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Compensation for Fear of Contracting Asbestos-Related Diseases: Critical Reflections on an Important U.S. Supreme Court Opinion and its Relevance for Europe

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Compensation for Damage to Parties on the Ground as a Result of Aviation Accidents

1. Introduction

Not too long ago, The Netherlands were shocked by an aircraft accident causing considerable surface damage. An El Al Boeing 747 cargo plane crashed some ten minutes after departure into an apartment building in the Bijlmer neighborhood of Amsterdam on 4 October 1992. The building was destroyed and many people lost their lives as a consequence of the crash. This accident raised questions about the application of international air law, its deficiencies, and the efficacy of recourse to national law, especially of the US and The Netherlands.¹

More than 40 people died and dozens more were seriously injured when the plane crashed into the apartment building. The damage was substantial both in terms of human suffering as well as in damage to property. Although the human suffering can be partially expressed in terms of injuries and deaths, injuries from such an accident can range well beyond the physical. In the case of psychiatric damage, one first thinks of victims who were directly affected and who will, because of the accident, encounter problems of a psychiatric nature such as attacks of fear or anxieties. But one also has to think of those victims who, although not directly affected themselves by the accident, have lost loved ones, or even have seen their loved ones being killed. These losses cause them to suffer mentally as well.

Although neither Boeing nor El Al have accepted legal responsibility for the accident, in the mean time, compensation has been paid out in settlements for deaths, physical injury and damage to property of the victims. A more difficult question has been whether to compensate for the psychiatric damage of those who have not suffered direct physical injury themselves. In settling the Bijlmer disaster, this question was dividing the parties involved.

In this article, we will address two subjects:

(1) Should the courts apply principles of ne-

gligence or strict liability to the claims of parties on the ground who are damaged as a result of an aviation accident? and

(2) Should the courts consider granting compensation for psychiatric damage as one element of the claims of these parties?

2. Negligence or Strict Liability?

2.1. The Situation under Dutch Law

The law regarding aviation is governed in part by international treaty law. In the case of damage on the ground, the Convention of Rome 1952 applies in many instances.² The convention uses strict liability as its point of departure. However, it has never become very popular as a result of a number of restrictions that are imposed on liability on this basis and the limits that are imposed on the amount of compensation.

In the case of the Bijlmer air disaster, neither The Netherlands nor Israel (owner of El Al) were parties to the Convention of Rome. As a result, local, in this case Dutch, law applies. To the bewilderment of many people in The Netherlands, it turned out that the victims on the ground could not rely on strict liability. It is true that in The

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1. See further P. Mendes de Leon and S. Mirmina, 'The International and American Law Implications of the Bijlmer Air Disaster', *Leiden Journal of International Law* 1993, p. 111 *et seq.*

2. *Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface*, signed by eighteen countries on 7 October 1952. The Convention was subsequently signed by an additional 33 countries. See on this convention in great detail the loose-leaf *Air Law* nr. 1, Martin, McClean, Martin and Margo, Div V, Ch 20 (Surface Damage). See further I.H.Ph. Diederiks-Verschuur, *An Introduction to Air Law*, Deventer 1993, Ch. VI (Surface Damage and Collisions).

Netherlands there is a brand-new Civil Code which contains numerous strict liabilities (based on risk), but the liability for damage caused by air traffic has not yet been regulated in it. In The Netherlands, a new regulation as part of the new transport law is still pending. Although there is strict liability for defective objects (things), airplanes have been specifically excluded from this.

As a result, until the new transport law is adopted, the general rules regarding negligence will be applicable (Art. 6:162 Civil Code). There is the possibility of products liability of the producer of the airplane (Art. 6:185 *et seq.* Civil Code). This rule stems from a European Directive, which again has certain restrictions of its own.³ But if product liability law is not applicable, under Dutch law, the airline company El Al is not liable unless it can be proven that the crash of the Boeing aircraft was the result of El Al's inadequate maintenance or poor control of the airplane by El Al's pilot, or of some other cause which can be attributed to the airline.⁴ Therefore, The Netherlands now have the somewhat strange situation that someone who causes damage to an apartment window with a radio-controlled toy airplane will be held to a strict liability standard, whereas when a fully-loaded Boeing 747 crashes into an apartment building, the operator is liable only if the victim can prove negligence. We should add, however, that if the court considers it appropriate it could shift the burden of proof from the victim to the defendant. And of course planes do not appear out of thin air without someone being negligent and therefore a shift of the burden of proof may seem reasonable in most cases. Therefore in the US liability in many airline accidents is conceded.⁵ The reason is probably that with *res ipsa loquitur*, as a practical matter, the airline usually will have to demonstrate that they were not responsible for the accident. After all, common causes of accidents such as pilot error, inadequate screening for bombs and poor maintenance are all their problems. Nevertheless, from the point of view of the victim, strict liability would be preferable to a negligence based liability.

