impact theory gave rise to a cognizable claim, but eventually courts accepted the physical manifestation requirement through the "zone of danger" test.[54] Recently, courts have moved beyond the impact rule and the physical injury–requirements[55] to allow for awards that focus on the psychological stress itself.[56] This

reckless disregard of causing emotional harm or distress.

47 *See Fogarty*, 640 F. Supp. at 957–58, 961–63; *see also* Nye v. Commonwealth, 480 A.2d 318, 322 (Pa. Super. Ct. 1984).

48 *Fogarty*, 640 F. Supp. at 962–63.

49 *Id.* at 962.

50 *Id.*

51 *See id.*

52 Turezyn, *supra* note 15, at 886–906.

53 *Id.* at 886–87.

54 *Id.* at 887–906.

55 *See supra* Parts I–II.

56 Turezyn, *supra* note 15, at 886–906. However, it is worth noting that this line of cases

movement recognizes emotional distress as a legitimate medical condition worthy of compensation, and it utilizes both modern technology and science to bolster its argument that the emotional distress experienced before an accident can be proven despite the victim's death.[57]

One influential decision that paved the way toward pre-impact fright was Maryland's *Beynon v. Montgomery Cablevision Ltd. Partnership*.[58] The Court of Appeals of Maryland explored the issue of whether pre-impact fright damages may be awarded in cases where the victim dies upon impact.[59] The significance of this case lies not only in its adoption of pre-impact fright as a valid tort claim, but also in the in-depth analysis presented by the court that explored the various arguments made and stances taken by jurisdictions across the country in response to the issue. The court outlined how other jurisdictions dealt with the impact and physical injury theories that had previously permeated the pre-impact fright scene.[60]

After reviewing the jurisdictions both in favor of and opposed to recognition of pre-impact fright as a compensable action, the court determined that "the cases upholding the recoverability of pre-impact fright... are more persuasive and compatible with Maryland law."[61] Because the jurisdictions acting as advocates of the pre-impact rule persuaded the Maryland court, it is useful to explore the decisions in these jurisdictions. The recent trend of acceptance shows no uniformity by courts in their reasoning, but the decisions can be broken into three different groups of thought.

A. Jurisdictions that Recognize Pre-Impact Fright by Expanding the Impact Rule

One group of jurisdictions justified recognition of pre-impact fright by broadening the scope of the impact rule.[62] These courts desired to follow the common law approach adopted in their jurisdictions, so they manipulated the impact rule to include the altered timing sequence of pre-impact fright cases.

Typically, the impact rule requires that the victim's pain and suffering follow the physical impact of the event.[63] The required chain of causation seeks to cure any speculation or evidentiary concerns that might arise

---

has not involved consideration of pre-contact or pre-near miss distress.

57 *See* Fogarty v. Campbell 66 Express, Inc., 640 F. Supp. 953, 963 (D. Kan. 1986).

58 Beynon v. Montgomery Cablevision Ltd. P'ship, 718 A.2d 1161 (Md. 1998).

59 *See id.* at 1163.

60 *See id.* at 1168–79.

61 *Id.* at 1179.

62 *See* Haley v. Pan Am. World Airways, Inc., 746 F.2d 311, 314–15 (5th Cir. 1984); Solomon v. Warren, 540 F.2d 777, 793 (5th Cir. 1976); Monk v. Dial, 441 S.E.2d 857, 859 (Ga. Ct. App. 1994).

63 *Solomon*, 540 F.2d at 793.

from emotional distress claims.[64] This group of jurisdictions, however, acknowledged a loophole within the impact rule sequence of events. Rather than apply the impact rule strictly, these courts decided that the timing of the impact in relation to the proclaimed emotional distress is not important. A federal court applying Florida law questioned the timing element of the impact rule and stated, "we are unable to discern any reason based on either law or logic for rejecting a claim because in this case . . . this sequence was reversed."[65] Louisiana law has also been interpreted as allowing a shift in the sequence of events for emotional distress claims. A federal court applying Louisiana law in a survival action for pre-impact fright involving an airplane crash declared that "[w]e are not prepared to conclude that the Louisiana courts would sever such an 'ordeal' into before and after impact components."[66] The Court of Appeals of Georgia also took this approach when stating there was "no requirement that the physical injury precede the mental pain and suffering."[67] These courts continue to utilize the impact requirement of the impact rule, but they relax the rule by allowing the impact to occur either before or after the mental anxiety.

