Pleading Panic: Pure Emotional Damages as Sickness or Disease for Bodily Injury Claims

Joseph N. Blumberg
NOTE

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I. INTRODUCTION

American courts have moved in fits and starts regarding emotional damages in negligence cases, and Missouri is no exception. The hang-ups are best expressed as struggles within the element of proximate cause, i.e. the scope of liability. While the Supreme Court of Missouri slowly developed its doctrine for emotional damages in the last century, it at least crafted clear proximate cause rules that resulted in a well-defined scope of liability. However, in two recent decisions regarding emotional damages, the court abandoned this slow approach and created a confusing scope of liability.

On the surface, Derousse v. State Farm Mutual Automobile Insurance Co. may be a relatively minor matter of statutory interpretation: Does Missouri insurance law require coverage for pure emotional distress caused by

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1. The Restatement (Third) of Torts strongly favors the term "scope of liability" over "proximate cause." RESTATMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM ch. 6, special note on proximate cause (2010). This "Special Note" makes clear that the authors consider the term "proximate cause" to be "an especially poor one to describe the idea to which it is connected." Id. "Scope of liability" better conveys the notion that "[t]ort law does not impose liability on an actor for all harm factually caused by the actor’s tortious conduct." Id. The Special Note recognizes the widespread usage of "proximate cause" by including it in parentheses following "scope of liability" but "fervently hopes that the Restatement Fourth of Torts will not find this parenthetical necessary." Id. While this Note focuses on "scope of liability," some of the authorities cited herein require usage of the "poor[er]" term. See, e.g., Keating, infra, note 70.

2. See infra Part III.

3. See infra Parts III.C., IV.
uninsured motorists? In answering the question, however, the court’s generous rules of interpretation signal its recent willingness to expand recovery for emotional distress claims. Traditionally, Missouri took a conservative approach to allowing emotional damages in tort claims. *Derousse* is a stark example that the old regime is a relic.

As a practical matter, the logic within the decision creates policy without guidance by failing to treat the case as anything more than a matter of statutory interpretation. The decision does not discuss a prior split between the Eastern and Western districts of the Missouri Court of Appeals and avoids the issue of whether emotional damages qualify as “bodily injury” for other types of insurance. Had the decision addressed either of those fronts, *Derousse* would be much more constructive to the insurance industry and future litigants.

Further, the court fails to reconcile *Derousse* within Missouri’s broader approach to permitting recovery for pure emotional damages. As such, it remains unclear how far emotional damages may spread in negligence cases. Hypothetical scenarios show that automobile insurance may now have to extend coverage for emotional damages to people traditionally considered “bystanders” and perhaps even to “victims” of near-miss accidents.

In summary, Missouri in recent cases has blurred the scope of liability for claims of emotional damages, and automobile insurance may have to fund a very wide safety net. The Supreme Court of Missouri makes clear that it is trending toward allowing broader recovery for pure emotional damages. The court’s work, however, should not end there: Clarity also demands stronger reasoning and sensible limits on recovery.

II. FACTS AND HOLDING

While traveling northbound on Highway 61 in Jefferson County, Missouri, Debra Derousse (“Derousse”) encountered a vehicle proceeding southbound in the northbound shoulder.4 The oncoming vehicle then swerved across both lanes of the two-lane road, struck a bluff, flipped into the air, and ejected a passenger from its back hatch.5 The ejected person landed on the hood of Derousse’s vehicle, then the body rolled off as Derousse applied her brakes.6 Derousse’s vehicle then continued over the body.7 When she exited her vehicle, Derousse learned that she knew the person who landed on her car.8 Derousse was wearing her seatbelt, and her airbag did not deploy.9

5. Id.
6. Id.
7. Id.
8. Id.
9. Id.
After exiting her vehicle, Derousse did not notice any cuts, bruises, or other physical symptoms, and she indicated to emergency responders that she was not physically injured.\(^{10}\)

Upon arriving home, Derousse vomited.\(^{11}\) Later, she called her primary care doctor, who prescribed Valium and Lexapro,\(^ {12}\) which can treat anxiety, sleeplessness, and depression.\(^{13}\) Derousse obtained refills of the two drugs without an examination.\(^{14}\) Though not physically injured, Derousse suffered nightmares, migraines, nausea, diarrhea, anxiety, headaches, vomiting, and backaches.\(^ {15}\) Derousse eventually sought psychological treatment from three therapists.\(^ {16}\)

Derousse sought coverage for her emotional distress damages by making an uninsured motorist claim under her insurance policy with State Farm Mutual Auto Insurance Co.\(^ {17}\) Derousse’s uninsured motorist policy provided coverage for “damages for bodily injury.”\(^ {18}\) The policy defined “bodily injury” as “bodily injury to a person and sickness, disease or death which results from it.”\(^ {19}\) Derousse sued when State Farm denied her claim by interpreting its policy as not providing uninsured motorist coverage for emotional injury.\(^ {20}\) The trial court granted summary judgment for State Farm, determining that Derousse had conceded she suffered no physical injury and that her uninsured motorist coverage for “bodily injury” did not include “injuries solely of an emotional nature.”\(^ {21}\)

Derousse appealed to the Missouri Court of Appeals for the Eastern District, raising three points of error.\(^ {22}\) First, Derousse contended that genuine issues of material fact remained as to whether her injuries were covered under

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10. Id.
11. Id.
12. Id. at 8-9.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id.
21. Id.
the State Farm insurance policy. Second, Derousse contended the insurance policy was ambiguous and should be construed against the drafter. Third, Derousse claimed the trial court’s interpretation of the insurance policy did not comply with the Missouri Financial Responsibility Law.

In disposing of Derousse’s arguments, the Eastern District rejected the notion that her emotional damages were compensable. The court recognized a “growing trend” in other courts to include mental or emotional injury accompanied by physical manifestations within the definition of bodily injury. Regardless, the court said, “this trend does not exist in Missouri.” The Eastern District held that the definition of “bodily injury” here was unambiguous and “clearly refers to physical conditions of the body and excludes mental suffering or emotional distress.” The court distinguished Lanigan v. Snowden, which permitted insurance reimbursement for emotional damages, by noting a difference in that policy’s language. The Eastern District said the controlling view in Missouri was expressed in Citizens Insurance Co. of America v. Leiendecker. The court held that under Leiendecker, the term “bodily injury” – standing alone or defined in an insurance policy as “bodily injury, sickness or disease” – is unambiguous and refers “only to physical injuries to the body and excludes mental suffering or emotional distress.”