The expectation is that the Dutch legislature will soon start work on a special strict liability for airplanes but that liability will be limited. At the present time, in The Netherlands, as in most European countries, there is no monetary limit for injury. Although airlines have a substantial third-party insurance cover, we assume that no in-

urance policy will provide for unlimited liability. The capacity of the international insurance market to provide coverage for excess liability controls the possibility of finding adequate insurance cover. Some commentators have pointed out that the possibilities of coverage are decreasing rather than increasing in the insurance market.⁶ Thus, one obvious solution would be for the legislature to limit the total amount of compensation that has to be paid for damage caused by any one aviation accident.

But one could also consider the creation of other restrictions. The law could provide that only certain losses would qualify for total compensation. For example, the Dutch Civil Code limits the strict liabilities (risk liabilities) for defective moveable things (Art. 173), for defective constructions (Art. 174), and for dangers to persons or things (objects). Loss of profits may fall outside the scope of these strict liabilities.

2.2. The Situation under US Law

One might have assumed that in the US, to the rest of the world the ultimate strict liability country, the standard of liability would have been resolved in favor of the victims on the ground long ago. Remarkably, this has not been the outcome at all. In the American law on aviation, one can see a rather unusual development: not a development from negligence to strict liability but – exactly the opposite – from strict liability to negligence!

In the nascent days of aeronautics, the American author Appel explains,⁷ flying was generally considered to be an ultra-hazardous activity which warranted the imposition of strict liability on its active participants for damage caused on the ground by the ascent, flight, or descent of an air-

3. Such as the short statutes of limitation and the limitation of material damage.

4. R. Cleton, NJB 1993, p. 624 (in Dutch).

5. David L. Farnbauch, 'Pre-Impact Pain and Suffering Damages in Aviation Accidents', 20 *Valparaiso L. Rev.* 219, 252 (1989) makes this statement.

6. Cleton, *op cit.* p. 625.

7. William J. Appel, Strict liability, in absence of statute, for injury or damage occurring on the ground caused by ascent, descent, or flight or aircraft, 73 *ALR4th* 416 (1989). Citations to older articles are cited in *Prosser and Keeton on Torts* (5th ed. 1984), p. 556 n. 44.

craft. Many states had legislation, modelled after the *Uniform Aeronautics Act* (1922), which imposed strict liability on aircraft owners and lessees for ground damage. The view that flying was an ultra-hazardous activity was also reflected in par. 520 of the first Restatement of Torts, which was promulgated in 1938. The Restatement (Second) continues to take the view that the owners and operators of aircraft should be held strictly accountable for damage caused on the ground (par. 520A Restatement (Second) of Torts). However, the trend of modern opinion is that flying is no longer an ultra-hazardous activity, and, therefore, it is no longer appropriate to impose strict liability on the owners and operators of aircraft for damage occurring on the ground. There is, however, a minority opinion that strong public policy reasons exist which justify the *continued* imposition of strict liability.

What are the arguments for and against strict liability? The arguments in favor of strict liability for aviation accidents are similar to the ones which apply traditionally to every type of activity in which strict liability has been imposed. In his article, Appel summarizes them briefly⁸:

(a) the unequal distribution of the benefits and risks of aviation between those in the air and those on the ground, especially where the victim is not a participant in the aviation enterprise;

(b) the difficult and expensive burden of proof faced by the plaintiff in an aviation accident case;

(c) the ability of the aircraft owner to spread the financial risk through its enterprise or through insurance; and

(d) the high degree of harm that ensues, despite the exercise of due care, when an airplane crashes.

On the other hand, there are several policy arguments favoring negligence:

(a) flying can no longer be considered an ultra-hazardous activity. For example, it is a far safer activity than automobile transportation;

(b) ground damage can be sufficiently reduced through the exercise of due care and through continual technical improvements;

(c) although the plaintiff's recovery will depend on a showing of negligence, often, the plaintiff will be able to employ the doctrine of *res ipsa loquitur* to establish negligence. *Res ipsa* is now frequently used in aviation crash cases and is widely recognized as an acceptable means of proving negligence;⁹

(d) transportation by air has great social utility;

(e) insurance arguments: it is not possible to obtain coverage for accidents where the number of claims might possibly be unlimited.

A fine example of the use of these policy arguments, both for and against strict liability, can be found in the case of *Crosby v. Cox Aircraft Co. of Washington*. In *Crosby*, the pilot flew the airplane over the Olympic Peninsula of the State of Washington and then turned back to Seattle, intending to land at Boeing Field. However, the plane ran out of fuel in mid-flight, and the pilot could not land safely. The airplane crash-landed on the roof of Mr. Crosby's garage, causing \$3,199.89 in damages.

