



If It Sounds Too Good to be True...Inherent Problems with Awarding Damages for Pre-Impact Fear



By: Marshal Pitchford
& Chris Cotter

Two roof installers fall eighty feet to their death. A steel coil breaks loose from a semi-trailer and strikes the driver of a passing vehicle. An airplane crashes just a few minutes into the flight, killing all who are on board.

If the persons who lost their lives in each of these accidents realized what was happening in the brief moment before the fatal impact, they may have experienced an excruciating sense of shock or fear. When representatives of these decedents filed wrongful death actions against a third-party, they alleged that their decedent suffered pre-impact fear and, in addition to other damages, sought to recover monetary damages based on such emotional distress.

Most states permit the representative of a decedent who *survives* an accident to recover for the pain and suffering experienced during the brief interval after the impact and before death. Yet, a similar consensus does not exist among the states as to whether the representative can recover for the fear experienced during the period before the impact, in which the decedent is uninjured but aware of an impending death.

Conceptually, the idea behind a pre-impact fear damage award seems fairly straight-forward. Because the law permits compensation for many forms of pain and suffering, including survivorship and hedonic damages, it would seem ready to provide a remedy for the suffering experienced by a person with an acute awareness of his or her imminent death. However, there are inherent problems in permitting a jury to award damages for pre-impact fear. Add to those problems the fact that most states view any type of emotional distress damages with skepticism, multiple avenues of attack on this claim become apparent. Pre-impact fear damages are simply not the clear-cut remedy they seem.

Difficulty of Proof and Speculation

One inherent problem with pre-impact fear damages is that they are difficult to prove. It is perhaps an obvious point, but if the plaintiff cannot prove the decedent was aware of his or her impending death, pre-impact fear damages will be unavailable. *See Byrd v. Wal-Mart Transp., LLC*, 2009 WL 3429562 at *5 (S.D. Ga. Oct. 23, 2009) (“Georgia law requires some evidence that the decedents actually anticipated the collision before a recovery for pre-impact pain and suffering is allowed”). In a case involving a truck-pedestrian collision, the court granted summary judgment for the defense on with respect to plaintiff’s pre-impact fear claim because plaintiff “has presented no evidence that [plaintiff] was aware of the impending crash.” *Swinney v. Schneider Nat. Carriers, Inc.*, 2011 WL 5434265 at *6 (N.D. Ga. Nov. 8, 2011).

Where the death occurs immediately upon impact, the key testimony for proving pre-impact fright, that of the decedent, is nearly always unavailable.¹ And because the matter to prove relates to a person's internal and often momentary feelings, evidence of a speculative nature is frequently offered.

In one case, the proof of fear consisted of third-party witness testimony that the decedent's facial expression showed that she saw the accident coming and was terrified. *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 929 (Ky. 2007). In the court's view, such evidence "simply underscores the speculative nature of such harm." *Id.* Similarly, in another case involving a truck-pedestrian collision, there was evidence that the decedent had lowered his head prior to the impact. *Estate of Eric S. Anderson v. U.S.*, 2011 WL 1231143 at *4 (D.Md. Mar. 28, 2011). The court rejected as speculation the plaintiff's suggestion that the decedent lowered his head in fear of the impending collision. *Id.*

When eyewitness testimony is unavailable, many plaintiffs present expert testimony with the hope of establishing pre-impact fright. However, this evidence is also subject to scrutiny. For instance, in an auto accident case, an accident reconstruction expert presented the possibility of the decedent realizing the impact less than a second before it occurred. *See Stegner v. Estate of Carter*, 2009 WL 3231225 at *1 (D.Md. Oct. 2, 2009). The court rejected the testimony because it was not supported by the physical evidence at the scene of the accident. *Id.* Physical evidence itself is not necessarily sufficient. In a case involving a fatal motor vehicle collision, the plaintiff relied on 60 feet of yaw marks to argue that the decedent was aware of an impending crash. *St. Clair v. Denny*, 245 Kan. 414, 424 (Kan. 1989). The court explained that, "[w]hile it is true the physical evidence suggests [the decedent] may have been aware of a possible collision momentarily prior to impact, that does not support a finding of emotional distress." *Id.* Because of the inherent problem of proving pre-impact fear, Maryland permits awards for pre-impact fear only if they are "capable of objective determination." *Beynon v. Montgomery Cablevision Lt'd Ptnrship*, 351 Md. 460, 464, 718 A.2d 1161 (1998).