In theory, the cited courts raise a valid point about the significance of whether an impact occurs before or after the fright or anxiety. Why should it matter whether the fright arises out of anticipation of an impact or as an effect of the impact? If the purpose of recognizing emotional distress claims is to compensate for mental suffering rather than any physical component, then it makes sense that an emotional response due to fear rather than physical contact is compensable. But altering the sequence of the impact rule defeats the very purpose of the rule.

The impact rule seeks to resolve causation issues that often arise in cases of emotional distress. By requiring that physical contact precede the emotional injury, the impact rule protects dockets from speculative claims.[68] When these jurisdictions accepted pre-impact fright by expanding the impact rule, their logic was flawed. The purpose of the impact rule is to resolve proof problems that arise in the area of causation in pre-impact fright claims, and these jurisdictions undermine the purpose of the rule by changing the sequence of events. Though the courts in this group raise a valid point about the timing sequence required by the impact rule, it is faulty legal analysis to accept pre-impact fright using an amended impact rule in this manner.

64 *See supra* Part I.

65 *Solomon*, 540 F.2d at 793.

66 *Haley*, 746 F.2d at 314.

67 *Monk*, 441 S.E.2d at 859 (citation omitted).

68 *See supra* notes 18–19 and accompanying text.

B. Jurisdictions that Recognize Pre-Impact Fright by Loosening the Physical Manifestation Requirement

Another group of jurisdictions accepting claims for pre-impact fright recognized the cause of action by loosening the physical manifestation requirement. The physical injury rule stands for the proposition that in order for a claim of emotional distress to be actionable, a physical injury must result from the emotional injury.[69] This requirement helps solve evidentiary problems surrounding emotional distress claims because these suits are vulnerable to frivolous claims or lofty speculation without a physical injury connected to the distress.[70] The courts taking this approach propose that the requirement of "physical injury" should not be taken literally.[71] Rather, it should be viewed as encompassing any physical evidence of emotional distress.[72] Maryland adopted this perspective.

The Court of Appeals of Maryland considered the evolved meaning of "physical" injury when it permitted a pre-impact fright claim after examining prior case law.[73] It determined that "the term 'physical' is not used in its ordinary dictionary sense. Instead, it is used to represent that the injury for which recovery is sought is *capable of objective determination.*"[74] This poses the question of what type of evidence constitutes objective determination of emotional distress. Anticipating this question, the Maryland court described two broad categories of "physical injury" evidence that would meet the objective determination standard.[75] The first type "pertain[s] to manifestations of a physical injury through evidence of an external condition or by symptoms of a pathological or physiological state."[76] The second type is more broadly stated as "evidence indicative of a 'mental state.'"[77] While these explanations are still somewhat vague, it is evident that Maryland has expanded the physical injury requirement to include not only physical injuries of the victim, but also physical evidence surrounding the event which could indicate an opportunity for the victim to experience mental anxiety.

In *Beynon v. Montgomery Cablevision Ltd. Partnership*, the Court of Appeals of Maryland found that the pre-impact fright claim passed the physical injury test because an objective determination of the emotional anxiety could

69 *See supra* note 33.

70 *See supra* Part II.

71 *See* Beynon v. Montgomery Cablevision Ltd. P'ship, 718 A.2d 1161, 1182 (Md. 1998).

72 *See id.* at 1182.

73 *Id.*

74 *Id.* (quoting Vance v. Vance, 408 A.2d 728, 733 (Md. 1979).

75 *Id.* (quoting *Vance*, 408 A.2d at 733).

76 *Id.* (quoting *Vance*, 408 A.2d at 733).

77 *Id.* (quoting *Vance*, 408 A.2d at 733).

be made.[78] The new objective determination requirement of the physical injury rule was satisfied by "the fatal injuries he sustained as a result of the feared impact—the automobile accident"[79] and "by the [71.5] feet of skid marks that . . . resulted from the decedent's apprehension of impending death, and the collision itself,"[80] both of which could independently satisfy the new physical injury test.