23. Id.
24. Id.
25. Id. at *1-2; Mo. REV. STAT. § 379.203 (2000) (The relevant portion of the statute provides: “1. No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto . . . in not less than the limits for bodily injury or death set forth in section 303.030, RSMo, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. Such legal entitlement exists although the identity of the owner or operator of the motor vehicle cannot be established because such owner or operator and the motor vehicle departed the scene of the occurrence occasioning such bodily injury, sickness or disease, including death, before identification.”) (emphasis added).
27. Id.
28. Id.
29. Id. at *2-3.
30. 938 S.W.2d 330 (Mo. App. W.D. 1997). The Western District found a policy ambiguous where it defined “bodily injury” as “bodily injury, sickness or disease sustained by a person including death resulting from any of these at any time.” Id. at 332.
32. Id. at *3; 962 S.W.2d 446 (Mo. App. E.D. 1998).
33. Derousse, 2009 Mo. App. LEXIS 701, *3 (citing Leiendecker, 962 S.W.2d at 452-54).
As to Derousse's third point, the court found "no conflict with or violation of" the Missouri Financial Responsibility Law. The court held that because the statute's language with respect to "bodily injury" was virtually identical to the definition of "bodily injury" in Derousse's policy, then "[t]he language is unambiguous and clearly requires an element of bodily injury for coverage." The Eastern District therefore found against Derousse on all three points and affirmed the trial court's grant of summary judgment for State Farm.

The Supreme Court of Missouri accepted transfer to hear the case. Derousse again argued that summary judgment was in error because "(1) she sustained injuries covered by her policy; (2) her policy is ambiguous as to its coverage for emotional distress; and (3) her policy violates Missouri law." The court held that because the insurance policy at issue used language that was narrower than required by the Missouri Financial Responsibility Law, the statute's mandatory minimum language was controlling. The court then found the statute to be ambiguous, because it was unclear whether "bodily" modified only the word "injury" or whether it also modified the phrase "sickness or disease." The court interpreted the statute as providing a series of distinct "categories of harm requiring uninsured motorist coverage: (1) bodily injury; (2) sickness; or (3) disease." The court held that under the minimum policy requirements provided by the Missouri Financial Responsibility Law, a claim for "sickness" or "disease" could be distinct from "bodily injury," thus Derousse's "purely emotional damages" were compensable under the categories of "sickness" or "disease." Accordingly, the court concluded that State Farm was not entitled to summary judgment, and it reversed and remanded the trial court's decision.

34. Id.
35. Id. at *3-4.
36. Id. at *4.
38. Id. at 893.
40. Derousse, 298 S.W.3d at 894.
41. Id. at 895.
42. Id.
43. Id.
44. Id.
III. LEGAL BACKGROUND

A. Emotional Damages During Missouri’s Conservative Era

For more than 100 years, Missouri followed the “impact rule,” which stated that an individual could not recover damages for pure emotional injury or, conversely, that an individual could only recover for emotional damages that resulted from a corresponding touching. Until the late-1960s, Missouri adhered to “an era of conservatism” in this area of tort law. While the state legislature took on several social issues throughout the 1950s, the Supreme Court of Missouri “did not stray from the traditional, common-law path” on questions such as whether an injured person could recover for emotional distress.

These conservative decisions were based on the difficulty of establishing proof and the concern that recovery would encourage plaintiffs to bring imaginary claims. This mirrored the national trend of “long-standing judicial skepticism of such claims.” By 1965, however, New York and New Jersey had bucked the long-standing trend and allowed recovery for emotional damages without an “impact.” That same year, the Restatement (Second) of Torts agreed that the “impact rule” no longer applied, instead suggesting recovery only where emotional fright manifested into “bodily

48. Simeone, supra note 46, at 1410.
52. See RESTATEMENT (SECOND) OF TORTS § 436(2) (1965).
Since that Restatement, many American courts "have liberalized the rules for recovery for stand-alone emotional harm." However, Missouri stood by its conservative recovery scheme for emotional damages, adhering to the principle that it was better for the individual victim to bear the loss than to require society as a whole to pay.

B. Negligent Infliction of Emotional Distress: An Evolving Tort

Legal scholars have distinguished negligent infliction of emotional distress from intentional infliction of emotional distress and voiced far greater policy concerns for permitting recovery in the negligent category. A leader in the development of tort law, William Keeton, aptly described the reason for such skepticism:

The temporary emotion of fright, so far from serious that it does no physical harm, is so evanescent a thing, so easily counterfeited, and usually so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence, where the elements of extreme outrage and moral blame which have had such weight in the case of the intentional tort are lacking.

The Restatement (Third) of Torts observes that some courts have "liberalized recovery for emotional harm by characterizing psychic or emotional harm as bodily harm." The Restatement (Third) "does not adopt that approach and indeed rejects it," as "[t]hat approach has the unfortunate effect of diluting the definition of bodily harm." Instead, the Restatement (Third) explicitly distinguishes between bodily harm and emotional harm. "Accordingly, if the defendant's negligent conduct (for example, negligent driving) frightens the plaintiff (for example, a pedestrian crossing the street), the

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53. Id. § 436 cmt. a. The reporters provided imprecise comments about what might qualify as physical manifestations of emotional fright. In one explanation, only a woman frightened into a miscarriage would qualify. Id. cmt. b, illus. 2. Short-term nausea and headaches would not qualify, but "long continued" nausea or headaches may qualify. Id. cmt. c.


55. Simeone, supra note 46, at 1410.


58. Id.

59. Id. cmt. b. "The definition of bodily harm is meant to preserve the ordinary distinction between bodily harm and emotional harm." Id.
harm to the plaintiff's nerve centers caused by this fear does not constitute bodily harm."\textsuperscript{60}

While some courts are willing to blend the physical with the psychic,\textsuperscript{61} medical uncertainty remains.\textsuperscript{62} Despite considerable advances in neuroscience and technology in recent decades, "no medical or scientific method yet exists to detect or quantify harms to emotional tranquility of the sort with which courts have wrestled."\textsuperscript{63}

Some susceptible individuals may suffer serious mental disease when a precipitating emotional shock occurs. Post traumatic stress disorder is a recognized, specific disease that is diagnosed using certain criteria, although most of those criteria are dependent upon responses by the patient. Some serious mental diseases may cause symptoms and deficits that persist for a lengthy period of time, lending significant support to the bona fides of the existence of the disease. While future scientific advances in clinical brain imaging and MRIs may provide forensic evidence of emotional trauma, those tools are not currently available to courts to verify the existence and extent of emotional harm.\textsuperscript{64}

A pending chapter of the Restatement (Third) of Torts dealing with pure emotional harm notes several traditional reasons why courts have treated emotional disturbance differently from bodily harm, which can be summarized as follows: (1) emotional disturbance is difficult to verify with objective means; (2) a great deal of emotional disturbance occurs, and recognizing tort claims for all such harms might inundate courts; and (3) minor emotional disturbance is an everyday occurrence, and the law should encourage people "to accept and cope with such harm" rather than focus on the disturbance via legal action.\textsuperscript{65}

This second concern – that creating a new cause of action would pack the courts with litigation of this type – can be described as one of "flood-
gates.\textsuperscript{66} The old "impact rule" addressed the concern of "floodgates" by creating "an absolute barrier" to claims for negligent infliction of emotional distress without physical harm.\textsuperscript{67} Distinct from "floodgates" is another institutional concern: "crushing liability." "Crushing liability" involves claims "from a single isolated incident but of enormous aggregate magnitude" so that claims must be prioritized due to a limited pool of funds from the defendant.\textsuperscript{68}