A bare majority of the judges of the Supreme Court of the State of Washington selected negligence as the basis for any possible liability. They relied especially on the argument that flying is no longer an ultra-hazardous activity. However, the majority's position avoided the primary thrust of the dissent. The dissent took the position that

'...in fact and theory, it is a policy question whether to impose liability upon the pilot and owner of an airplane which crashes into the person or property of a wholly innocent person on the ground. Compelling, persuasive policy reasons exist to impose such strict liability. Those reasons should be explored and evaluated rather than simply accepting the pigeonhole conclusion that aviation is not abnormally dangerous as defined by ... the Restatement.'

The dissent therefore argued that the burden of loss should be placed on the 'person who voluntarily chose to fly that airplane, for his own purpose and benefit' and not on the 'wholly innocent, nonactive, nonbenefitted, but damaged person.' The dissent also cited problems of plaintiffs in proving negligence, even with the aid of *res ipsa loquitur*.

In a comprehensive article on 'strict liability for hazardous enterprise' the American Jones briefly says the following about the *Crosby* case:

'It would be difficult to imagine a stronger case for strict liability. The injury is the product of either negligence or unavoidable hazard. If negligence is pres-

8. William J. Appel, Annotation, 73 ALR4th 416 (1989).

9. E.g., *Crosby v. Cox Aircraft Co. of Washington*, 746 P.2d 1198, 1202 (Wash. 1987) (majority opinion).

ent, then liability is clear. If negligence is absent, the unavoidable hazard is clearly a result of aviation, not of ground activity. Victims are powerless to guard against airplane crashes and aircraft debris. Nor is this the kind of case in which transaction costs should be trouble. Some aviation accidents of this type are infrequent occurrences and almost certainly will generate claims and litigation whether the rule is negligence or strict liability.¹⁰

We agree. Ground damage is an area where the policy reasons to impose strict liability seem strong, and the countervailing reasons supporting the need for using negligence as the basis for liability seem much less powerful.¹¹

3. Infliction of Emotional Distress to Persons on the Ground

3.1 The Concern with Compensating for Psychiatric Damage of Persons on the Ground

Psychiatric damage has become more and more a focus of attention over the last few years in liability law in general. Air crashes are no exception. In addition to damage to property and physical injuries, psychiatric damage will occur in many aviation accidents. One could imagine all types of anxieties and neuroses resulting from an aviation accident which negatively influence daily life. The consequences could range from the fear of ever flying (again) to more serious effects such as unemployment or divorce.

This applies of course to all those victims who sustained physical injury themselves. But we should not forget that where we have damage on the ground due to plane crashes, the number of potential victims will be a lot larger. The difficulty lies often with bystanders, who might have witnessed the accident, or relatives of passengers who, from a distance, were also victims of the disaster as a result of the harm done to their loved ones. Should any of these bystanders qualify for compensation of their psychiatric damage?

Cases involving such accidents have forced courts to examine the outermost limits of recovery for bystanders who, although themselves not physically injured, have nevertheless suffered extreme emotional shock and psychological injury. Scientific psychiatric research after the Lockerbie, Scotland air disaster has shown how severe that psychiatric damage can be.¹² However, courts in many countries, like the US, have often expressed a certain reserve in granting an award for damage to the psyche.

The arguments in favor of this caution are familiar. They usually fall into the following categories:

- (i) mental disturbance often will be of a temporary and slight nature,
- (ii) psychiatric damage can be simulated,¹³
- (iii) determining the nature and duration of the damage is often difficult,
- (iv) the plaintiff may have an 'eggshell skull', i.e., he/she may be especially vulnerable to psychiatric damage,
- (v) the emotional distress harm may become manifest at a time and place that is too remote from the alleged cause of the injury,
- (vi) there will be an infinite number of emotional distress claims filed in court, in denying claims, courts often raise the spectre

10. William K. Jones, 'Strict Liability for Hazardous Enterprise', *Columbia Law Review* 1992, p. 1748. Anyone who examines the opinions in the US will notice that in legislation and case law, there is a strong preference for the negligence approach whereas authors of scholarly articles usually opt for strict liability. See *id.*, p. 1747, footnotes 215-220.

11. We assume that even in a strict liability regime, the operator of the aircraft could avoid some or all of the liability by proving that another responsible actor should provide indemnification. For example, at this writing, the cause of the crash of TWA 800, off the shore of New York State, is unsolved. Should it be determined that Boeing delivered a defective product to TWA, or if the wildest speculation turns out to be true, that the US Navy shot the plane out of the sky accidentally, TWA should be able to seek indemnification from those entities.

12. See Neil Brooks and William McKinlay, 'Mental Health Consequences of the Lockerbie Disaster', *Journal of Traumatic Stress*, 1994, pp. 527ff.

