Preimpact Terror Awards – A Lottery

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SINCE the early 1980's, in about a dozen jurisdictions in the United States courts and juries have been permitted to award a decedent's estate tort damages for preimpact terror (or fright) as a separate subcategory of damages awarded for conscious pain and suffering. The intent of such awards is to compensate the estate for the emotional harm and fright thought to have been endured by the decedent during the brief interval between first becoming aware of a dangerous situation that is likely to lead to his or her impending death and sustaining the fatal physical injuries resulting from the perceived danger. Such awards do not serve as compensation for the survivors' pecuniary loss, or for their own emotional distress at the loss of a loved one, or for loss of parental care and guidance, or any other type of damages resulting from the death that may be recoverable in the particular jurisdiction whose law applies. While the preimpact terror cases frequently involve airplane crashes,

automobile accidents, or drownings, recovery is not limited to those fact patterns.

Preimpact terror, as a form of "emotional harm," has been recognized as a category of compensable tort damages by the American Law Institute in Section 47 of its Restatement of the Law, Torts: Liability for Physical and Emotional Harm.[1] The "black letter" of *Restatement* § 47 provides, in relevant part, "An actor whose negligent conduct causes serious emotional harm to another is subject to liability to the other if the conduct: (a) places the other in danger of immediate bodily harm and the emotional harm results from the danger; . . ."

Under the *Restatement's* formulation, physical injury is no longer necessary; emotional harm is enough. That is the law in those jurisdictions, such as New York, that allow preimpact terror damages. Plaintiffs need only produce "some evidence that the decedent perceived the likelihood of grave injury or death before the impact, and suffered emotional distress as a result."[2] Where plaintiffs cannot provide proof cognitive awareness for at least some period of time following an accident, summary judgment will be granted, dismissing the claim for preimpact terror.[3]

In some states, no damages are available for conscious preimpact fright unless there is proof that the decedent also suffered physical harm prior to the impact as a result of the fear of impending death.[4]

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[1] Restatement of the Law, Torts: Liability for Physical and Emotional Harm, § 47 (ALI 2012) ("*Restatement* § 47").

[2] *In re* 91st Street Crane Collapse Litigation, 154 A.D.3d 139, 153, 62 N.Y.S.3d 11, 22 (N.Y. Sup. Ct. 2017).

[3] Keenan v Molloy, 137 A.D.3d 868, 871 (N.Y. Sup. Ct. 2016) (conflicting medical evidence whether decedent lost consciousness on impact after being struck by a bus); Kevra v. Vladagin, 96 A.D.3d 805, 949 N.Y.S.2d 64 (N.Y. Sup. Ct. 2012) (one-car accident, car traveled flipped on its roof and hit a tree; "Any finding that the decedent perceived grave injury or death, so as to justify making an award for 'preimpact terror,' would be based on impermissible speculation"); Boston v. Dunham, 274 A.D.2d 708, 711, 711 N.Y.S.2d 54, 58 (N.Y. Sup. Ct. 2000) (preimpact terror claim dismissed "since the record lacks any indication that decedent evinced some level of awareness postimpact and prior to his death"); *In re* Dearborn Marine Service, Inc., 499 F.2d 263, 288 (5th Cir. 1974) (offshore oil platform explosion; the "immediacy of the occurrence and the absence of other evidence make too speculative the finding that Monk survived for a matter of minutes").

[4] *See, e.g.,* Nye v. Com., Dept. of Transp., 331 Pa. Super. 209, 216, 480 A.2d 318, 322 (Pa. Super. 1984) ("the estate may recover damages for 'pre impact fright' only upon proof that Karen suffered physical harm *prior to the impact* as a result of her fear of impending death"); *In re* Air Crash Disaster Near Chicago, Ill. etc., 507 F. Supp. 21 (N.D. Ill. 1980) (no recovery under Illinois law for fright and terror decedent may have suffered in anticipation of physical injury prior to death in an airplane crash); Fogarty v. Campbell 66 Exp., Inc., 640 F. Supp. 953 (D. Kan. 1986) (no recovery is permitted under Kansas law for negligently induced preimpact mental anguish, not itself resulting in physical injury, notwithstanding

Except in rare situations, like hijacked United Flight No. 93 on September 11, 2001, when some passengers on the doomed plane were describing their feelings to loved ones via cell phones, or where a witness to the accident saw and heard the decedent in the interval before death, or where a survivor describes her feeling in the moments before the crash, no can or will ever "know" what the decedent was thinking.