More to the substantive concerns about emotional distress claims, the Restatement's first and third concerns relate to whether society, under current social norms,\textsuperscript{69} is comfortable with the underlying notion of compensating for emotional damages. When considering whether liability should cover some harm, "it is natural to regard the seriousness of the harm as the first consideration to which we should direct our attention."\textsuperscript{70} The "simplest and best reason" to recognize liability for emotional distress is that it "may be fully as severe and debilitating as physical harm."\textsuperscript{71}

But according to one scholar, the issue is "not quite so simple."\textsuperscript{72} The "slow expansion" of negligent infliction of emotional distress is significant because it "expands tort law's conception of harm to encompass some non-physical harm."\textsuperscript{73} The question is whether liability for misconduct should make a defendant responsible to those who are "left physically intact but emotionally or economically damaged as a result."\textsuperscript{74} The typical downtown automobile accident likely would cause non-physical damages "to a vast number of potential plaintiffs."\textsuperscript{75} In this scenario, the courts are concerned with "proportionality and manageability."\textsuperscript{76}

Scholars have questioned an expansive view of emotional damages, urging that "[I]iability for negligently inflicted emotional harm must be limited."\textsuperscript{77} The traditional rule of "duty" cannot limit liability in such cases, because "duty" only focuses on whether the harm was foreseeable:\textsuperscript{78} If the

\begin{itemize}
\item \textsuperscript{66} Robert L. Rabin, \textit{Emotional Distress in Tort Law: Themes of Constraint}, 44 \textit{WAKE FOREST L. REV.} 1197, 1200 n.17 (Floodgates are "about serial litigation of a particular repetitive type of claim, extending out indefinitely once recognized.").
\item \textsuperscript{67} Id. at 1199.
\item \textsuperscript{68} Id. at 1200 & n.17.
\item \textsuperscript{69} Id. at 1198.
\item \textsuperscript{70} Gregory C. Keating, \textit{Is Negligent Infliction of Emotional Distress a Free-standing Tort?}, 44 \textit{WAKE FOREST L. REV.} 1131, 1169 (2009) (arguing proximate cause rules are the proper device for limiting liability for emotional distress).
\item \textsuperscript{71} Id. at 1172-73.
\item \textsuperscript{72} Id. at 1173.
\item \textsuperscript{73} Id. at 1171.
\item \textsuperscript{74} Id. at 1154.
\item \textsuperscript{75} Id. at 1153.
\item \textsuperscript{76} Id. at 1175.
\item \textsuperscript{77} Id. at 1135.
\item \textsuperscript{78} See id. at 1135-36.
\end{itemize}
defendant's actions create some risk of physical harm, then even if the physical harm does not actually occur, the emotional harm is still foreseeable. The "unthinkable" end result would be "general liability" for emotional damages.79 Thus, duty "has nothing to do with" defining "a fair and manageable orbit of responsibility."80 Proximate cause rules, on the other hand, can be used to limit liability, because they better define what harm should be compensable.81 Even where the defendant has breached an acknowledged duty, proximate cause is "preoccupied with discriminating among harms suffered and with making judgments about where the fair and effective boundaries of liability lie."82 Indeed, the modern view is that proximate cause is more properly expressed as the "scope of liability."83 The question in claims of emotional distress is not whether the distress was reasonably foreseeable, but whether society wants to extend the scope of liability to cover such emotional harms.84 "The logic at work here is the classic logic of proximate cause, preoccupied with constructing a manageable orbit of liability."85

After extinguishing the "impact rule," courts instituted various "bystander rules" to ensure such proximate cause limitations on liability.86 The Restatement (Third) further distinguishes the categories of bystander cases.87 The first category includes plaintiffs who suffer severe emotional distress after narrowly escaping physical peril.88 The second category exists where plaintiffs suffer emotional distress from witnessing physical injury to a third-party.89 Courts and commentators fundamentally disagree about how far to extend the scope of liability in these categories.90

Initially, two alternatives prevailed: California in 1968 used a "foreseeability" test in Dillon v. Legg,91 followed the next year by New York's "zone of danger" standard in Tobin v. Grossman.92 Tobin criticized the Dillon

79. Id. at 1135.
80. Id. at 1140.
81. Id. at 1171.
82. Id. at 1144.
83. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM ch.6, special note on proximate cause (2010).
84. See Keating, supra note 70, at 1140.
85. Id. at 1154.
86. Rabin, supra note 66, at 1203. Bystander rules also focus on "the fairness consideration" from the defendant's perspective, "taking account of the elementary moral principle that the punishment should fit the crime." Id. See also Asaro v. Cardinal Glennon Memorial Hosp., 799 S.W.2d 595, 598 (Mo. 1990) (en banc).
87. Keating, supra note 70, at 1144 n.40.
88. Id.
89. Id. (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 46 cmt. a (Tentative Draft No. 5, 2007)).
90. See id.
91. 441 P.2d 912, 920 (Cal. 1968).
“foreseeability” scheme for overextending the consequences of every injury, like “ripples of the waters, without ends.” Thus, Tobin announced that there was no “bystander” recovery, only emotional damages for those directly involved in the accident. California itself stepped away from the “foreseeability” test in Thing v. La Chusa. Repeatedly discussing the need to “limit liability,” the court in Thing was concerned that liability could outweigh the fault of a defendant “whose conduct is simply negligent” and that such damages could become impossible to insure against.

C. Missouri’s Evolving Approach

In the last three decades, Missouri has steadily chipped away at many of the conservative approaches that restricted or limited liability for emotional damages. In 1983, Bass v. Nooney Co. destroyed the “impact rule” in Missouri. In Bass, the Supreme Court of Missouri permitted a plaintiff to recover for the negligent infliction of emotional distress upon a showing of two elements. First, the defendant should have realized that his conduct involved an unreasonable risk of causing emotional distress, and second, the emotional distress or mental injury must be medically diagnosable and must be of sufficient severity to be moderately significant. Thus, while the Restatement (Second) of Torts addressed the issue in 1965, Missouri did not abandon the impact rule until Bass in 1983.

93. Id. at 424.
94. Id.
96. Id. at 828-29.
97. Id. at 826-27 (“In order to avoid limitless liability out of all proportion to the degree of a defendant’s negligence, and against which it is impossible to insure without imposing unacceptable costs on those among whom the risk is spread, the right to recover for negligently caused emotional distress must be limited.”). The court in Thing also argued that claims are not proper for “that form of acute emotional distress” caused by “the occasional gruesome or horrible incident to which every person may potentially be exposed in an industrial and sometimes violent society.” Id. at 829. Thing adopted the much narrower rule that,

[i]n the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely related to the injury victim[,] (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim, and (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness.

