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## COVERAGE UNDER AUTO LIABILITY POLICIES FOR BYSTANDER EMOTIONAL DISTRESS

*[Ref: Law of Automobile Liability Insurance,  
Paras. 1.03, 4.01 and UM/UIM, Para. 1.07]*

A person who suffers severe emotional distress as a result of another's negligence is entitled to recover damages from the negligent party. Recovery is permitted in most jurisdictions, at least in certain circumstances, even for those who suffer distress as a result of witnessing an injury to another, the so-called "bystander" theory of emotional distress. When recovery is based on negligence, bystander emotional distress claims frequently involve the negligent party's auto liability coverage or the emotional distress claimant's uninsured (UM) or underinsured (UIM) motorists coverage.

Many auto liability policies have split coverage limits, providing a stated amount of coverage for bodily injury to one person and a higher limit for all bodily injuries sustained in any one accident. A key issue that arises under split limits policies is whether a bystander's emotional distress claim is included in the per person limit applicable to the injured person's claim, or is a separate bodily injury with its own per person limit.

**EXAMPLE:** Dave was driving his car with his wife Judy as a front seat passenger. An oncoming car driven by Steve suddenly swerved into Dave's lane, causing a collision between the two vehicles. Dave, who was wearing a seatbelt, did not suffer any physical injuries in the accident. Judy, however, was not wearing a seatbelt. When Dave's car spun as a result of the impact, Judy was thrown from the vehicle, hitting her head on the pavement. After the accident Dave saw his wife bleeding and moaning in pain as she lay in the street. He continued to witness Judy's suffering in the ambulance and at the hospital emergency room. Judy was seriously injured and later made a bodily injury claim against Steve. Dave, who was traumatized by witnessing his wife's injuries and suffering and had to seek psychiatric treatment, also made a claim against Steve for his emotional distress. Steve's auto policy had bodily injury liability limits of \$100,000 per person and \$300,000 per accident. Judy's injuries were so severe that the insurer paid the \$100,000 per person limit in settlement of her bodily injury claim. It refused, however, to make any offer on Dave's emotional distress claim, arguing that Dave's claim was included in the per person limit applicable to Judy's bodily injury. Since that limit was exhausted by settlement of Judy's claim, the insurer argued there was no remaining coverage for Dave's emotional distress claim. Dave argued that his emotional distress was a separate bodily injury and his claim should be considered under a separate \$100,000

per person limit. If Dave is correct, there is an additional \$100,000 in coverage available under Steve's policy to cover Dave's claim.

Many policies define bodily injury simply as "bodily injury to a person, and sickness, disease or death which results from it." These policies also define bodily injury to one person as "all injury and damages to others resulting from this bodily injury." The intent of these policy provisions is to limit emotional distress damages to those suffered by a person who has himself sustained a physical injury and if emotional distress damages are permitted without physical injury, to include them in the per person limit available to the direct victim. Courts have sometimes interpreted this policy language as providing coverage for bystander emotional distress claims when the emotional distress is accompanied by physical symptoms. More recent policy forms have added more restrictive language to achieve the underwriters' intent. This article will examine how courts have interpreted policy language in bystander emotional distress claims.

### PHYSICAL MANIFESTATION REQUIREMENT

A claim for emotional distress may involve purely emotional injury, such as humiliation, depression, or anxiety, or it may also involve physical manifestations of the distress, including weight loss, nausea, and headaches. When an insurance policy defines bodily injury as "bodily injury to a person, and sickness, disease or death which results from it," the question is whether emotional distress coupled with physical manifestations qualifies as bodily injury.

The majority rule is that the term "bodily injury" as used in liability insurance policies does not include emotional distress unaccompanied by physical harm. Courts differ, however, on whether bodily injury is limited to a physical injury to the claimant that causes emotional distress (which would disqualify a bystander claim) or also includes physical manifestations that are caused by the emotional distress. At least some courts recognize emotional distress accompanied by physical manifestations as a separate bodily injury, thus allowing a bystander claimant with physical manifestations to recover under his own per person limit. Purely emotional or psychological injury does not qualify as bodily injury under this view.