The approach adopted by Maryland in *Beynon* indicates that death itself may serve as physical evidence of emotional distress. It also appears that *any other objective evidence,* such as skid marks, which indicate the *possibility* of a victim experiencing emotional anxiety would satisfy the physical injury rule. Extending the physical injury rule in this way, however, merely perpetuates the very problems that the physical injury rule was instituted to eliminate. Problems of frivolous claims and speculation, which commonly accompany emotional distress suits, are not cured by expanding the physical requirement to include *any objective determination* of injury. Rather, this invites opportunities for more litigation and unsubstantiated inferences being made to find any physical evidence that could support a claim for pre-impact fright damages. While the Maryland court may have justifiable reasons for wanting to grant awards for pre-impact fright suits, its support for doing so is weak. Broadening the physical injury requirement to include objective evidence at the scene of the accident or allowing the death of a victim itself to stand as evidence practically eliminates the need for a "physical injury" in its literal sense.

C. Jurisdictions that Recognize Pre-Impact Fright by Permitting Inferences of Emotional Anxiety with no Physical Injury Requirement

While some jurisdictions seek to expand the physical injury rule to incorporate pre-impact fright, other courts have eliminated the requirement altogether, thus allowing the emotional distress to speak for itself. Rather than seek external evidence to substantiate the emotional distress claims, these courts have relied on the proposition that jurors and judges are capable of drawing inferences that could logically link emotional distress to an act of negligence when physical evidence is lacking. Even without a physical demonstration to prove a victim's mental anxiety, these courts point to other proof that is available to fact finders.

For example, New York law has been interpreted by federal courts as permitting a claim for emotional trauma "where the plaintiff can produce evidence from which a jury could infer that the decedent was aware of the danger and suffered from pre-impact terror."[81] In *Malacynski v. McDonnell*

78 *Id.*

79 *Id.*

80 *Id.*

81 Malacynski v. McDonnell Douglas Corp., 565 F. Supp. 105, 106 (S.D.N.Y 1983).

Douglas Corp., a plaintiff in a survival action sought to introduce evidence of pre-impact fright from a plane crash.[82] The court found that summary judgment in favor of the defendant was inappropriate because "testimony at trial of an eyewitness to the crash . . . may support an inference that the decedent knew she was in imminent danger and should therefore recover for pre-impact fright."[83] Here, testimony about the incident and the mere potential of a victim's recognition of impending death or injury was enough evidence to indicate the possible existence of pre-impact fear.

Nebraska also granted jurors' discretion in determining whether a victim could have plausibly experienced emotional distress before his or her death.[84] When faced with no real evidence of the decedent's pre-impact fright before a fatal motorcycle crash, the court allowed the jury to examine the issue because "the personal representative's offers of proof nonetheless provide a basis upon which the jury certainly need not, but could, if it wished, find that [the] decedent . . . apprehended and feared his impending death during the [five] seconds . . . before he was crushed and thus killed."[85] The court adopted the view that witness testimony that raises the possibility of an emotional distress claim, even for a narrow window of time, is acceptable to formulate the existence of an injury.[86]

By allowing juries to exercise such judgment in the face of limited evidence, this method compounds the problems generally associated with pre-impact fright. Evidentiary problems, mere speculation, and potential for fraudulent claims become a greater concern for courts that allow fact finders to draw inferences based on little or no physical evidence of emotional distress. It provides jurors or judges too much latitude and discretion. These jurisdictions seek to eliminate barriers to pre-impact fright claims, but in doing so, they may be abolishing the fourth necessary element to a negligence claim: an injury.[87]

IV. The Practical Effect: Is Pre-Impact Fright Needed to Redress Plaintiffs?

A. Pre-Impact Fright Awards Are Unpredictable and Often Slight

The practical effect of recognizing pre-impact fright as a component of a valid negligence claim is questionable. Does a court's decision to award these damages truly compensate plaintiffs in a meaningful way as compared

82 *Beynon*, 718 A.2d at 1174 (citing *Malacynski*, 565 F. Supp. at 107).

83 *Id.* (citing *Malacynski*, 565 F. Supp. at 107).

84 Nelson v. Dolan, 434 N.W.2d 25, 32 (Neb. 1989).

85 *Id.*

86 *Id.*

87 *See* Helton v. Montgomery, 595 S.W.2d 257, 258 (Ky. Ct. App. 1980) (stating that injury is a necessary element of a negligence claim).

to the usual survival action damages, and if so, can uniformity be found in the amounts of pre-impact fright awards? An examination of cases in which damages have been awarded answers those questions in the negative.