In her Note: "'Why Aren't The Pilots Doing Something?' A Look At The Approaches Courts Use To Handle Claims For Pre-Impact Terror In Airplane Disasters,"[5] Christine Nierenz included portions of the word-for-word transcript taken from the dialogue of the show "Survival in the Sky: A Wing and a Prayer" (The Learning Channel broadcast, Dec. 8, 1996). They show that not all passengers on doomed airplanes panic or experience terror; some, quite the opposite, enjoy feelings of total peace and serenity. And, it is impossible to say into which group a decedent falls, although it is reasonable to suppose, and experts have so testified, that the more likely response is fear and panic.

The Learning Channel interviewed the flight crew of United Air Lines Flight 232, which took off from Denver, Colorado bound for Chicago, Illinois, but instead attempted an emergency landing in Sioux City, Iowa after suffering catastrophic failure of its tail-mounted engine, which led to the loss of all flight controls. Of the 296 passengers and crew on board, 111 died.[6] Ms. Nierenz writes that "Jan Brown-Lohr, a senior flight attendant on the plane, recalls, 'Well, we started to go over, uh, I was like, I don't want to do this, [laughs], I know this airplane is starting to roll.' In the moments after the crash, Brown-Lohr remembers, 'I couldn't hear anything, I couldn't feel anything, I couldn't smell anything, nothing was working except my mind; uh, it was like total body detachment, or, being in a protective cocoon; um, I then realized that two-thirds of me was suspended in fire and I felt, this is, this is it, this is how I'm going to go, this is how I'm going to die, and it was, uh, the most incredibly peaceful moment I've ever known, that, uh, I was in no pain. I had no fear anymore, it was total peace.'"[7]

While a damages award cannot stand when the only evidence to support it is speculative or purely conjectural, eyewitness testimony is not necessary to support an award

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that the collision caused physical injury); R.J. v. Humana of Fla., 652 So. 2d 360, 363 (Fla. 1995) ("we have continued to uphold the impact rule", with limited exceptions, such as in the case of intentional tort).

[5] 47 DRAKE L. REV. 343, 345 (1999)("Note").
[6] https://en.wikipedia.org/wiki/United_Airlines_Flight_232.
[7] Note at 345.

for preimpact terror. In most cases it would be difficult, if not impossible, to obtain. Circumstantial and expert evidence will suffice.[8] But one court, ruling on defendant's motion *in limine*, permitted plaintiff's expert to testify as to preimpact terror generally, but excluded as speculative his testimony regarding the specific incident involved in the case.[9]

I. Circumstantial evidence

In *Lang v. Bouju*, [10] the court found that a "reasonable factfinder could infer, from the fact that Lang applied his [motorcycle] brakes as he did, that he had indeed seen Bouju's [stopped] truck and was aware of the likelihood--and ultimately the certainty--of a serious collision, during the approximately five seconds preceding impact. . . . In view of his speed and proximity to the truck when this occurred, and his inability to control the motorcycle as it proceeded toward the truck, it was not unreasonable for the jury to find that, at some point prior to impact, Lang perceived the inevitable, that he was going to endure grave injury or death, so as to justify making an award for this 'preimpact terror'." The court allowed a recovery of $100,000 as "ample compensation for Lang's brief emotional pain and suffering."[11]

In *Missouri Pacific Railway Co. v. Lane*,[12] decedent's truck stalled as it was going over a railroad crossing and would not restart. Decedent "was confronted with a 2,000-ton train speeding toward him at sixty miles per hour." The court held that "the terror and consequent mental anguish Lane suffered for the six to eight seconds while he faced imminent death" was sufficient to sustain a $19,500 award for preimpact terror.

Two Second Circuit cases, arising out of the same plane crash and decided within six months of each other reached opposite results based on where the passengers were seated. In *Shatkin v. McDonnell Douglas Corp.*,[13] the court found "no evidence in the record from which a person could reasonably find that Lloyd Shatkin suffered any conscious pain and suffering prior to the impact which instantly killed him." The NTSB report, introduced by the plaintiff, revealed that "despite the loss of the left engine [on take-off] the plane on which Shatkin and his wife were passengers took off normally, was

[8] Haley v. Pan American World Airways, Inc., 746 F.2d 311, 316-317 (5th Cir. 1984); Stein v Leibowitz-Pine View Hotel, 111 A.D.2d 572 (N.Y. Sup. Ct. 1985).

[9] Woods v. Burlington Northern & Santa Fe Ry., 2003 Mont. Dist. LEXIS 1727 at *1 (Mont. App. 2003).