13. Prosser and Keeton on Torts, 1984, at 361, assert 'Mental disturbance is easily simulated, and courts which are plagued with fraudulent personal injury claims may be unwilling to open the door to an even more dubious field'. On the other hand, Nicholas J. Mullany and Peter R. Handford, *Tort Liability for Psychiatric Damage* The Law Book Company Ltd., 1993, take a more optimistic view, see *infra*.

of 'opening the flood gates' or starting down a 'slippery slope'.¹⁴

Nevertheless, in the United States and other countries such as Australia and England,¹⁵ all these difficulties have *not* resulted in a general rule rejecting claims for compensation in cases of psychiatric damage. The well-known adage, 'the tortfeasor takes the victim as he finds him', is usually applied as a point of departure.¹⁶ Furthermore it is practically possible to distinguish fake cases from cases where genuine psychiatric damage occurred. The English Law Commission recently published a report on psychiatric damage. It states

'...although many psychiatric illnesses ... cannot be substantiated by "physical" tests (such as blood tests), a number of psychological tests now exist which can help to ascertain whether the plaintiff has faked or exaggerated psychological symptoms and whether he or she is a credible informant. These tests also distinguish long-standing character problems and dysfunctions from illness or injury or sudden onset. The tests are objective and are often given and scored by computer'.¹⁷

3.2. Which Victims have a Right to Compensation: Various Tests

Let us look at the potential victims with psychiatric damage as a possible result of air disasters:

- a. victims who themselves also sustained physical injury as a result of the crash (primary victims);
- b. victims where this is not the case but who were near the crash site and witnessed the accident;
- c. respectively those who saw loved ones being killed or injured;
- d. victims who have not witnessed the accident but heard of it later and feared for the lives of loved ones;
- e. the rescue workers who were involved by giving emergency aid after the accident;
- f. other victims.¹⁸

Although there is very little case law, Dutch law tends to be rather generous when it comes to compensation of psychiatric damages. This becomes clear, e.g., in the approach taken in the Dutch Supreme court ruling about a so called 'compensation neurosis' ruling. Henderson, a student and member of a steelband, fell off a float during the carnival in Aruba. In the chaos, he was beaten several times with a baton by Gibbs, deputy inspector of police, due to a misunderstanding. The

victim developed a 'compensation neurosis'. In psychiatry, compensation neurosis is regarded as a serious form of neurosis. The Supreme Court supported Henderson's claim:

In an unlawful act, constituting of inflicting injury, the consequences of a reaction determined by the personal predisposition of the victim will be generally regarded as a result of the unlawful act and imputed to the perpetrator, even when this reaction is also caused by the neurotic need of the victim to receive compensation and even when the consequences are thereby more severe and last longer than normally would be expected.¹⁹

14. See Sir Thomas Bingham MR in his foreword to Mullany and Handford, *op. cit.* note 13 above, (at p. vii): 'Underlying the cases has been the judges' concern that unless the limits of liability are tightly drawn the courts will be inundated with a flood of claims by plaintiffs ever more distant from the scene of the original mishap. So fine distinctions have been drawn and strict lines of demarcation established.' See also his comments in dissent in *M v. Newham LBC* [1994] 2 WLR 554, 573. *The Law Commission Consultation Paper No. 137, Liability for Psychiatric Illness, HMSO 1995*, discusses his comments in some detail in par. 2.6 and 2.7. There is further discussion of floodgates argument in par. 4.2-4.6.

15. Mullany and Handford, *op. cit.* note 13 above, at p. 10 (England and Australia have been less reluctant than US courts to 'open up the gates of liability'). For an analysis of the reluctance of the courts to grant emotional distress damages from a feminist point of view, see Elizabeth Handsley, 'Mental Injury Occasioned by Harm to Another: A Feminist Critique', 14 *Law & Inequality* 391 (1996).

16. For an argument that tort law should not 'equate thin skins and thin skulls', see Tony Weir, Book Review, [1993] *Cambridge L.J.* 520 at 521.

17. The Law Commission Consultation, *op. cit.* at p. 55. Rosalind English believes that '[m]ore open acknowledgement of the realities of [psychiatric] diagnosis' could prevent 'judicial equivocation' and 'hair-splitting'; in: 'Nervous shock: Before the Aftermath', [1993] *Cambridge L.J.* at pp. 204-06.