A survey of the cases analyzed in this Note reveals a wide range of damages awarded for pre-impact fright. On the high end of awards lies a case in Texas where the Supreme Court of Texas upheld a jury award of $500,000 for "mental anguish the decedents suffered from the time of the plane's break-up until it hit the ground."[88] Furthermore, a New York appeals court found that even though a jury award of $239,125 was "excessive," an award of $100,000 for pre-impact fright a decedent suffered in a fatal car accident would be "ample compensation."[89] These figures illustrate that damage awards may be significant; however, the New York and Texas court awards are not characteristic.

Many pre-impact fright awards are $20,000 or less. In Michigan, a decedent's estate was awarded $500 in damages for the pre-impact fright of a decedent who was struck by a falling boxcar.[90] Even in Texas, where the Supreme Court of Texas upheld one of the largest pre-impact judgments, another fright award for a mere $5,000 was granted to compensate a decedent's estate for the fright he experienced before a truck backed over him.[91] Several other jurisdictions have granted awards in the range of $10,000 to $20,000 for pre-impact fright associated with similar events to those described above: plane crashes, automobile accidents, and other tortious events.[92]

Certainly the specific facts of each case are unique, but such a disparity in awards for pre-impact fright is unsettling. At its core, pre-impact fright is a claim for emotional distress designed to compensate decedents for the fear they experienced in anticipation of the injury that caused death. Theoretically and morally this sounds appealing, but how can fear of death be quantified into such diverse figures? In most of the cited cases, the time frame of emotional anxiety was quite brief, and even the circumstances surrounding death were similar in many cases. It does not make practical sense, then, that one plaintiff is awarded hundreds of thousands of dollars in damages and another plaintiff is awarded only a few thousand dollars to compensate for the same injury: fear.

It is recognized that disparate awards often arise in the context of other

88 Yowell v. Piper Aircraft Corp., 703 S.W.2d 630, 634 (Tex. 1986).

89 Lang v. Bouju, 667 N.Y.S.2d 440, 442 (App. Div. 1997).

90 Kozar v. Chesapeake & Ohio Ry. Co., 320 F. Supp. 335, 364–66 (W.D. Mich. 1970).

91 Green v. Hale, 590 S.W.2d 231, 238 (Tex. Civ. App. 1979).

92 *See* Haley v. Pan Am. World Airways, Inc. 746 F.2d 311, 317 (5th Cir. 1984) (affirming judgment for $15,000); Solomon v. Warren, 540 F.2d 777, 792 (5th Cir. 1976) (affirming judgment for $10,000); United States v. Furumizo, 381 F.2d 965 (9th Cir. 1967) (affirming judgment for $15,000); Mo. Pac. R.R. v. Lane, 720 S.W.2d 830, 833 (Tex. App. 1986) (affirming judgment for $19,500).

types of tort claims, such as pain and suffering awards.[93] But one can assume that juries and judges have physical evidence, medical reports, or victim testimony upon which to base awards granted for these types of claims. The unique nature of pre-impact fright in mortal injury cases, however, results in a lack of proof. The victim is unable to testify as to his or her fear, and the emotional injury of fear before death is much more difficult to quantify than a physical injury or emotional distress in a survivor.

Although this Note is not an exhaustive review of the practical implications of pre-impact fright, the brief overview displays facts that not only bolster the theoretical arguments posed by opponents of pre-impact fright claims but also provide new reasons for rejecting the claims. The lack of uniformity in the implementation of pre-impact fright even within a single jurisdiction is one more reason that pre-impact fright should be abandoned as a tort claim. The foundational problems of speculation and lack of evidence lead courts and juries to award compensation that often does not accurately reflect the injury suffered.

B. Alternative Claims May be Brought by Plaintiffs that Redress Their Injuries Better than Pre-Impact Fright

In mortal injury cases, the estate of the deceased may typically seek compensation for damages using both wrongful death and survival statutes.[94] The damages recoverable under these statutes commonly include "compensatory damages," as well as "awards of nominal and/or punitive damages."[95] One can assume that this wide statutory leeway provides plaintiffs the authority to seek damages for the decedent's economic loss and pain and suffering, in addition to punitive damages.[96] With these other avenues of redress available, the question arises whether pre-impact fright is even needed. If plaintiffs may seek redress through other more predictable and legally sound avenues, then why should a court expend the time and resources needed to formulate an award for pre-impact fright?