[10] 245 A.D.2d 1000, 1001, 667 N.Y.S.2d 440, 441 (N.Y. Sup. Ct. 1997).

[11] 245 A.D.2d at 1000, 667 N.Y.S.2d at 442.

[12] 720 S.W.2d 830, 833 (Tex. Ct. App. 1986).

[13] 727 F.2d 202, 206-207 (2d Cir. 1984).

able to correct a slight bank to the left, and did not go into its 90-degree left plunge until only 3 seconds before it crashed," and the rolling of the plane, the only possible indicia of danger to this particular passenger, was as compatible with normal airline traffic patterns as with imminent disaster. The court found "no evidence permitting an inference that Shatkin was aware that the left engine had been lost on take-off; since he was seated on the right side of the wide-bodied plane, it would be sheer speculation to infer that he knew of the incident. There was no evidence that the pilot or anyone else called the danger to the passengers' attention. As far as the record is concerned Shatkin could have dozed off in his seat."[14]

In *Shu-Tao Lin v. McDonnell Douglas Corp.*, [15] the court (with Judge Friendly on both panels) concluded that the jury could reasonably find that a passenger in a window seat over the left wing of the airplane could have seen the left engine and a portion of the wing break off at the beginning of the flight and suffered preimpact mental anguish during the 30 seconds before the plane crashed. Although seated on the other side of the aircraft from Shatkin, it was just as likely that Dr. Lin had dozed off and a finding that he was looking out the window and aware that the engine had broken off during take-off would have been based on sheer speculation. Nevertheless, the court affirmed the $10,000 award for preimpact pain and suffering.

In *Solomon v. Warren*,[16] the pilot of a small plane en route to Barbados radioed air traffic control that the fuel gauges on the aircraft were reading empty and that he would attempt to ditch the aircraft near a merchant vessel. Despite an extensive search of the area, no sign of the aircraft or its occupants was ever found. The trial court awarded the "very modest" and "minimum compensation" of $10,000 each for conscious mental pain and suffering to the estates of two passengers. The panel's majority affirmed, finding the awards "on the very low side."[17]

Although "there was no evidence as to the length of time that the [passengers] suffered prior to death, or whether [they] were killed upon impact or survived for some time in the water," the trial court stated that it was "convinced that both of the deceased knew of the impending crash landing at sea, knew of the immediate dangers involved and are certain to have experienced the most excruciating type of pain and suffering (the knowledge that one is about to die, leaving three cherished children

[14] *Id*.
[15] 742 F.2d 45 (2d Cir. 1984).
[16] 540 F.2d 777, 783 (5th Cir. 1976), *cert. denied* (1977) (Florida law).
[17] *Id.* at 793.

alone)."[18] The majority agreed. "While the evidence at trial was silent as to the exact length of time that the [passengers] were aware of the probability of their impending deaths, nevertheless the inference is reasonable, almost compelling, that they appreciated that possibility at least from the time of the radio transmission from [the pilot] to Barbados Tower."[19]

The dissent stated, "[w]e may, or may not, be acting on unknown facts involving a martyr's death or deaths: unknown hours (or days) at sea, followed by a shark attack or by exhaustion and death by drowning. Or the truth may involve a confident approach to ditch alongside a freighter which was assumed to have seen the aircraft, followed by a sudden stall and instant death. We cannot know, nor could the court below have known. Yet an award of $20,000 has been made, apparently in the view that these constitute nominal damages. The majority has opened the door to such uncertainties by reversing the sequence of impact followed by pain and suffering."[20]

In *In re Air Crash Disaster Near New Orleans, LA,*[21] a plane crashed shortly after takeoff. A witness on the ground testified that upon hearing trees cracking she looked up and saw the plane with its wings perpendicular to the ground. Moments later it crashed, exploded, and burned. The Fifth Circuit held that the "combination of circumstances, the unusual sound of the engines, the violent maneuvering of the large aircraft until it was flying 90 degrees off level, with a wingtip smashing trees as it plummeted to the ground, provided an adequate basis from which the jury could draw reasonable inferences about the mental state of the passengers in the final seconds before the disastrous impact." The panel reduced the awards of preimpact fear and anguish from $25,000 to $7,500 for each passenger, and this was upheld after a hearing *en banc*.