Difficulty of Determining the Amount of the Damage Award

Another inherent problem with pre-impact fear damage awards is the difficulty of measuring the award. In most cases, there are only a few short seconds in which the pre-impact fear could have occurred. By comparison, survivorship damages typically are based on suffering over a span of hours or sometimes days or months. In refusing to permit an award of pre-impact fear damages, the Kentucky Supreme Court commented that such fear "is possibly trivial." *Congleton*, 234 S.W.3d at 929; *see also Neace v. United Group Services, Inc.*, 2008 WL 4372907 (E.D. Ky. Sept. 22, 2008). The Maryland Supreme Court has also recognized that pre-impact emotions could 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." *Beynon*, 351 Md. at 473.

¹ In *Simmons v. Christus Schumpert Medical Center*, the decedent's daughter testified at trial that the decedent had stated before her death, "[I]f ya'll don't do something for me I don't think I'm going to make it." 71 So.3d 407, 428 (La. App. 2011). However, in most cases that present the issue of pre-impact fear damages, the decedent is not given the opportunity to communicate with someone prior to death.

Ironically, despite the evanescent nature of pre-impact fear or fright, evidence of such fear can improperly appeal to a jury's emotions, leading to an excessive award. For example, in a Louisiana case, an accident reconstruction expert testified that the decedent was likely aware of his imminent death when he began to hydroplane out of control just prior to a collision with a semi-truck. *Cavalier v. State, ex rel. Dept. of Transp. and Development*, 994 So.2d 635, 646 (La. App. 2008). For the decedent's fright during those fleeting moments alone, the jury awarded \$200,000. *Id.* The appellate court held the award was excessive and suggested that "the jury may have been affected by the severity of [the decedent's] injuries and tragic death." *Id.* Interestingly, the court also commented that "the evidence was speculative regarding the extent to which [the decedent] actually realized he was about to die or suffer serious bodily injury." *Id.*

Emotional Damages Viewed with Skepticism

In addition to these inherent problems with pre-impact fear damages specifically, long-standing jurisprudence in many states views emotional distress damages generally with skepticism. For this reason, many states do not permit recovery of emotional distress damages unless the distress is, in the words of the Kentucky Supreme Court, "related to, and *the direct and natural result of*, the physical contact or injury sustained." *Congleton*, 234 S.W.3d at 929 (emphasis in original). Known as the impact rule, the well-established principle limits claims for emotional distress to those that accrue only after physical injury manifests.

Many courts have applied the impact rule to prohibit pre-impact fear damage awards. *See, e.g., Congleton*, 234 S.W.3d at 929; *Gage v. City of Westfield*, 26 Mass.App.Ct. 681 (Mass. App. 1988); *In re Air Crash Disaster Near Chicago, Ill., etc.*, 507 F.Supp. 21, 24 (N.D.Ill. 1980). After all, mental distress experienced before an impact, if any, is not caused by the impact, but by fear of it. A Massachusetts appellate court acknowledged that recovery of pre-impact fear damages "has some logical appeal" but the court was "not persuaded by it." *Gage*, 26 Mass.App.Ct. at 696. The court looked to "the relevant period for purposes of measuring compensation for conscious pain and suffering," which "has consistently been defined in our appellate decisions as commencing with the impact of the fatal injury." *Id.* Presuming the limitation was intentional, the court hesitated to expand the scope of recovery for conscious pain and suffering. *Id.*

Defense Strategy for Pre-Impact Fear Claims

When faced with claims for pre-impact fear or shock, the defense has several avenues of recourse. First, several states (e.g. Kentucky, Massachusetts, Illinois and South Carolina) outright bar damage awards for pre-impact fear. In states that permit such awards, the plaintiff must still prove that the decedent was actually aware of an impending death and actually experienced the fright or shock alleged. Any evidence presented by the plaintiff should be viewed with skepticism. Without the testimony of the decedent, it is extremely difficult to uncover the internal thoughts and feelings of a person in the brief moments before a fatal impact. Finally, to the extent the jury is permitted to award pre-impact fear damages, the trial court should be given an opportunity to evaluate whether the award is excessive, in light of the tendency of the evidence to appeal to jury's emotions. As the saying goes, if it sounds too good to be true, it probably is.

Marshal Pitchford and Chris Cotter are attorneys with Roetzel & Andress, LPA in Akron, Ohio. Mr. Pitchford and Mr. Cotter focus their efforts on transportation litigation, including cargo claims, personal injury claims, freight charges collection and transactions, government relations and commercial litigation.