In *Allstate Ins. Co. v. Wagner-Ellsworth*, 188 P3d 1042 (Mont. 2008), two brothers were crossing the street in front of their school when one of the brothers was struck by a car and severely injured. The other brother was not struck but witnessed the accident and his brother's injury. The boys' mother arrived shortly after the accident and observed her injured son lying in the street. The driver's auto insurer paid its \$50,000 per person bodily injury limit to settle the injured brother's claim. The mother filed a negligence action against the driver, seeking emotional distress damages on behalf of herself and her other son. She alleged that her son became withdrawn after the accident and that she suffered stress, migraine headaches, a rapid heartbeat, physical pain, and depression. The policy required the insurer to pay damages "which an insured person is legally obligated to pay because of ... bodily injury sustained by any person" and defined bodily injury as "physical harm to the body, sickness, disease or death."

The trial court held that the emotional distress claims did not involve separate bodily injuries, relying on an earlier decision holding that emotional injury, "including physical manifestations resulting therefrom, did not constitute 'bodily injury' as defined in the policy" for purposes of a UM claim. The Montana Supreme Court acknowledged that the case was properly decided under the earlier precedent but decided to revisit the issue, noting that the earlier case was decided "prior to the development of a significant body of court decisions which perceived a distinction between mental injuries and mental injuries with physical manifestations." Relying on cases in other states, the court ruled that in a case involving emotional distress with physical manifestations, "physical harm to the body, sickness, disease or death" could mean strictly physical injury but could also include physical

manifestations arising from a mental injury or sickness. The definition of bodily injury was thus ambiguous, and the ambiguity had to be resolved in favor of the claimants. The court pointed out that the definition was not ambiguous “in the context of purely emotional injuries without physical manifestations.”

The court in *Wagner-Ellsworth* recognized that “distinguishing between injuries which have physical manifestations and those which do not can be challenging,” noting another court’s observation that “every emotional disturbance has a physical aspect and every physical disturbance has an emotional aspect.” Ruling that “there is no litmus test for determining where to draw the line between emotional and physical injuries,” the court cited cases from other jurisdictions in which the following symptoms had been held to be physical manifestations of emotional distress:

- ◆ dry throat
- ◆ rise in body temperature
- ◆ high blood pressure
- ◆ weight loss
- ◆ headaches, stomach pains, and muscle aches

On the other hand, crying, shaking, loss of self-esteem, humiliation, and mental anguish were held not to constitute physical manifestations. Perhaps the best indication of the difficulty in “drawing the line” is the fact that loss of sleep appeared on both lists.

Not all courts recognize emotional distress with physical manifestations as a separate bodily injury. In *Taylor v. Mucci*, 952 A2d 776 (Conn. 2008), a child was struck by an auto operated by the defendant. The child’s mother witnessed the accident and the injury to her child. The child’s bodily injury claim was settled for the defendant’s \$100,000 per person bodily injury limit, but the insurer refused to pay anything more for the mother’s emotional distress claim, noting a policy provision stating that the per person limit was “the most the insurer will pay for all damages, including ... emotional distress ... arising out of bodily injury sustained by any one person...” The court applied what it described as the “majority rule” that emotional distress does not qualify as a separate bodily injury unless it is accompanied by physical harm. In response to the claimant’s argument that the physical manifestations of her distress satisfied the physical harm requirement, the court declined to address “the medical or scientific question of the degree to which the mind and the body affect each other.” Rather, the case turned on the legal interpretation of the policy that defined bodily injury as “any bodily injury, sickness, disease or death sustained by any person.” In that context the court ruled in the insurer’s favor, relying on prior case law that rejected the argument that a policy’s definition of bodily harm includes emotional distress accompanied by physical manifestations.