Id. at 815.
98. 646 S.W.2d 765, 772 (Mo. 1983) (en banc).
99. Id. at 772-73.
100. Id.
102. Bass, 646 S.W.2d at 772.
Even after Bass, however, indicia of conservatism remained, as Missouri courts limited recovery by making it more difficult for plaintiffs to prove each of the two new Bass elements. First, as to foreseeability, Missouri required a showing that the negligent defendant should have realized his conduct created not merely an unreasonable risk of any harm, but an unreasonable risk of causing emotional distress.103 Common, everyday events did not create an unreasonable risk of emotional distress.104 The second part of the Bass test—diagnosis and severity—reflected the approach taken in the Restatement (Second) of Torts.105 Yet because of the requirement that the emotional distress be “medically diagnosable” and “medically significant,”106 the early decisions following Bass denied emotional damages where the victim failed to seek “at least minimum medical attention.”107

Missouri proceeded in a similarly conservative fashion in “bystander” cases. After evaluating the “foreseeability” and “zone of danger” approaches, Missouri in Asaro v. Cardinal Glennon Memorial Hospital followed New York’s lead in Tobin by adopting a “zone of danger” rule.108 The court explained that allowing recovery for eyewitnesses “provides no rational practical boundary for liability,” while limiting recovery to those directly harmed by the defendant’s negligence created “efficient liability rules.”109 After Asaro, a plaintiff could only claim emotional damages from witnessing injury to a third person if he satisfied three elements: First, the defendant should have realized that his conduct involved an unreasonable risk to the plaintiff; second, the plaintiff was present at the scene of the injury-producing, sudden event; and third, the plaintiff was in the “zone of danger,” i.e., placed in a

105. See RESTATEMENT (SECOND) OF TORTS § 436 (A) (1965).
106. Bass, 646 S.W.2d at 772-73.
108. Asaro v. Cardinal Glennon Mem’l Hosp., 799 S.W.2d 595, 599 (Mo. 1990) (en banc) (“On reflection, we agree with the New York Court of Appeals. The zone of danger standard is preferable.”).
reasonable fear of physical injury to his or her own person. In 2001, the Supreme Court of Missouri reaffirmed this “zone of danger” rule.

However, in the 2008 case of Jarrett v. Jones, Missouri blurred the “zone of danger” requirement by applying it only to bystanders—not direct victims. At the same time, the court expanded the class of plaintiffs considered direct victims, and thus exempt from the “zone of danger” requirement. In Jarrett, the plaintiff was driving his tractor-trailer eastbound along an interstate, while Jones was driving westbound in a car with his family. Jones negligently crossed the median and hit Jarrett’s tractor-trailer head on. Jarrett twisted his ankles and hit his knees on the steering wheel, but otherwise Jarrett admitted “there was no physical injury of any kind as a result of impact injury.” After the collision, Jarrett left his vehicle and went to Jones’s vehicle to make sure that no one was hurt. When Jarrett reached the vehicle, he saw that the Jones’s two-year-old daughter died in the accident and that Jones and his wife were badly injured.

As a result, Jarrett suffered “mental and emotional injuries, including post-traumatic stress disorder and feelings of anxiety, trauma, anguish and stress.” But Jarrett’s emotional fright of seeing the body was at least one step removed from the actual fear of danger. Jarrett was driving a semi-truck and admitted that he was not distressed by the collision itself; it was only after the accident was over, when he got out of the semi and observed the girl’s body, that he suffered emotional damage.

The court determined that Jarrett’s emotional distress was “a result of his participation in the accident . . . not simply from viewing [the girl’s] body.” Though Jarrett was suing for emotional damages that originated from viewing a third party’s death, the court determined that “his role was not that of a passive, shocked witness,” and his mental and emotional injuries

110. Id. at 599-600.
112. 258 S.W.3d 442 (Mo. 2008) (en banc).
113. Id. at 443.
114. Id. See also Josh Hill, Note, Fender Bender Lottery: Direct Victims and Bystanders in Recovery for the Negligent Infliction of Emotional Distress, 74 Mo. L. Rev. 871, 880-81 (2009).
115. Jarrett, 258 S.W.3d at 443.
117. Jarrett, 258 S.W.3d at 443.
119. Jarrett, 258 S.W.3d at 443.
120. See id.
121. Id.
122. Id.; Jarrett, 2007 WL 2231791, at *1 n.3.
123. Jarrett, 258 S.W.3d at 447.
were linked to his direct involvement in the accident. The court found that Jarrett's act of exiting his truck to check on the patrons in the other vehicle in no way rendered him a mere bystander by the time he viewed the body of the little girl. The Supreme Court of Missouri in Jarrett thus expanded the direct-victim concept in two ways: first, by including plaintiffs who suffer emotional distress from observing the injury or death of a third party, "so long as the plaintiff was directly involved in the same accident?" and second, by extending the time period that one may remain in the zone of danger.

One commentator suggested that the failure of the Jarrett court to clearly define the distinction between bystanders and direct victims "can and will lead to future problems" in cases involving the negligent infliction of emotional distress. If plaintiffs who are directly involved in accidents can recover for viewing others' injuries after the accident, then "negligent actors will be punished beyond their culpability." Jarrett defined direct victims and bystanders "without providing any clue as to the distinction between them." Use of the court's definition of "direct victim" makes "the doors to recovery seem wide open, and any person involved in an accident, in even the smallest way," can succeed on an emotional distress claim. What was already a perplexing area of tort law was made "even more confusing, and clarification will eventually be needed again.

D. Emotional Distress as "Bodily Injury" for Insurance Policies

Prior to Derousse, Missouri courts were split regarding if and when to allow recovery for claims of negligent infliction of emotional distress under various types of insurance policies covering bodily injury. This matter concerns not only all of the practical issues of skepticism, severity, and diagnosis of emotional harm, but also, because it involves the risk-spreading nature of insurance coverage, it drives at the fundamental tort policy of how far society should be required to go to compensate for negligence.

Courts throughout the country are similarly divided on the topic. As recently as 1997, Keri Farrell-Kolb noted that the "majority view" held pure emotional distress did not constitute "bodily injury" under a variety of gen-

124. Id.  
125. Id. at 447-48.  
126. See id. at 448.  
127. Hill, supra note 114, at 886.  
128. Id.  
129. Id. at 887.  
130. Id.  
131. Id.  
133. See supra notes 45-46 and accompanying text.
eral insurance liability policies. At that time, the majority view was expressed in cases from thirteen states and one federal circuit court of appeals. The minority included decisions from courts in only six states.

However, a fresh look at the subject shows that at least eleven states interpret emotional distress as being compensable under insurance policies covering "bodily injury." One of those states had been included in the "majority" as of 1997 but has since reversed itself, now allowing claims of emotional damages under an insurer’s "bodily injury" policy. Of the eleven states that permit recovery, three do so by interpreting emotional distress as a "sickness or disease," thus falling within the insurance policy’s definition of "bodily injury." Some of the eleven states interpret emotional damages as "bodily injury" only with a showing of "physical manifestation" of the distress. In summary, where in the past a majority had been opposed to interpreting emotional distress as "bodily injury" under insurance policies, the courts are now split, with the trend moving in favor of allowing emotional distress claims as "bodily injury."