In *Beynon v. Montgomery Cablevision L.P.*,[22] the Maryland Court of Appeals surveyed the case law around the country and, while Maryland requires "physical impact or injury directly resulting in harm" in order for mental or emotional injuries such as fright to be compensable, the court held that "[t]he fact that the fright or mental anguish preceded the crash [or other event] that resulted in the decedent's fatal bodily injuries does not affect causation." The majority reasoned that "[a] rule that does not

[18] *Id.* at 792.
[19] *Id.*
[20] *Id.* at 797.
[21] 789 F.2d 1092, 1098 (5th Cir. 1986) (*en banc*), *vacated on other grounds,* 490 U.S. 1032 (1989*).*
[22] 351 Md. 460, 506, 718 A.2d 1161, 1184 (Md. 1998).

permit a decedent's estate to recover pre-impact fright damages in a survival action would be illogical in view of the fact that a victim who survives an accident similar to the one in this case would be entitled to recover damages for the emotional distress and mental anguish he or she suffered before the accident, independent of any physical injury that may have been sustained before, or after, the emotional injury. The purpose of survival statutes is to permit a decedent's estate to bring an action that the decedent could have instituted had he or she lived. Here, there is no question that, had he lived, the decedent would have been permitted to recover damages for the 'pre-impact fright' he suffered before crashing into rear of the tractor - trailer."[23] The majority found that from the 71½ feet long skid marks made by the decedent's vehicle immediately prior to the actual crash, a jury reasonably could have inferred that "the decedent was aware of the impending peril, that he was going to crash, and attempted an evasive maneuver to avoid it. The jury equally reasonably could have concluded that the decedent suffered emotional distress or fright during that period before the crash, after he became aware of the imminent danger and began braking. This is not rank speculation." [24] While the fact that decedent was taking evasive measures to avoid the collision was not "rank speculation," what, if anything, he was thinking of during that time is pure speculation.

The jury in *Benyon* awarded $1,000,000 in damages for the 1½ to 2½ seconds of fright that it assumed Mr. Beynon must have suffered before crashing into the rear of Mr. Kirkland's truck. The statutory "cap" on noneconomic damages then in effect required the award to be reduced to $350,000, and, as reduced, it was affirmed. The dissent distinguished Mr. Benyon's case from that of a passenger in an out-of-control airplane, or the driver of a truck stalled at a railroad crossing in the path of an oncoming train, who were "obviously aware of an impending disaster that they, themselves, could do nothing to avert" and whose minds are "free to contemplate, even if momentarily, the awful reality of which it about to occur."[25] The dissent believed that "[w]hen, as in Mr. Beynon's case, the person either reacts instinctively or marshals his or her whole being in a supreme effort to control the event, *absent some evidence beyond merely that effort*, it is purely speculative to infer that the decedent was consciously pondering the effects of an impending death."[26]

The problem, according to the dissent in *Benyon,* is not merely one of amount — "the jury's actual

[23] *Id.* at 504.
[24] *Id.* at 508-509.
[25] *Id.* at 512.
[26] *Id.*

award amounted to at least $400,000 per second of fright, later reduced to $140,000 per second of fright. . . . Whether the award is great or small, when grounded on nothing more than skid marks or other evasive action, it can only be a sympathy verdict based not on any substantial evidence of fright but rather on a desire either to compensate the decedent's beneficiaries for his or her death, beyond what is allowed in a wrongful death action, or to punish the wrongdoer."[27]

In the *91st Street Crane Collapse Litigation,*[28] Leo, the crane operator, was trapped in the glass cab that teetered and then fell backward from a height of 200 feet, struck another building and bounced off a number of terraces before reaching the ground where it crashed onto his co-worker, Turtaj, who was trapped under the wreckage with multiple bone-shattering injuries as a result of being hit with the heaviest components of the collapsing crane.[29] While the jury could find that each man was aware of his impending death, "[a]ccording to witnesses, the collapse occurred "very rapidly," *i.e.*, taking between 10 and 45 seconds," and Leo was knocked out when the crane struck another building.[30] The New York Appellate Division reduced the two identical jury awards of $7.5 million each for "inconceivable preimpact terror" to $2.5 million for Leo and $2 million for Kurtaj, with no explanation for its action or the $500,000 difference other than saying that each award "materially deviates from reasonable compensation."[31] The decision has been hailed by the plaintiff's personal injury bar because "human suffering was not reduced to seconds or minutes" and the sums awarded "represent new plateaus for these types of damages in New York."[32]

II. Expert evidence

In *Haley v. Pan American World Airways, Inc.*,[33] the plane took off and rose to an altitude of 163 feet before beginning its fatal descent during which its wing struck a tree and the aircraft rolled, impacted and disintegrated some four to six seconds later, killing all passengers and crew. The jury awarded Michael Haley's parents $15,000 for the mental anguish suffered by their son "prior to the first impact between the plane and the ground." Plaintiffs' expert, "a psychiatrist who had