Proponents of pre-impact fright in survival actions argue that the emotional distress felt by a victim before a fatal accident is a distinct claim and decedents should not be denied an opportunity to seek compensation for this suffering. They claim that "[i]t is illogical . . . to allow someone who consciously suffers for a short period following an injury-producing event to have a jury evaluate his or her claim while denying that chance to someone confronted with impending death who does not otherwise

93 Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CALIF. L. REV. 773, 776–77 (1995).

94 *See* DAMAGES IN TORT ACTIONS, *supra* note 5, § 20.02[1](b).

95 *Id.*

96 *See id.* These damages serve merely as an example of the types of damages potentially available to plaintiffs, not an exclusive list of damages.

suffer from the fatal collision."[97] In theory, this statement is logical, but it does not work as a practical matter. The way courts implement pre-impact fright in survival actions seems to be an award of damages for emotional distress using evidence that would normally constitute pain and suffering. Courts' moral consciences want to compensate decedents, so they justify the use of pre-impact fright by expanding its coverage to include situations in which there is no actual evidence of emotional distress.[98] By allowing physical evidence of potential emotional distress or permitting inferences to be drawn, courts have essentially awarded more damages for pain and suffering under the heading "pre-impact fright."[99] From this perspective, it appears that the way courts implement pre-impact fright renders the claim practically meaningless. Courts could accomplish the same result using the more traditional claim of pain and suffering. This would compensate decedents without compromising sound legal theory.

V. Other Recommendations: Limitations on Pre-Impact Fright Damages

This Note stands for the proposition that pre-impact fright in mortal injury cases is tainted by problems of both faulty legal theory and poor implementation and should be abolished because of these deficiencies. It advocates for courts to reject pre-impact fright and use other types of claims to accomplish the goal of redressing deceased plaintiffs. But what about those courts that have already adopted pre-impact fright or will adopt it as a valid legal claim in the future despite its many faults? Recognizing the reality of a trend in favor of pre-impact fright, this Note also reluctantly provides recommendations on how to limit the negative effects of pre-impact fright without completely abolishing it.

A. Courts Should Implement a Maximum Recovery Rule on Pre-Impact Fright Damages

Because pre-impact fright is so speculative and opens the door for disparate awards of damages, courts should place a limit on the amount a plaintiff can recover for a pre-impact fright claim. One way of applying this rule is to create a policy stating that similar claims should warrant similar awards, and the amounts of these awards should rise and fall as a group.[100] While some scholars may think this is the responsibility of the legislature, a few courts have taken it upon themselves to limit recovery in this way.

97 Kroll, *supra* note 8, at 468.

98 *See supra* Part III.

99 *See supra* Part III.

100 *See* Louisa Ann Collins, Comment, *Pre- and Post-Impact Pain and Suffering and Mental Anguish in Aviation Accidents*, 59 J. Air L. & Com. 403, 436–37 (1993-1994).

For example, the Fifth Circuit implemented a version of the maximum recovery rule, which is used "to keep awards low, allowing them to grow at a permissible rate in all similar cases."[101] This circuit's maximum recovery rule does not place a standard monetary amount that must be used in all awards.[102] Rather, it ensures that an award is not egregious by requiring courts to analyze "all relevant cases that are similar in factual background . . . to determine the limit of the maximum recovery rule."[103] This rule helps cure one of the practical effects of pre-impact fright, lack of uniformity, and creates a level of predictability.

A court also could implement a maximum recovery rule that states a strict monetary value on pre-impact claims. Opponents of placing a maximum figure on fright claims might argue that each case is unique and warrants an analysis of the facts, which might lend itself to a higher award. But, a maximum figure does not require that all judgments reach this cap amount. And, more importantly, an award for pre-impact fright is itself problematic because the claim is so speculative and the nature of a claim for emotional distress in a survival action is difficult to quantify. A maximum recovery rule would create not only predictability for parties but also stability and ease for court systems.

B. Courts Should Use Remittitur as a Method to Limit Pre-Impact Fright Awards and Ensure the Awards Are Justified

Another way courts can limit the amount of damages awarded for pre-impact fright is to use remittitur. Remittitur is a review mechanism—"a process by which a court compels a plaintiff to choose between reduction of an excessive verdict and a new trial."[104] When using remittitur, a court reviews a jury's award of damages and proposes a reduced award in an amount the court feels is more reasonable (often fifty percent).[105] The plaintiff must then choose whether to take the remittitur amount or undergo the hassle of a new trial.[106] Plaintiffs will often choose the reduced amount, thus making remittitur an effective way for courts to limit pre-impact awards.[107]

The Fifth Circuit also uses remittitur as a way to limit jury awards for pre-impact fright.[108] In determining whether remittitur is necessary, and if so, what is a proper remittitur amount, courts such as the Fifth Circuit,

---

101 *Id.* at 437.