The Restatement (Third) of Torts discourages this trend. In both black-letter definitions and comments, the Restatement (Third) explicitly opposes the notion that emotional distress could qualify as physical impairments by

135. Id. at 986 n.37, 987 n.44 & 988 n.47 (citing 14 cases).
136. Id. at 986 n.37 (citing Bituminous Fire & Marine Ins. Co. v. Izzy Rosen’s, Inc., 493 F.2d 257, 261 (6th Cir. 1974)).
137. Id. at 990 n.78 (citing six cases).
139. Wagner-Ellsworth, 188 P.3d at 1051 (“We now conclude that we manifestly erred . . . by failing to recognize the development in the law with regard to mental injuries with physical manifestations. Many courts have concluded in insurance interpretation cases like this one that the term ‘bodily injury’ is ambiguous when applied to physical problems arising from a mental injury.”).
140. Derousse, 298 S.W.3d at 895 (Missouri); Cooper, 518 So. 2d at 710 (Alabama); Lawrence, 881 P.2d at 494 (Hawaii).
141. See, e.g., Wagner-Ellsworth, 188 P.3d at 1051; Voorhees, 588 A.2d at 423.
falling under the "illness" and "disease" categories.\textsuperscript{142} It defines "physical harm" as "the physical impairment of the human body ("bodily harm") . . . . Bodily harm includes physical injury, illness, disease, impairment of bodily function, and death."\textsuperscript{143} Any possible ambiguity is explained by comment b, titled Bodily harm and emotional harm, which states that "[t]he definition of bodily harm is meant to preserve the ordinary distinction between bodily harm and emotional harm."\textsuperscript{144}

Most automobile\textsuperscript{145} or general business insurance policies\textsuperscript{146} include coverage for "bodily injury" and property damage. Whether the policy distinguishes between "injury," "damage," and "personal injury" depends upon a construction of the policy.\textsuperscript{147} Since 1966, standard business insurance language has defined bodily injury as "bodily injury, sickness, or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom."\textsuperscript{148} The Missouri Financial Responsibility Act codifies this boilerplate language with regard to uninsured-motorist claims.\textsuperscript{149} Any person with a Missouri automobile insurance policy can claim up to $25,000 for damages by an uninsured motorist,\textsuperscript{150} regardless of whether the uninsured motorist actually collides with the insured's vehicle,\textsuperscript{151} or the insured is riding in another vehicle,\textsuperscript{152} standing outside his car,\textsuperscript{153} or is merely

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\textsuperscript{142} See \textsc{Restatement (Third) of Torts: Liab. for Physical \& Emotional Harm} § 4 (2010).
\textsuperscript{143} Id.
\textsuperscript{144} Id. cmt. b.
\textsuperscript{145} Mo. Rev. Stat. § 379.203(1) (2000). For automobile insurance in Missouri, the Missouri Financial Responsibility Act "becomes . . . part of every policy of insurance to which it is applicable to the same effect as if it were written out in full in the policy itself." Dawson v. Denny-Parker, 967 S.W.2d 90, 94 (Mo. App. E.D. 1998) (quoting Ezell v. Columbia Ins. Co., 942 S.W.2d 913, 915 (Mo.App. S.D. 1996)).
\textsuperscript{146} Farrell-Kolb, supra note 134, at 985 (discussing general commercial liability policies).
\textsuperscript{148} Farrell-Kolb, supra note 134, at 985.
\textsuperscript{149} Mo. Rev. Stat. § 379.203(1) (covering "bodily injury, sickness or disease, including death, resulting therefrom").
\textsuperscript{150} Mo. Rev. Stat. § 303.030.5 (2000); Dawson, 967 S.W.2d at 92 n.1 (the statutory minimum requires up to $25,000 for the insured and up to $50,000 per event, thus also covering a potential passenger).
\textsuperscript{151} Dawson, 967 S.W.2d at 92-93 ("[T]he General Assembly intended to preclude insurers from requiring proof of physical contact before paying uninsured motorist benefits under the policy.").
\textsuperscript{152} Hines v. Gov't Emplrs. Ins. Co., 656 S.W.2d 262, 265 (Mo. 1983) (en banc).
\textsuperscript{153} Oberkramer v. Reliance Ins. Co., 650 S.W.2d 300, 302 (Mo. App. E.D. 1983).
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a pedestrian.\textsuperscript{154} In short, uninsured motorist coverage "is personal coverage which follows the insured."\textsuperscript{155}

As to whether pure emotional damages can be recovered under various types of insurance covering "bodily injury," Missouri courts have found multiple ways of interpreting the boilerplate language. For a time, Missouri’s Court of Appeals for the Eastern and Western districts agreed that "bodily injury" insurance provided coverage for emotional distress.\textsuperscript{156} The Western District in \textit{Lanigan} held that a particular definition of "bodily injury" was ambiguous – thus it could include emotional distress – and remanded the case back to the trial court.\textsuperscript{157} This policy defined "bodily injury" as "bodily injury, sickness or disease sustained by a person including death resulting from any of these at any time."\textsuperscript{158} But a year later, in \textit{Leiendecker}, the Eastern District held the opposite – that the policy unambiguously denied coverage for emotional distress.\textsuperscript{159} Thus, for eleven years, Missouri courts were split on whether basic insurance policies covered emotional damages.

\textbf{IV. INSTANT DECISION}

The Supreme Court of Missouri undertook a de novo review of the insurance policy language in question.\textsuperscript{160} However, the court noted that State Farm’s counsel conceded in oral argument that its policy language was not as broad as the default language of the Missouri Financial Responsibility Law.\textsuperscript{161} Therefore, the court ruled that State Farm’s insurance policy contravened the Missouri Financial Responsibility Law.\textsuperscript{162} The insurance policy was thus unenforceable under state law,\textsuperscript{163} so the insurance policy language could not be the basis for the court’s decision.\textsuperscript{164} Instead of analyzing \textit{Derousse} according to the parties’ insurance policy contract, the court determined that it must decide the case under the default legislation of the Missouri Financial Responsibility Law.\textsuperscript{165}

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\bibitem{154} Hines, 656 S.W.2d at 265.
\bibitem{155} Schmidt v. City of Gladstone, 913 S.W.2d 937, 941 (Mo. App. W.D. 1996).
\bibitem{157} \textit{Lanigan}, 938 S.W.2d at 332.
\bibitem{158} \textit{See id.} at 333.
\bibitem{159} Citizens Ins. Co. of America v. Leiendecker, 962 S.W.2d 446, 450 (Mo. App. E.D. 1998).
\bibitem{161} \textit{Id.}
\bibitem{162} \textit{Id.}
\bibitem{163} \textit{Id.} at 894-95 (citing Rodriguez v. Gen. Accident Ins. Co. of Am., 808 S.W.2d 379, 382 (Mo. 1991) (en banc)).
\bibitem{164} \textit{Id.} at 894.
\bibitem{165} \textit{Id.} at 895.
\end{thebibliography}
Then, in attempting to apply the Missouri Financial Responsibility Law, the court found the statute ambiguous because it was unclear whether "bodily" modified only the word "injury," or whether it also modified the phrase "sickness or disease." The court noted that where a statute is ambiguous, it would construe the statute by "determining the intent of the legislature and by giving effect to its intent whenever possible." The court found that because a comma in the statute separated the phrase "bodily injury" from "sickness or disease," then "the statute provide[d] a series of categories of harm requiring uninsured motorist coverage: (1) bodily injury; (2) sickness; or (3) disease."