[27] *Id.*
[28] 154 A.D.3d 139, 153, 62 N.Y.S.3d 11, 22 (N.Y. Sup. Ct. 2017).
[29] *Id.* at 22.
[30] *91st Street Crane Collapse*, Brief for Defendants-Appellants, p. 50.
[31] *Id.* at 23.
[32] Robert Kelner and Gail Kelner, "Pre-Impact Terror and Conscious pain and Suffering in Wrongful Death Cases," NEW YORK LAW JOURNAL, Sept. 25, 2017, p.3.
[33] 746 F.2d 311, 316-317 (5th Cir. 1984),

treated survivors of aircraft accidents and was familiar with the physiological effects of stress, rendered his opinion that 'most of the people [aboard Flight 759], if not all, would be in an absolute state of pandemonium, panic and extreme state of stress,' at least from the time the plane hit the tree, if not from the beginning of its descent and roll, until impact seconds later."[34] Although "[n]o one indeed will ever 'know' whether Michael Haley was aware of his impending death, or whether he experienced the uncontrollable 'panic' of which his [expert] testified," the court found the "inference is more than 'reasonable,' however, that Michael apprehended his death at least from the time the plane's wing hit the tree" and that "[o]ne need not 'speculate' that the decedent was aware, for at least four to six seconds, of the impending disaster. The jury could have reasonably inferred therefrom that Michael Haley experienced the mental anguish commonly associated with anticipation of one's own death."[35]

In *Stein v Leibowitz-Pine View Hotel,*[36] the court affirmed an award of $50,000 for conscious pain and suffering where decedent was found dead at the bottom of the hotel's indoor swimming pool and plaintiff's expert testified that "a person drowning would live four to eight minutes and struggle prior to death." In another drowning case,[37] the court upheld an award of $5,000 for physical pain and mental anguish suffered by a 3-year-old boy found dead at the bottom of a swimming pool. A doctor who arrived on the scene within a few minutes after the boy was lifted from the pool, examined him and saw no bruises or marks which might indicate that he may have fallen against a hard object and was unconscious before becoming entering the water. In his opinion, the boy died of drowning after struggling for two or three minutes before losing consciousness.

III. Eyewitnesses

In *Snyder v. Whittaker Corp.*,[38] the supervisor on a drilling platform on the outer continental shelf testified that he felt a jar like the impact boats normally made when attempting to dock at the platform. He saw a shrimp boat with two crewmembers, one of whom leaned over to examine the hull near the bow. They showed no signs of distress. About 45 minutes to an hour later, he was told that a shrimp boat was sinking about 300 feet away. In the dusk, he thought he could see a capsized boat and a

[34] *Id.* at 316.
[35] *Id.* at 317.
[36] 111 A.D.2d 572 (N.Y. Sup. Ct. 1985).
[37] Mitchell v. Akers, 401 S.W.2d 907 (Tex. Civ. App. 1966).
[38] 839 F.2d 1085, 1088 (5th Cir. 1988) (Tex. law).

figure clinging to it. Coast Guard divers found the boat 40 feet below the surface with a sizeable hole in the hull that appeared to have burned through from a heat source within the vessel. The bodies of the two men were never found. Defendant's own expert testified that, under the weather conditions that night, a man could survive from eight to twenty hours in the water.[39] The court found the jury could reasonably infer that the two men struggled for several hours in the water and $100,000 for each decedent was affirmed as not an abuse of discretion.

In *Thomas v. State Farm Ins. Co.*,[40] decedent's son Scott, driver of the car he and his mother were in, saw an oncoming car lose control and cross over the divider into his lane. Scott testified that he "hit his brakes and exclaimed, 'Oh, no, mom!' she looked up and saw the car coming, and she reached over and grabbed [his] arm, and she gasped, which is a frequent thing that she did when she was frightened." The crash took place immediately thereafter. Mrs. Thomas was killed or rendered unconscious upon impact or seconds later. While this testimony was sufficient to support the trial judge's award for preimpact terror, "[b]ecause only a few seconds could possibly have elapsed between the time Mrs. Thomas realized what was happening and the time of impact," the appellate court reduced the award from $15,000 to $7,500.[41]

In *Chapple v. Gangar*,[42] decedent's 10-year old son, Christopher, was severely injured while a passenger in a car driven by his mother, who was killed in a fatal two-car collision. Her death was almost instantaneous and Christopher had no memory of the accident. However, during his hospital stay, Christopher, "on one occasion when he was not fully cognizant, screamed 'Watch out, Mom! Watch out, Mom!' Thus, there is credible evidence that both mother and son were aware of and did appreciate the impending impact at least several seconds before it happened, even though there is no evidence Ms. Chapple had sufficient time to physically react with the vehicle." The court found this sufficient evidence of fear and awarded decedent $25,000 preimpact damages.