18. See also Andreas L. Lowenfeld, 'Hijacking, Warsaw, and the Problem of Psychic Trauma', *Syracuse Journal of International Law and Commerce* 1973, pp. 345ff. Because this article is concerned with victims on the ground only, it excludes discussion of the psychiatric damage which might be suffered by passengers in the plane that crashes, see Louisa Ann Collins, Comment, Pre-and Post-Impact Pain and Suffering and Mental Anguish in Aviation Accidents, 59 *J. Air Law & Commerce* 403 (1994). See also the Farnbauch article, *op. cit.*

19. HR 8 februari 1985, NJ 1986, 137 (annotation by C.J.H. Brunner); AA 1985, 417 (annotation by J.H. Nieuwenhuis).

The Dutch law professor (for some time a Justice on the Dutch Supreme Court) Hans Nieuwenhuis points out that an actual compensation neurosis leads to a real, not simulated, disability. Similar to a victim who can not be condemned for the fact that he is suffering from exceptionally brittle bones, a person with compensation neurosis can not be condemned for the fact that he is suffering from an involuntary, and thereby non-culpable need for compensation. This is also the position of the Dutch Supreme Court.

In settling (out of court) the Bijlmer damage claims, so far the victims with physical injury and who also have suffered psychiatric damage have had their injuries compensated. That group did not pose a problem because they fit within the most restrictive test which is still applied by some American courts: those who can prove physical injury are also entitled to compensation for any resulting psychiatric damage.²⁰ It goes without saying that under Dutch law this – what the Americans call the *physical injury-test* – is a minimum test.

Some American courts, too, have gone further by modifying the physical injury rule into a 'physical impact test', so that even when there had been no infliction of injury, but just a slight 'touch', the judge could award damages for the psychiatric damage that occurred.²¹ Alternatively, some states in the US have required proof that the psychiatric damage has led to a manifestation of physical injury.²²

Courts in the US, however, constantly struggle with the question of whether plaintiffs with emotional distress claims must meet special restrictions. Therefore, the people who have not sustained physical injury but who nevertheless claim to have suffered psychiatric damage pose a problem. Will psychiatric damage also be compensated if the violation of the standard of care has not been accompanied by physical injury or 'impact'?²³ With the gradual recognition that psychiatric damage was an equally serious form of injury as physical injury, many courts and commentators have seen no justification in treating these cases differently. For example, the English author Munkman states:

Where a neurosis claim arises out of an accident, there has usually been some physical injury or at least shock which would be actionable in any case, and neurosis supervenes afterwards, or else the accident aggravates an existing neurotic state. But there seems no reason

why an action should not lie for causing neurosis alone in the absence of injury or shock (if such a thing is possible). A recognisable illness is something more than the unhappy or painful thoughts which, as already indicated, are not in themselves a subject of compensation.²⁴

In some jurisdictions, and also in the out of court settlement of the Bijlmer disaster, until now the more flexible '*zone of physical danger*'-test has been applied, instead of the 'physical injury' requirement.²⁵ Around the accident a zone of danger is proclaimed. The claim will be permitted without proof of physical injury or impact as long as the claimant was within the zone of danger and possessed a 'reasonable fear of injury'.²⁶ With the help of this test, many cases of damage to the psyche can be dealt with. Most jurisdictions in the

20. E.g., *In re Air Crash Disaster Near Cerritos, California (Estrada)*, 967 F.2d 1421 (9th Cir. 1992) (damages awarded for family killed when airliner crashed into home).

21. *Prosser and Keeton on Torts, op cit* note 13 above, at pp. 362-64. Only five US states still follow the physical impact or injury test. See *Consolidated Rail Corp v Gottshall*, 512 U.S. 532 n. 7 (1994) (citing cases).

22. *Prosser and Keeton on Torts, op cit* note 13 above, at 364 credit the origins of this test to an Irish case, *Bell v Great Northern Railway* [1890] L.R. 26 Ir. Rep. 428. The first US case applying this test was *Hill v Kimball*, 76 Tex. 210, 13 S.W. 59 (Texas 1890). US courts do not have a clear rule as to what will qualify as a sufficient physical consequence from the damage to the psyche. *Payton v Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171 (1982) (surveying different standards).

23. See, e.g., *Saunders v Air Florida*, 558 F.Supp. 1233 (D.D.C. 1983) (no recovery allowed for emotional shock sustained by father of passenger who died in air crash, under the law of the District of Columbia, emotional distress must arise from physical injury).

24. John Munkman, *Damages for Personal Injuries and Death*, Butterworths 1993, at p. 128. The Law Commission (Consultation Paper (1995), *op cit* note 14 above at par. 2.4), too, makes clear that the plaintiff must suffer a recognised psychiatric illness that, at least where the plaintiff is a secondary victim, must be shock-induced, and not just transitory fear and anxiety.

25. Probably the first case announcing this test was *Dulieu v White & Sons*, [1901] 2 K.B. 669.

26. E.g., *In re Air Crash Disaster Near Cerritos, California (DiCosta)*, 973 F.2d 1490, 1494 (9th Cir. 1992) (allowing recovery for emotional distress to couple who feared for their own safety due to proximity to mid-air collision of two planes over their neighborhood).