The court then sought to define these categories to determine whether Derousse's injuries fit within any of them. The court applied the rule of construction that if statutory language is not expressly defined, it is given its plain and ordinary meaning as typically found in the dictionary. The dictionary defined "sickness" as "the condition of being ill . . . a disordered, weakened, or unsound condition . . . a form of disease." The court defined "disease" as "an impairment of the normal state of the living animal . . . sickness, illness . . . a cause of discomfort or harm." Utilizing these definitions, the court found that Derousse's damages were compensable under the "sickness" or "disease" categories provided in the default language of the Missouri Financial Responsibility Law. The court defined "bodily" as "of or relating to the body," but the court said there was no need to discuss whether Derousse's damages – described as "anxiety attacks" and "severe mental and emotional distress" – met the definition of "bodily injury."

Without dissent, the court found that under the minimum policy requirements provided by the Missouri Financial Responsibility Law, a claim for "sickness" or "disease" could be distinct from "bodily injury." Therefore, Derousse's "purely emotional damages" were compensable under the categories of "sickness" or "disease." Accordingly, the court concluded that State Farm was not entitled to summary judgment, reversed the trial court's decision, and remanded the case.

In his concurring opinion, Judge Michael Wolff questioned the wisdom of the Missouri Financial Responsibility Law and suggested that "[p]erhaps it

166. Id.
167. Id.
168. Id.
169. Id.
170. Id.
171. Id.
172. Id.
173. Id.
174. Id. at 895-96.
175. Id.
176. Id. at 895.
would be wise for today’s legislators to put their minds to this matter.”177 He described the court’s principal opinion as reading the phrase “bodily injury, sickness or disease, including death” to include sickness or disease, whether bodily or mental.178 Thus, according to Judge Wolff, “[t]he Court’s decision is in line with contemporary notions of the relationship of the mind to the body.”179

Judge Wolff asked the philosophical question of whether compensation could ever help cure a plaintiff when the injury is a sickness or disease of the mind.180 “What Derousse experienced — a body landing on the hood of her car — undoubtedly was shocking and upsetting.”181 Judge Wolff noted that mental injuries heal due to the “ability to forget” what occurred.182 But in seeking compensation, litigation “encourages the victim to keep the memory fresh.”183 Thus, Judge Wolff asked, “Is that good public policy?”184

He suggested that the policy implications of the Derousse decision “of course, are beyond the scope of this Court’s interpretation of the statute.”185 Judge Wolff noted that one could speculate that the General Assembly, when writing the Missouri Financial Responsibility Law many years ago, “never meant to cover sickness or disease unless it was ‘bodily.’”186 But, he concluded that the legislature is an esoteric body that only expresses itself by the words of a statute.187 Not knowing what was in the legislature’s mind decades ago, Judge Wolff encouraged the current legislature to reconsider the issue.188

V. COMMENT

On the surface, Derousse answers the following question only as a matter of statutory interpretation: Does Missouri insurance law require coverage for emotional damages caused by uninsured motorists? The Supreme Court of Missouri underwent a complicated analysis — first determining that the State Farm insurance policy was contrary to state law, then determining that the default state law was ambiguous, and, finally, using the dictionary to define that state law — to reach the conclusion that pure emotional harm is a “sickness” or “disease” and thus compensable as an uninsured motorist.

177. Id. at 896 (Wolff, J., concurring).
178. Id.
179. Id.
180. Id.
181. Id.
182. Id.
183. Id.
184. Id.
185. Id.
186. Id.
187. Id.
188. Id.
But the message flowing from Derousse is much simpler: In its most recent decisions regarding pure emotional damages in negligent torts, the court gives expansive treatment and unanimously clears impediments in a plaintiff’s path to compensation. While it traditionally took a conservative approach to emotional damages, the Supreme Court of Missouri clearly has turned the page on that era.

The instant case provides a perfect scenario for why the old “impact rule” was indeed misguided. Who could say that Derousse’s emotional damages would only be legitimate if she had banged her head on her steering wheel? Society now recognizes and appreciates the legitimacy of emotional trauma. This change overcomes one of the traditional reasons for barring emotional damages — that emotional disturbance is difficult to verify with objective means. This recognition of legitimacy is at the heart of Missouri’s modern tort regime permitting pure emotional damages in cases of negligence.

This Note argues, however, that to allow this recognition, the Supreme Court of Missouri must be clearer and must articulate strong scope-of-liability rules to ensure such claims maintain “proportionality and manageability.” If not, then Missouri will have failed to address many of the traditional reasons for barring emotional damages. Derousse should have taken into account the many fundamental concerns of permitting broad recovery for pure emotional damages.

Derousse completely ignores the traditional concern that a great deal of emotional disturbance occurs in everyday life, and recognizing tort claims for all such harms might inundate courts. The result of this misstep is a new policy without any policy support, and the implication is that Missouri courts may now permit recovery for broad classes of car-crash witnesses and “near-miss” victims.

Finally, this Note argues that in the broader sense — i.e., beyond uninsured motorist claims — Derousse does very little to clarify whether pure emotional distress qualifies as bodily injury. In drafting such a narrow opinion, the court missed an opportunity to address whether emotional damages will qualify as “bodily injury” under other types of commercial insurance. Thus,

189. See supra notes 160-76 and accompanying text.
190. Derousse, 298 S.W.3d at 895-96.
191. See supra notes 45-55 and accompanying text.
193. See Keating, supra note 70, at 1175.
while automobile insurers are bound by Derousse’s interpretation of the Missouri Financial Responsibility Law, other insurers arguably remain free to draft around coverage for pure emotional damages.

In its most recent decisions regarding emotional damages – in the instant case and in Jarrett v. Jones – the Supreme Court of Missouri has eroded past decisions’ conservative, policy-driven measures that prevented a gross expansion of emotional distress claims in negligence cases. Instead of embracing its role in the development of this common-law tort, the court has avoided discussions of policy that would guide future litigation, and it has failed to distinguish, explain, or square these recent decisions with those of the past.

In one respect, the court is justified in applying the emotional-damages doctrine to the statutory insurance language of “bodily injury, sickness or disease, including death, resulting therefrom.” The statute applies to claimants “who are legally entitled to recover damages.” Missouri courts clearly do recognize that victims of negligently inflicted emotional distress are entitled to recover damages. The legislature has never said otherwise and thus arguably has given tacit approval to emotional distress claims.

However, by summarily recognizing the legitimacy of those who suffer emotional distress, the court now extends liability too far. The court should not permit plaintiffs like Jarrett and Derousse to proceed as direct victims because, quite simply, they were not the direct victims of the negligence. The direct victim in Jarrett was the young girl who died in the wreck. The direct victim in Derousse was the man who was ejected from the car and flew onto Derousse’s hood. Jarrett and Derousse suffered emotional fright after witnessing injuries to those third parties; Jarrett and Derousse suffered no physical injuries. Thus, both Jarrett and Derousse met the textbook definition of “bystanders.”