In *Lubecki v. City of New York*,[43] decedent, who had been taken as a hostage during a bank robbery and was being used as a shield by the robber, received three gunshot wounds during a shootout between the robber and the police. "One bullet penetrated her left thigh and

[39] *Id.* at 1092-1093.
[40] 499 So. 2d 562 (La. App. 1986).
[41] *Id.* at 563.
[42] 851 F. Supp. 1481, 1487 (E.D. Wash. 1994).
[43] 304 A.D.2d 224, 229-230, 758 N.Y.S.2d 610, 614 (N.Y. Sup. Ct. 2003).

traveled for about five inches before exiting on the other side of her thigh, a second bullet entered her right ankle, shattering her tibia and her fibula, and the third bullet entered her chest, pierced her heart and lodged in her back." After the shooting stopped, Ramon Santiago, the hostage's brother "went to his sister and spoke to her. She turned her head and tried to speak, began rolling her eyes and moving her fingers. He observed her leg was 'split in half' and blood was coming from her groin and chest. The paramedics gave her a couple of electric shocks and took her by ambulance to the hospital. Santiago went to the hospital by taxi and waited for about an hour before a doctor told him that Ms. Vargas 'just died.'"[44]

The Appellate Division, First Department, found that an award of $3,000,000 to the decedent (reduced by the trial court from $4,500,000) "does not deviate materially from reasonable compensation considering the preimpact terror experienced and the significant injuries sustained before her death." The court did not distinguish between the decedent's pain from her wounds and the preimpact terror she experienced during the interval after the police ordered the robber to drop his gun and the shooting occurred; there was no suggestion that she was in fear for her life before that time as the robber's gun was not pointing at her head or chest.[45]

Today in New York, in wrongful death actions where preimpact terror is claimed, there are separate lines on the verdict sheet in which the jurors are instructed to state the amount awarded for the specific category of damages, including "Emotional pain and suffering [decedent] endured between the moment [decedent] realized that (he, she) was going to be gravely injured or die and the moment [decedent] sustained a physical injury," and "Pain and suffering of [decedent] from the moment of physical injury to the moment of death"; if no award is made for any item, the jurors are to insert "none" as to that item.[46] The Pattern Jury Instruction to be charged when there is evidence that the decedent experienced preimpact terror is:

> Plaintiff is also entitled to recover the amount you find that will fairly and justly compensate for the emotional pain and suffering actually endured by AB between the moment AB realized that (he, she) was going to be gravely injured or die and the moment AB sustained a physical injury. In order to find that plaintiff is

[44] *Id.*
[45] *Id.* at 228.
[46] N.Y. Pattern Jury Instructions, 1B PJI3d 2:320 at 1008-1009 (2017).

> entitled to recover for these damages, you must find that (a) AB was aware of the danger that caused (his, her) grave injury or death, (b) AB was aware of the likelihood of grave injury or death, and (c) AB suffered emotional distress as a result of (his, her) awareness of (his, her) impending grave injury or death.[47]

IV. The unpredictability of awards and the need for courts to impose limits

As shown below, awards for preimpact terror range from very modest amounts ($5,000, $7,500 and $10,000) to substantial sums ($100,000, $250,000), to the unimaginable windfalls for the survivors that have been allowed by the New York Appellate Division ($2 million, $2.5 million and $3 million) and are equivalent to their being given winning lottery tickets.

It is virtually impossible for judges, lawyers and insurance company claims professionals to objectively evaluate preimpact terror claims for settlement because courts often reduce or increase awards with no explanation beyond the statement that the award "deviates materially from what would be reasonable compensation."[48] Such cryptic opinions do not give any practical guidance to attorneys who must advise their clients whether an offer or demand is fair and reasonable, or to insurance company claims personnel who must set adequate reserves necessary to maintain the solvency of their company and decide whether to accept settlement offers, or to judges tasked with making or reviewing such awards. These individuals need more than generalizations; they need tools to assist them in trying to predict what would be the highest amount still considered "reasonable compensation" by an appellate court that will review the award. Meaningful settlement negotiations cannot take place unless there is some commonly understood and agreed upon basis whereby all interested parties can assess how the courts are likely to react to the facts of their case. At present, there is none.