US now recognize the zone of physical danger rule as a minimum test for liability.²⁷ In settling the Bijlmer disaster claims, application of the zone of danger test was the decisive factor for many victims.²⁸

Yet the zone of danger test does not always lead to satisfactory results either. Many real victims receive no compensation because, at the time of the disaster, they were outside the zone of danger. Take, for example, a man who was at the time of the crash in the centre of Amsterdam. When he heard about the Bijlmer disaster, he immediately realised that his small children were at home in the disaster-stricken apartment building. After several hours it emerged that his children had miraculously survived. In the meantime, the man had become a mental wreck. It is a fact that this victim was never inside the zone of danger. It is also a fact that the man has sustained some measure of psychiatric damage. But, according to the zone of danger test, he is not entitled to compensation, as he was outside that zone. The disagreeableness of this test is that it does not allow for the fear for the lives of children and partners. Here the zone of danger-test works indiscriminately. Whoever was within the zone will easily get compensation, even when the psychiatric damage is slight: anyone outside the zone who has possibly suffered severe damage gets nothing at all.

For example, in the American case *Cohen v. McDonnell Douglas Corp.*,²⁹ a mother who died of a heart attack caused by learning that her son had died in a plane crash was denied compensation under Massachusetts law because she was a substantial distance from the crash and was told of the death rather than perceiving the accident herself. In contrast, a couple who were inside their house and merely heard a mid-air collision were allowed to recover for emotional distress under California law because they could have feared legitimately that the crashing air planes might have hit their home.³⁰

As a result of the perceived unfairnesses created by both the physical injury and zone of danger tests, the courts of many American states require only that the psychiatric damage must have been 'reasonably foreseeable'. The classic example is a mother who sees her child die before her eyes in an accident, but is not herself in any physical danger.³¹ The California Supreme Court rejected both the zone of danger-test and the physical injury-test in such a case in 1968:

'[We see] no good reason why the general rules of tort law, including the concepts of negligence, proximate cause, and foreseeability, long applied to all other types of injury, should not govern the case now before us. Any questions that the case raises 'will be solved most justly by applying general principles of duty and negligence, and ... mechanical rules of thumb which are at variance with these principles do more harm than good.'³²

In the *Dillon* case, the California Supreme Court noted that the law of torts holds a defendant answerable only for injuries to others which at the time were reasonably foreseeable to the defendant. Therefore the court would be guided by factors such as the ones which applied to the facts of the *Dillon* case:

- a. whether the plaintiff was located near the scene of the accident as contrasted with one who was a distance from it;
- b. whether the shock resulted from direct emotional impact upon plaintiff from the sensory

27. The American Law Institute adopted the zone of danger rule in Restatement (Second) of Torts §§ 313, 436 (1965). See, e.g., *Clohesy v. Bachelor*, 675 A.2d 852, 858 n. 9 (Connecticut Supreme Court 1996) (citing cases of 13 US states adopting the zone of danger rule) and 862 n. 11 (citing cases from 24 other states adopting even broader rule). The Supreme Court of the United States has adopted the zone of danger rule for cases arising under one particular statute, the *Federal Employers' Liability Act*, which protects railroad workers. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994).

28. See, e.g., *Trouw*, 4 October 1995. We want to underline, though, that still no Dutch case law is available.

29. 450 N.E.2d 581, 590 (Mass. Supreme Judicial Court 1983).

30. In re *Air Crash Disaster Near Cerritos, California (Di Costa)*, 973 F.2d 1490, 1491 (9th Cir. 1992).

31. English case law has wrestled with these cases frequently. For the most recent important ruling, see *Alcock v. Chief Constable of South Yorkshire Police*, [1992] 1 AC 310; [1991] 4 All ER 907, HL. See the Law Commission's entire report, *op. cit.* note 14 above. For criticism of the lower court ruling in the *Alcock* case, on the grounds that the court failed to provide either 'Justice' or 'Certainty', see Steve Hedley, 'Nervous Shock: The Common Law Moves in a Mysterious Way (Again)', [1991] *Cambridge L.J.* 229-31.

32. *Dillon v. Legg*, 441 P.2d 912 (California Supreme Court 1968).