## **SEPARATE CLAIMS AND SEPARATE LIMITS**

It is sometimes argued that claims for bystander emotional distress are “derivative” because they derive from and are dependent on the bodily injury claim of the injured person, sometimes referred to as the “direct victim.” In other words, the negligent party has not injured the bystander claimant directly, but only through the injury inflicted on the direct victim, and the bystander has a claim only because of the injury to the direct victim. (Loss of consortium is viewed as a derivative claim in many states.) Insurers have argued that a bystander’s emotional distress claim is derivative and not a separate bodily injury and should be governed by the per person limit applicable to the direct victim’s bodily injury claim. Many courts have held, however, that a bystander emotional distress claim is not derivative and should be considered a separate bodily injury for coverage purposes.

In *Auto Club Ins. Assn. v. Hardiman*, 579 NW2d 115 (Mich. App. 1998), six-year-old Kimberly Hardiman witnessed an accident in which her pedestrian brother was struck and seriously injured by an automobile. The driver had a liability policy with 100/300 limits. The policy included the following language:

The Bodily Injury limit for each person is the maximum amount that will be paid for bodily injury sustained by one person in one occurrence. The limit includes all claims for derivative damages allowed under the law.

The insurer settled the direct victim's claim for \$96,000 and offered only \$4,000 for Kimberly's emotional distress claim because it was a derivative claim. The court distinguished several cases cited by the insurer because they were claims for loss of consortium, explaining that unlike claims for loss of consortium, a bystander injury does not derive from injury to another person. "Rather, the injury is directly to the bystander as a result of the bystander seeing the accident and reasonably believing that the direct victim would be seriously injured or killed."

The court concluded that in this case, Kimberly's claim for negligent infliction of emotional distress was a separate, independent cause of action and that the success of her claim did not depend on recovery by her brother. Accordingly, the court held that the claim was not derivative and "not subject to the policy's \$100,000 per person limit of coverage for claims involving derivative damages."

Even when the court finds that a bystander claim is separate and not derivative, the court can interpret the policy language, if sufficiently specific, as requiring a bystander's emotional distress damages to be included as part of the per person limit applicable to the direct victim.

In *Partridge v. Mong*, 252 P3d 640 (Kan. App. 2011), the plaintiff, Kolt Mong, was riding as a passenger in a vehicle driven by his stepmother when it struck a tractor being driven by his father. Two suits were filed against Kolt's stepmother: one was a survival and wrongful death action by the father's estate and the other was an action by Kolt for his emotional distress at witnessing the incident. The defendant was insured by State Farm under a policy with limits of 100/300. The insurer paid the per person limit of \$100,000 on the claims by the estate. It did not, however, pay the son's emotional distress claim. In a declaratory judgment action to determine whether the insurer had an obligation to pay up to \$100,000 for Kolt's emotional distress claim over and above the \$100,000 it paid for the father's wrongful death and survival claims, the insurer argued that Kolt's claim was included in the \$100,000 limit applicable to the claims for his father's death. The court ruled in the insurer's favor and held that the \$100,000 limit for each person "constituted the total liability insurance proceeds available for the combination of Kolt's individual claim, the wrongful death claim, and the survival claim."

On appeal, the court focused on the language of the State Farm policy:

"Bodily Injury – means physical bodily injury to a person and sickness, disease or death which results from it."

"The amount of bodily injury liability coverage is shown on the declarations page under 'Limits of Liability – Coverage A – Bodily Injury, Each Person, Each Accident.' Under 'Each Person' is the amount of coverage for all damages due to bodily injury to one person. 'Bodily Injury to one person' includes all injury and damages to others resulting from this bodily injury, and all emotional distress resulting from this bodily injury sustained by other persons who do not sustain bodily injury.

Kolt acknowledged that he suffered no bodily injury although he did allege that his mental anguish at witnessing his father's death resulted in physical manifestations. He argued that his claim was for a separate and independent injury resulting from the death of his father that entitled him to a separate \$100,000 per person limit over and above the \$100,000 available for the wrongful death and survival claims covered under the policy.