Unfortunately, there is "no magic or precise mathematical formula for computing damages" in death actions.[49] Each case is necessarily different, with the outcome dependent on the application of discretion to always varying fact patterns. Therefore, "the fixation of damages in personal injury action is peculiarly a function

[47] 1B NY PJI3d 2:320 at 1007 (2017).
[48] N.Y. C.P.L.R. § 5501(c).
[49] Rinaldi v. State, 49 A.D.2d 361, 364, 74 N.Y.S.2d 788, 792 (N.Y. Sup. Ct. 1975).

of the jury." [50] At the same time, neither jurors nor courts should have unfettered license to give away other people's money. Reviewing courts, "as an exercise of public policy, must control verdicts within flexible limits."[51]

While the power to determine what is reasonable compensation in a particular case is discretionary, "`there must be a basis of fact or circumstance for its exercise.' Judicial discretion is a phrase of great latitude; but it never means the arbitrary will of the judge." [52] Verdicts far above or below the average in similar cases should not be allowed to stand without a clear explanation from the court for the difference in results. Too often, such explanations are missing.

In *Donofrio v. Montalbano*,[53] the New York Appellate Division, Second Department, of the New York Supreme Court sitting in Brooklyn, ordered a new trial unless plaintiffs stipulated to reduce the verdict for conscious pain and suffering from $1,500,000 to $100,000, explaining that where "the duration within which the decedent could have experienced any preimpact terror was limited to only several seconds, [it] warrants, at best, a minimal award." Courts in other jurisdictions would not view as "minimal" $100,000 compensation for "several seconds" of preimpact terror — if, in fact, that is what the decedent experienced when the speeding car he was driving went out of control, started fishtailing and hit a tree causing him to lose consciousness upon impact. In any case, in *91st Street Crane Collapse,* the Appellate Division, First Department, across the East River in Manhattan, upheld awards of $2,500,000 and $2,000,000 (reduced from $7,500,000 each) for preimpact terror of short duration with no explanation other than that each award "materially deviates from reasonable compensation." While it is generally impossible to know what decedents were thinking or experiencing in the interval between their awareness of impending death and the physical injuries that caused their deaths, the cases offer some points of similarity that can be used as a basis for comparison; (i) the type of accident and cause of death (airplane crash, automobile/truck collision, one-car leaving the roadway and striking an object or going off a bridge or over a cliff, an unwitnessed drowning), (ii) the length of time the decedent had to reflect on his or her inevitable

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[50] Hallenback v. Caiazzo, 41 A.D.2d 784, 340 N.Y.S.2d 947, 949 (N.Y. Sup. Ct. 1973).

[51] Miner v. Long Island Lighting Co., 47 A.D.2d 842, 847, 365 N.Y.S.2d 873, 881 (N.Y. Sup. Ct. 1975) (Hopkins, J., dissent), *rev'd on other grounds*, 40 N.Y.2d 372 (1976).

[52] *In re* Superintendent of Banks, 207 N.Y. 11, 15 (N.Y. Ct. App. 1912).

[53] 240 A.D.2d 617, 618, 659 N.Y.S.2d 484, 485 (N.Y. Sup. Ct. 1997).

death, (iii) whether the decedent lacked control over the event and was "free to contemplate, even if momentarily, the awful reality of which was about to occur," as a passive passenger in a car or airplane or a pedestrian suddenly struck by a falling object, or (iv) was an active actor who may have been "react[ing] instinctively or marshal[ing] his or her whole being in a supreme effort to control the event," with likely no thoughts of anything else.[54]

While there may always be inexplicable outliers in the decisions, judicial consideration of these and other similarities should more readily indicate whether a preimpact terror claim or award "deviates materially from what would be reasonable compensation."

[54] *Beynon*, 351 Md. at 512, 718 A.2d at 118.

V. Survey of sustained awards for preimpact terror

Set forth below is a survey of awards for preimpact terror.