- and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; and
- c. whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only distant relationship. Many US states have found *Dillon's* general approach to be persuasive.³³

The 'reasonable foreseeability' approach of *Dillon* is especially appealing where there is such a varied group of victims as in the Dutch Bijlmer disaster. This task should be performed under the reasonable foreseeability approach as originally created in *Dillon* itself, rather than the cases transforming the *Dillon* factors into formal prerequisites to recovery. Otherwise the courts will end up making the sort of arbitrary distinctions which have led to the abandonment of earlier tests such as physical impact or injury. For example, in *In re Air Crash Disaster Near Cerritos, California (Estrada)*,³⁴ the plaintiff was allowed to recover for her emotional distress which resulted from an airplane crashing into her home and killing her husband and children. Although her distress was foreseeable, and quite believable, she was able to recover only because she happened to arrive at the accident scene in time to see her house in flames and because she had good reason to believe that her husband and children were trapped in the house. She could not have recovered unless both of those facts were true.³⁵ Other victims who have sustained emotional distress under just slightly different circumstances have been denied recovery.³⁶

3.3. Assessing the Injury and Damage

We do agree that the assessment of the injury and damage has to be realistic. For example, it has to be established that the claim is not spurious. Despite the reservations that many US courts have expressed over the years in cases where psychiatric damage is not accompanied by physical injury, for two groups of cases a more liberal policy has been developed. First are cases involving mistakes in the circulation of news, especially where someone's death has been wrongly announced.³⁷ Second are cases where a human corpse is negligently handled without due care and respect.³⁸ Prosser believed that courts have treated these cases with less reserve because of 'an especial likelihood of genuine and serious mental distress, arising from

the special circumstances, which serves as a guarantee that the claim is not spurious'.³⁹

The same may apply to our subject, aviation accidents: for the inherently shocking nature of aviation accidents is self-evident.⁴⁰ The question may be more whether public policy will support extending liability to those emotionally or psychologically harmed indirectly by a horrifying aviation accident. A second, equally important, question is whether this damage can be insured against and at a reasonable rate.

That one victim is more sensitive than the other and therefore will be more susceptible to mental

33. At least 24 U.S. states have adopted some form of the rule announced in *Dillon*. See *Clohesy v. Bachelor*, 675 A.2d 852, 862 n. 11 (1996) (citing cases from 24 other states following *Dillon*; Connecticut becomes 25th). The State of New York is the most important state jurisdiction to have rejected the *Dillon* rule and to have chosen to retain the zone of danger rule. *Trombetta v. Conkling*, 626 N.E.2d 653 (N.Y. Court of Appeals, 1993). Another question that has arisen is whether the factors stated in *Dillon* were to be used as general guidelines in determining whether the emotional distress injury was foreseeable or whether the guidelines are actually prerequisites to recovery. E.g., *Thing v. LaChusa*, 48 Cal.3d 644 (California Supreme Court 1989); *Portee v. Jaffee*, 417 A.2d 521 (N.J. Supreme Court 1980) (both treating factors as prerequisites). See also *Blinzer v. Marriott International, Inc.*, 81 F.3d 1148, 1154 (1st Cir. 1996) (treating factors as prerequisites 'serve a critical function in keeping bystander liability within reasonable bounds').

34. 967 F.2d 1421, 1424-25 (9th Cir. 1992).

35. *Ibid.*

36. E.g., *Cohen v. McDonnell Douglas Corp.*, 450 N.E.2d 581, 589-90 (Mass. 1983) (collecting cases where plaintiffs were not allowed to recover for emotional distress caused by the death of relatives in air crashes where the plaintiffs were a substantial distance away, and did not observe either the scene of the accident or the injuries inflicted on the victims).

37. *Johnson v. State of New York*, 37 N.Y.2d 378, 372 N.Y.S.2d 638, 334 N.E.2d 590 (N.Y. Ct. App. 1975) (hospital incorrectly notified daughter that her mother had died). Similarly, a court in Ontario, Canada, awarded damages to a widow who was informed that her husband had committed suicide when he had actually drowned in his bath due to negligent supervision in a mental hospital. *Jinks v. Cardwell*, [1987] 39 CCLT 168.

38. *Prosser and Keeton on Torts*, *op. cit.* note 7 above, at p. 362.

39. *Ibid.*

40. Accordingly Lee S. Kreindler, *Aviation Accident Law* (1996 revised edition) par. 6.04(1).

traumas is mostly immaterial. The well-known adage still applies: 'The tortfeasor takes the victim as he finds him'. This rule is generally accepted although, for example, the German judge will sometimes require '*ein Minimum an physischer oder psychischer Widerstandskraft*' ('a minimum of physical or mental resistance'). If this is missing the claim will be rejected.⁴¹

Under Dutch law, both the physical as well as the psychiatric damage are open to compensation.⁴² The principal rule is that damage to the psyche will be imputed to the liable person, even when the psychiatric damage can also be blamed on the personal predisposition of the victim. Special personal circumstances regarding the victim do not break the chain of causation. It is, however, established case law in The Netherlands that any predisposition of the victim has to be taken into account when estimating damages and awarding compensation, because some forms of physical or mental disorder can increase the possibility of certain injuries.