There was no Kansas case on point so Kolt cited a Louisiana case, *Hebert v. Webre*, 971 So2d 1238 (La. App. 2007) (*Hebert I*). But the Kansas appeals court pointed out that the case had been overturned a year later by the Louisiana Supreme Court in *Hebert v. Webre*, 982 So2d 770 (La. 2008) (*Hebert II*). In that case, a wife claimed mental distress at witnessing severe injuries suffered by her husband. The Louisiana Supreme Court held for the insurer and distinguished prior Louisiana cases that did not deal with policy language that defined bodily injury as physical bodily injury. The appeals court referred to the reasoning of the Louisiana Supreme Court in *Hebert II*:

The first distinction is that 'bodily injury' is defined in this policy as '*physical* bodily injury to a person and sickness, disease or death which results from it' whereas in *Crabtree v. State Farm*, 632 So2d 736 (La. 1994) and *Hill v. Shelter Mutual*, 935 So2d 691 (La. 2006), bodily injury was defined as 'bodily injury to a person and sickness, disease and death which results from it.' In *Crabtree*, this Court stated that 'if the definition of bodily injury was intended to cover only external, physical injuries, then 'bodily injury' easily could have been defined in a more restrictive fashion through the use of such words, i.e., 'external, physical.' State Farm followed the suggestion of *Crabtree* and amended its definition of 'bodily injury' to require that such injury be 'physical' in nature to differentiate it from a mental or emotional injury ... We find that the addition of the word 'physical' is sufficient under *Crabtree* to differentiate a 'bodily injury' sustained in a physical manner, which would be entitled to separate per person limits, from an injury which is emotional in nature and, though might have physical consequences, is not a 'physical' bodily injury.

The second major distinction is found in the definition of 'bodily injury to one person.' In *Crabtree* and *Hill*, 'bodily injury to one person' was defined to include 'all injury and damages to others resulting from this bodily injury.' This State Farm policy defines 'bodily injury to one person' to include 'all injury and damages to others resulting from this bodily injury, and all emotional distress resulting from this bodily injury sustained by other persons who do not sustain bodily injury.'

Since Kolt did not argue that he suffered mental distress from a bodily injury he himself sustained in the accident, the appeals court concluded that under the clear and unambiguous policy language, his claimed damages were included within the coverage limits provided for his father's injury and death.

The Kansas appeals court cited court decisions in other states that have interpreted similar facts under similar policy language in the same way:

<b>Connecticut</b>	<i>Galgano v. Metropolitan Property</i> , 838 A2d 993 (Conn. 2004)
<b>Florida</b>	<i>Allstate v. Clohessy</i> , 32 F. Supp. 2d 1333 (M.D. Fla. 1998)
<b>Hawaii</b>	<i>First Ins. Co. of Hawaii v. Lawrence</i> , 881 P2d 489 (Haw. 1994)
<b>Indiana</b>	<i>Allstate v. Tozer</i> , 392 F3d 950 (7th Cir. 2004)
<b>Maine</b>	<i>State Farm v. Mitchell</i> , U.S. Dist. LEXIS 298 (D. Me. 2005)
<b>Massachusetts</b>	<i>McNeill v. Metropolitan Property &amp; Liability</i> , 650 NE2d 793 (Mass. 1995)
<b>Nebraska</b>	<i>Farm Bureau Insurance of Nebraska v. Martinson</i> , 659 NW2d 823 (Neb. 2003)

## CONCLUSION

Bystander claims can be complicated. Assuming there is a valid legal claim, the question is whether a bystander's emotional distress qualifies as a bodily injury for coverage purposes and as we've discussed, this depends on the facts of the particular claim, the language of the particular policy, and the way the courts in the jurisdiction interpret that language. Many policies define bodily injury as "bodily injury to a person and sickness, disease and death which results from it." More recently, some policies have used more restrictive language and defined bodily injury as "physical bodily injury to a person and sickness, disease or death which results from it." Courts interpreting this more restrictive language have been more inclined to hold that an actual physical injury is required rather than mere physical manifestations of emotional distress.

In addition, some policies have used more restrictive language to describe limits of liability for bystander claims, defining bodily injury to include "all injury and damages to others resulting from this bodily injury, and all emotional distress resulting from this bodily injury sustained by others who do not sustain bodily injury." Courts interpreting this more restrictive language have been more inclined to hold that an emotional injury is not a separate covered bodily injury calling for the payment of a separate per person limit.