AWARD	TIME	CASE
$5,000	unknown	Solomon v. Warren, 540 F.2d 777 (5th Cir. 1976)
$5,000	2-3 min.	Mitchell v. Akers, 401 S.W.2d 907 (Tex. Civ. App. 1966)
$7,500	few sec.	Thomas v. State Farm Ins. Co., 499 So. 2d 562 (La. App. 1986)
$7,500	brief	*In re* Air Crash Disaster Near New Orleans, LA., 789 F.2d 1092, 1099, *rehearing en banc*, 789 F.2d 1092 (5th Cir.), *vacated on other grounds,* 490 U.S. 1032 (1989) (reduced from $25,000 each)
$10,000	unknown	Solomon v. Warren, 540 F.2d 777, 783 (5th Cir. 1976)
$10,000	30 sec.	Shu-Tao Lin v. McDonnell Douglas Corp., 742 F.2d 45 (2d Cir. 1984)
$15,000	4-6 sec.	Haley v. Pan American World Airways, Inc., 746 F.2d 311 (5th Cir. 1984)
$15,000	<1 min.	United States v. Furumizo, 381 F.2d 965, 967 (9th Cir. 1967)
$19,500	6-8 sec.	Missouri Pac. R. Co. v. Lane, 720 S.W.2d 830, 833 (Tex. Ct. App. 1986)
$25,000	several sec.	Chapple v. Gangar, 851 F. Supp. 1481, 1487 (E.D. Wash. 1984)
$50,000	4 – 8 min.	Stein v Leibowitz-Pine View Hotel, 111 A.D.2d 572 (N.Y. Sup. Ct. 1985)
$100,000	5 sec.	Lang v. Bouju, 245 A.D.2d 1000, 667 N.Y.S.2d 440 (N.Y. Sup. Ct. 1997)
$100,000	few sec.	Donofrio v. Montalbano, 240 A.D.2d 617, 659 N.Y.S.2d 484 (N.Y. Sup. Ct. 1997) $1.5 million verdict reduced to $100,000)
$100,000	several hrs.	Snyder v. Whittaker Corp., 839 F.2d 1085, 1092-1093 (5th Cir. 1988) (Tex. Law)
$250,000	15 min.–1 hr.	Torelli v. City, 176 A.D.2d 119 (N.Y. Sup. Ct. 1991) (preimpact terror & pain from physical injuries; $1,074,000 verdict reduced by trial court to $75,000, increased by Appellate Division to $250,000)
$250,000	2+ sec.	Grevelding v. State of N.Y., Ct. Claims No. 109855 (2013); 132 A.D.3d 1332 (N.Y. Sup. Ct. 2015), *lv. to app. den*., 27 N.Y.3d 905 (2016)
$350,000	1½ -2½ sec.	Beynon v. Montgomery Cablevision L.P., 351 Md. 460, 718 A.2d 1161 (Md. 1998)
$2,000,000	unknown	*In re* 91st Street Crane Collapse Litigation, __ A.D.3d __, 2017 N.Y App. Div. LEXIS 6404 (N.Y. Sup. Ct. Sept. 12, 2017) ($7.5 million verdict reduced to $2 million) (Kurtaj)
$2,500,000	10-45 sec.	*In re* 91st Street Crane Collapse Litigation, __ A.D.3d __, 2017 N.Y App. Div. LEXIS 6404 (N.Y. Sup. Ct. Sept. 12, 2017) ($7.5 million verdict reduced to $2.5 million) (Leo)
$3,000,000	unknown	Lubecki v. City of New York, 304 A.D.2d 224, 758 N.Y.S.2d 610 (N.Y. Sup. Ct. 2003) (preimpact terror & pain from physical injuries)

VI. A Suggestion

In most cases, one can never know what an accident victim's last thoughts were and whether he or she was at peace with or panic-stricken by the prospect of impending death. Reviewing courts cannot make meaningful factual distinctions based on individual experiences to determine what may be considered reasonable compensation for "preimpact terror." At most, they can look at what other courts have done in cases involving similar types of accidents and similar durations of time between the decedent's awareness of impending death and the fatal impact. This has led to wide disparity in awards, ranging from $5,000 to $2,500,000, with no explanation for why the presumed (and that is all it can ever be) preimpact terror of one person deserves compensation 500 times as great as that of another.

Perhaps, as a matter of public policy, it would be more just if the legislatures or highest courts of each state considered enacting or ruling that a "one size fits all" schedule of specified amounts is to be considered "reasonable compensation" for preimpact terror depending on the length of time between awareness of impending death and the fatal impact, and other identified factors commonly found in the cases. This could be analogous to a workers' compensation schedule of awards for loss of a leg or an eye, etc., with an inflation factor. Admittedly, this would be an arbitrarily chosen amount, but at least it would treat equally all objectively similarly situated decedents and not reward some of their survivors with the equivalent of a winning lottery ticket.