102 *Id.* at 436 (quoting Douglass v. Delta Air Lines, Inc., 897 F.2d 1336, 1344 (5th Cir. 1990)).

103 *Id.* at 437.

104 *Id.* (citation omitted) (internal quotation marks omitted).

105 *See id.* (citation omitted).

106 *Id.* at 437–38.

107 *See id.* at 437–38 (citation omitted).

108 *Id.* at 438.

have looked at each of the following factors: "(1) fairness to the plaintiff; (2) fairness to the defendant; (3) judicial economy; (4) the constitutional preference for jury trials; and (5) non-constitutionally mandated public policy favoring trial by jury."[109] While analyzing these factors grants trial judges significant discretion in determining a remittitur amount,[110] it serves as a useful safeguard against juries awarding extreme damages to plaintiffs for speculative and unfounded pre-impact fright claims.

C. Courts Should Include Pre-Impact Fright as a Part of Pain and Suffering Damages Upon Proof that the Harm Caused by the Defendant Actually Occurred

One approach suggested by Professor Kathleen M. Turezyn is that pre-impact fright should be an extension of a plaintiff's claim for physical injury.[111] While pre-impact fright would maintain its separate identity as redress for a person's emotional distress due to the anticipation of a tragic event, this approach removes all the rules and requirements normally implemented by courts.[112] Instead, it focuses on one prerequisite for a pre-impact fright claim.[113] Requirements of proof and physical injury would be eliminated and instead "courts [w]ould allow recovery for pre-impact distress . . . [w]hen the defendant negligently places a victim in danger of serious physical harm or death, and injury or death does in fact occur as a result of the feared event."[114] Using this method, a pre-impact fright claim would regularly succeed when a defendant is found negligent in causing physical harm to a victim.[115]

While this approach might not be legally sound in its use of a physical injury as proof of an emotional injury, its practical benefits are numerous. It eliminates the need for useless litigation or frivolous or fraudulent claims brought by plaintiffs because "so long as the plaintiff can establish to the satisfaction of the fact-finder that he or she experienced distress, courts should allow recovery."[116] This approach adds consistency to awards for pre-impact fright and fosters predictability for plaintiffs in assessing whether their cases have potential for pre-impact fright claims. Problems of causation and injury still exist when using this approach, but for courts unwilling to abolish pre-impact fright, this method eases the negative practical effects of implementing pre-impact fright.

---

109 *Id.* (quoting Irene Sann, *Remittitur Practice in the Federal Courts*, 76 COLUM. L. REV. 299, 301 (1976)) (internal quotation marks omitted).

110 *Id.* (citation omitted).

111 Turezyn, *supra* note 15, at 931.

112 *See id.*

113 *See id.*

114 *Id.*

115 *See id.*

116 *Id.*

CONCLUSION

Recent legal trends show a movement towards recognition of pre-impact fright. Courts often feel the need to redress plaintiffs for the distress felt by decedents in anticipation of their deaths, and therefore rely on legal theory to support their recognition of pre-impact fright damages. The problem, however, is that courts' legal justifications for instituting pre-impact fright damages are flawed. Not only do courts often negate the very legal theories they are endorsing by pursuing pre-impact fright, but also the practical effects of their judgments are questionable. The awards have been disparate and show little or no predictability as to what "fear of death or substantial bodily harm" is worth. For these reasons, it appears that pre-impact fright is an impractical claim. Its purpose is evident and noble, but it opens the door to an area of the law that is unpredictable, speculative, and unsubstantiated by legal theory. This Note proposes that in survival actions, pre-impact fright should be abolished as a legal claim and courts should redress plaintiffs through other methods and claims where evidence is more substantial. Recognizing, however, that many courts have already accepted pre-impact fright as a claim within their jurisdictions, this Note also provides a few recommendations that serve to limit the negative effects of pre-impact fright. If courts choose to recognize pre-impact fright claims, they should use one of the various methods outlined in this Note[117] to limit the amount of damages awarded.

117 *See supra* Part V.B–C.