Nevertheless, for American law the conclusion is that in general, plaintiffs who seek recovery for emotional distress arising from witnessing or learning of aircraft disasters have not been successful very often.⁴³ It follows from the above that we disagree with the trend of these results. In our opinion, the issue of whether a breach of the duty of care has been accompanied by physical violation of the plaintiff, or the presence or absence of the factors identified in the *Dillon* case, can play a role in establishing the gravity and seriousness of the alleged psychiatric damage, but should not be a prerequisite to recovery. We agree with the Australian authors Mullany and Handford that '[d]ifferences in the strengths of various types of claims can be reflected in the quantum of damages awarded rather than leading to the automatic exclusion of some actions'.⁴⁴ It might also be appropriate for the legislature to establish some arbitrary limits, such as a maximum amount of recovery per victim, or to choose to recognise certain types of claims rather than others. We think that courts should not engage in this sort of public policy 'line drawing,' however. In the face of legislative inaction, courts should simply apply traditional tort tests, such as reasonable foreseeability, and should not endeavor to decide when liability will be too great to bear.⁴⁵

It may be easier for courts to accept the application of the traditional tests when one considers

what will be the treatment of a large group of potential emotional distress victims – professional rescue workers, including police officers, who can be involved in terrible rescue operations. In the case of Pan Am Boeing 727 (Lockerbie) where some rescue workers sustained severe psychiatric damage, their claims for compensation were rejected. In principle, this seems correct to us. Because especially from them, to use the German concept once again, one can expect more '*physischer oder psychischer Widerstandskraft*' (physical or mental resistance). Furthermore, it is more obvious for them (or their employers) to insure themselves – as they are in the Netherlands – than it is for the ground-based victim of an air crash. Jurisdictions in the US generally bar such claims for rescue workers' injuries of any kind under the so-called 'fireman's rule', which is a specialized form of the concept of assumption of risk.⁴⁶ Thus, if these traditional rules are also followed, a large class of potential suits need not be considered.

4. Conclusion

Courts – in the Netherlands, the US or elsewhere – should not pin themselves down to a hard, rigid test. As indicated in section 2 above, courts should apply principles of strict liability to the claims of

41. For further German case law, see Hermann Lange, *Schadensersatz*, J C B Mohr (Paul Siebeck) Tubingen 1990, at pp 132 and 141 ff.

42. See Article 6:106 Civil Code. 'The victim has the right to an equitable determined reparation of harm other than patrimonial (= pecuniary) damage if the victim has suffered physical injury, injury to honour or reputation or if his person has been otherwise afflicted.' *New Netherlands Civil Code, Patrimonial Law*, Translated by P P C Haanappel and Ejan Mac Kaay, Kluwer Law and Taxation Publishers, Deventer Boston 1990.

43. Kreindler, *op cit* note 39, par 6:04[6], discusses one such example. In *Bode v Pan American World Airways Inc*, 786 F 2d 669 (5th Cir 1986), witnesses to an air crash were not allowed to recover under Louisiana law for their emotional distress.

44. Mullany and Handford, *op cit* note 13 above, at p 312.

45. *Jaensch v Coffey*, 155 CLR 549 (Austl 1984) (opinion of Justice Deane) is an example of a high court justice taking this approach.

46. See Prosser and Keeton on Torts, *op cit* note 7, § 61 at pp 429-432. Dutch case law is not available.

parties on the ground. We believe that courts will reach better results with a multi-factor approach. Before granting relief, courts should be certain that there is indeed proof of serious injury, that plaintiffs are not complaining of merely the 'usual' upset that one might experience as a result of hearing of a disaster or the loss of loved ones. Legislatures (by statute or treaty) might choose to impose further restrictions. For example, the public policy makers might well choose to limit liability to plaintiffs who themselves sustained physical injury, or they might choose to extend liability to plaintiffs who actually witnessed close loved ones being killed. Another possibility would be to extend liability more fully to all foreseeable victims, but to restrict the level of compensation to demonstrated pecuniary losses only.⁴⁷ For example, the American *Death on the High Seas Act*,⁴⁸ which applies to air crashes in waters beyond the borders of the US and its territories, allows recovery for pecuniary losses only due to the wrongful death and restricts the claim to the

immediate family of the decedent and financially dependent relatives.⁴⁹ We have little doubt that the operators of commercial airlines and their insurers have the political capacity to bring the problem of unbridled liability to the attention of legislators, who can then decide whether it is necessary to impose some arbitrary limits on compensation for physical and psychiatric damage to parties on the ground. Until the national legislature acts, however, we think that the courts should apply the traditional tests of strict liability, foreseeability and proof of injury to these claims.

47. For one article advocating such an approach, see John L. Diamond, 'Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries', 35 *Hastings L.J.* 477 (1984).

48. 46 U.S.C. 762.

49. *Zicherman v. Korean Air Lines Co.*, 116 S.Ct. 629 (1996).