195. 258 S.W.3d 442, 443 (Mo. 2008) (en banc).
197. Id. (This coverage is “for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom”).
199. The victim status was not at issue on appeal in Derousse; the court’s discussion was limited only to the insurance issue. See Derousse v. State Farm Mut. Auto. Ins. Co., 298 S.W.3d 891 (Mo. 2009) (en banc).
200. Jarrett, 258 S.W.3d at 443.
201. Brief of Appellant, supra note 4, at *8.
In fairness to the court, under Missouri’s “bystander” requirements, both Jarrett and Derousse probably could have shown the requisite fear of physical injury. For Jarrett, this is so because of the head-on nature of his collision, though this still overlooks the issue that Jarrett was not scared until after he left the zone of danger. Derousse could easily satisfy that she feared for her safety because of the nature of the near-miss wreck, coupled with the body flying toward her windshield.

Nevertheless, problems remain. First, Jarrett blurs the line as to who qualifies as a direct victim because Jarrett was not scared of the collision itself. Second, Jarrett extends the time period in which a person can remain in the zone of danger, increasing the likelihood that his emotional harm will be recognized as being compensable. In application, the first concern makes it possible that a person involved in a near-miss accident could qualify as a direct victim for emotional damages, while the second concern also expands the potential pool of plaintiffs. Then Derousse comes into play, forcing insurers to compensate for the losses of this expanded class of plaintiffs.

In summary, Jarrett will allow more plaintiffs to proceed as direct victims; Jarrett and Derousse will allow direct victims to proceed without physical damages; and Derousse will expand the number of plaintiffs that society as a whole must compensate through insurance, thus causing insurance rates to increase. If this status quo remains, then Missouri will ignore fundamental liability concerns.

“Floodgate” concerns now come into play, opening the courthouse doors for a wider class of accident “victims” to sue their insurers for emotional damages. After the decision in the instant case, it is possible that a Missouri court would now require a negligent driver to reimburse another driver for emotional distress from a near-miss wreck. The legislature and courts have long recognized that an actual impact with the uninsured vehicle is not necessary for an injured driver to collect for a near-miss wreck. But even when there is a near-miss, the plaintiff had to show at least some physical impact to a human. Today, not only is a vehicular impact not required, but bodily impact is not required, either. The “floodgate” concern is very real here, as insurers now must compensate not only for negligent uninsured motorists who cause accidents, but also for those who cause fright.

203. See Asaro v. Cardinal Glennon Mem’l Hosp., 799 S.W.2d 595, 599-600 (Mo. 1990) (en banc). However, neither Derousse nor Jarrett could have succeeded under California’s bystander rule that they be “closely related to the injury victim.” See Thing v. La Chusa, 771 P.2d 814, 815 (Cal. 1989).

204. See Jarrett, 258 S.W.3d at 443, 447-48; Jarrett, No. 28259, 2007 WL 2231791, at *1 nn.2 & 3.

205. See Brief of Appellant, supra note 4, at *8.

206. See Rabin, supra note 66, at 1199, 1200 n.17.

207. See supra notes 151-56 and accompanying text.

208. See supra notes 151-56 and accompanying text.
Consider a slight variation on Derousse, where the ejected body lands on the road instead of Derousse’s windshield. Derousse would still stop out of fright and get out of her car to inspect the wreck. Derousse would still fear for her own safety, witness the wreck, and discover that the ejected body was someone she knew. In this hypothetical, her emotional distress would still be significant. Furthermore, because of Jarrett, the remoteness in time of witnessing the body would not change Derousse’s status as a direct victim.209

Because Derousse presents such a compelling and fact-specific narrative, the legitimacy of Derousse’s emotional distress is not in dispute. Yet extreme events and the corresponding desire to compensate the innocent victim are precisely the wrong issues upon which to base new law.210 The Supreme Court of Missouri has now tied a purely physical tort to the purely emotional but has not prescribed guidance for the marriage. Non-physical tort claims demand a clear scope of liability to guard against a flood of litigation.211 If the court will not address this concern, then perhaps the legislature should.

A second fundamental concern of “crushing liability”212 is less likely to stem from an automobile accident. Still, a single event with massive emotional damages could at least dent an insurer’s bottom line, and thus dent every driver’s wallet via insurance premiums. Consider the outcome if Derousse had a passenger in her car. That person would be no less of a victim than Derousse. Either Derousse’s uninsured motorist coverage would have to compensate that person’s emotional distress,213 or the passenger’s own uninsured motorist policy would cover the damages.214 Consider the expansion of liability if Derousse had instead been driving a bus involved in a near-miss wreck (or even an actual wreck). The emotional damages for one driver would be just as severe as for the dozens of passengers, and the elements of causation and foreseeability would be no different. Because uninsured motorist coverage “is personal coverage which follows the insured,”215 any passenger who carries his own Missouri insurance would be able to claim up to $25,000 for emotional damages. Thus, a bus of forty passengers could result


210. “Hard cases, it has been frequently observed, are apt to introduce bad law.” Winterbottom v. Wright, (1842) 152 Eng. Rep. 402, 406 (Rolfe, B.). “This is one of those unfortunate cases in which . . . it is, no doubt, a hardship upon the plaintiff to be without a remedy but by that consideration we ought not to be influenced.” Id.

211. See Keating, supra note 70, at 1171.

212. “Crushing liability” involves claims “from a single isolated incident but of enormous aggregate magnitude” where claims must be prioritized due to a limited pool of funds from the defendant. Rabin, supra note 66, at 1200 & n.17.


214. See supra notes 151-56 and accompanying text.

in one million dollars in emotional damages claims. That may not be enough to "crush" an insurer, but such wide "ripplings" from a single event are not consistent with Missouri’s rules on emotional damages expressed in Asaro v. Cardinal Glennon Memorial Hospital. The Supreme Court of Missouri in the instant case expands recovery for emotional damages without mentioning Asaro. If the instant case is seen only as a matter of statutory interpretation, then the court properly ignored Asaro. However, as a step in the larger evolution of emotional damages, the court either ignored precedent or undermined it, without doing the heavy lifting that should be required of such a decision.

The Missouri Financial Responsibility Law codifies the understanding that an insurer must compensate its policyholder for damages caused by an uninsured motorist. Given the modern understanding of the connection between the physical and emotional, it seems at least logical that the insurer should also cover emotional damages after such an accident. The court should be commended for fully recognizing the legitimacy of emotional distress, especially after Missouri’s earlier reluctance to do so.

However, even the states that were earliest to expand liability for negligent infliction of emotional distress recognized that there must be limits. The scope of liability extends too far in Missouri because Jarrett and Derousse failed to address fundamental liability concerns. Proximate cause rules are the appropriate means for doing so, and Missouri adopted such rules with a clear policy rationale in Asaro. Missouri now reads the Asaro rules too literally and forgets the policy reasons for their adoption. After all, Asaro followed New York’s lead in Tobin v. Grossman explicitly because Tobin took a narrow approach to recovery. Tobin would have criticized Missouri’s expansive recovery scheme that extends liability like “ripplings of the waters, without end.” Tobin aside, Missouri now fails to recognize its own words: Allowing recovery for eyewitnesses “provides no rational practical boundary for liability,” and distinguishing between those directly harmed by the defendant’s negligence creates “efficient liability rules.” In simple terms, plaintiffs such as those in Jarrett and Derousse are witnesses—not direct victims—and should fall outside the “rational practical boundary for liability.”

217. See 799 S.W.2d 595, 599-600 (Mo. 1990) (en banc).
219. See supra notes 45-55 and accompanying text.
221. Keating, supra note 70, at 1171.
222. Asaro, 799 S.W.2d at 599.
223. Id. (“On reflection, we agree with the New York Court of Appeals. The zone of danger standard is preferable . . . .”).
225. See Asaro, 799 S.W.2d at 599 (quoting Tobin, 249 N.E.2d at 424).
226. Asaro, 799 S.W. at 599.
The Supreme Court of Missouri should now follow California’s lead in *Thing* by scaling back liability for emotional damages after extending it too far in early decisions.227 Similar to *Thing*, Missouri should now be concerned with the difficulty of insuring against such damages.228 It is an unsustainable approach to compensate for the “acute emotional distress” caused by the gruesome or horrible incidents “to which every person may potentially be exposed in an industrial and sometimes violent society.”229 Because of the straightforward drafting of the *Derousse* opinion, it is unclear whether the court considered these policy concerns.230 In deciding whether to interpret “bodily injury, including sickness, disease or death resulting therefrom” as including emotional distress, the court easily could have gone the other way by citing its own language from *Asaro*: While Missouri recognizes pure emotional damages, it will be careful to provide a “rational practical boundary for liability,” to adopt “efficient liability rules,” and to limit recovery to those directly harmed by the defendant’s negligence.231 This approach clearly is not some antiquated conservative philosophy, as the Restatement (Third) explicitly opposes the notion that emotional distress could qualify as physical impairments by falling under the “illness” and “disease” categories.232

If the court did consider these policy concerns but chose not to articulate them in the opinion, then that choice of drafting provides little guidance to practitioners and insurers. The court decided the instant case without mentioning the split between Missouri’s Court of Appeals for the Eastern and Western districts found in *Lanigan*233 and *Leiendecker*234 as to whether pure emotional distress could be a “bodily injury.”235 Those cases turned on inter-

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228. See id. at 826-27 (“In order to avoid limitless liability out of all proportion to the degree of a defendant’s negligence, and against which it is impossible to insure without imposing unacceptable costs on those among whom the risk is spread, the right to recover for negligently caused emotional distress must be limited.”).
229. See id. at 829. *Thing* requires plaintiffs to show either physical injury to the plaintiff himself, or a showing of close relation to the injury victim, presence at the time of the injury, and emotional distress beyond that which would be anticipated in a disinterested witness. *Id.* at 815.
pretation of the language in the insurance policy. The court here properly chose to avoid interpreting the insurance policy, because in the future, insurers would have been able to change the language in their policies to bar emotional damages. By setting aside the insurance policy language as ambiguous and instead interpreting the Missouri Financial Responsibility Law, the court effectively created a new statewide policy for all automobile insurers. Because the Missouri Financial Responsibility Law sets the minimum floor for coverage with which all Missouri insurers must comply, Derousse forecloses the possibility of automobile insurers contracting around coverage for emotional damages. The statutory minimum coverage, as defined here by the court, now extends all uninsured motorist coverage to “purely emotional damages.” Whether intended or not, the court’s methodology makes new policy, and it should have articulated its underlying rationale to better serve the bar and insurers.

As a more practical matter of insurance law, while the approach of interpreting the statute rather than Derousse’s individual policy language was an appropriately shrewd way of tying automobile insurers’ hands in Missouri, the court’s means of doing so comes with a downside. While some states have taken the direct approach of categorizing emotional distress as “bodily injury,” the court sidesteps that issue here – instead classifying emotional distress as “sickness” or “disease.” The court expressly states that there was no need to discuss whether Derousse’s emotional distress met the definition of “bodily injury.” Thus, despite what Judge Wolff said in his concurrence, the court does not actually resolve the issue of how closely Missouri views the relationship between the mind and the body.

By leaving the discussion of “bodily injury” for another day, the court passes on deciding liability for emotional distress under other types of insurance policies. Commercial general liability insurance – business insurance – provides coverage for “bodily injury” and property damage. Business insurers might now change their boilerplate language specifically to exclude

236. See id. at *3-4.
238. Derousse, 298 S.W.3d at 894.
239. Derousse, 298 S.W.3d at 894.
241. Derousse, 298 S.W.3d at 895.
242. Id.
243. Id. at 896 (Wolff, J., concurring) (“The Court’s decision is in line with contemporary notions of the relationship of the mind to the body.”).
244. Farrell-Kolb, supra note 134, at 985.

http://scholarship.law.missouri.edu/mlr/vol76/iss3/11
emotional damages. It is unclear whether such avoidance would work, because the Missouri Financial Responsibility Law doesn’t reach these types of insurance, and Derousse provides no opinion about whether policies covering “bodily injury” but not “sickness or disease” will have to compensate for negligent infliction of emotional distress. Again, a more policy-driven opinion here would have provided both plaintiffs and insurers with guidance toward efficiency both in the marketplace and in legal strategy.

Finally, Judge Wolff’s concurrence expresses concern that emotional distress claims encourage claimants “to keep the memory fresh.” This concern of perverse incentives for litigants is a fundamental criticism of compensating for emotional damages, as explained by the Restatement (Third) of Torts: Minor emotional disturbance is an everyday occurrence, and the law should encourage people “to accept and cope with such harm” rather than focus on the disturbance via legal action.

Yet Judge Wolff raises the issue and in the next step backs away from it. He suggests that the legislature, not the court, should weigh in on the policy decision here. But the court, not the legislature, has always decided Missouri’s rules for negligent infliction of emotional distress. Judge Wolff writes as though he can do no more than provide food for thought. Decades ago, in Bass v. Nooney Co., the court took it upon itself to decide that pure emotional distress is legitimate. If the court – or even Judge Wolff alone – now has an evolving concern in an evolving tort, then the court should take it upon itself to revisit the issue rather than chide the legislature into action. Now that the legislature is aware of the court’s new position on these damages, it may indeed feel the need to better define the Missouri Responsibility Law with regard to emotional damages. Until Derousse, however, it was not apparent that the legislature needed to act.

VI. CONCLUSION

Even after abolishing the “impact rule” in Bass, Missouri hesitated to permit liberal recovery for pure emotional damages caused by negligence. One can easily speculate that the courts took time getting accustomed to the idea of a plaintiff being compensated for non-physical harm. In one sense, Derousse continues Missouri’s slow march toward acceptance of negligent

245. Derousse, 298 S.W.3d at 895.
246. Id. at 896 (Wolff, J., concurring).
248. Derousse, 298 S.W.3d at 896 (Wolff, J., concurring).
249. 646 S.W.2d 765, 772-73 (Mo. 1983) (en banc).
infliction of emotional distress by only interpreting emotional distress as a “sickness” or “disease,” rather than deciding whether to fully incorporate it as a “bodily injury” as other jurisdictions have done.

In other ways, however, the court’s means are troublingly overbroad. First, the court crafts a new policy without clarifying how Derousse fits within Missouri’s scheme of liability for emotional distress. Second, the combination of Derousse and Jarrett blurs the outer boundaries of the scope of liability in emotional distress claims. By combining these decisions, it seems possible that Missouri courts could permit pure emotional damages for plaintiffs who witness traffic accidents or are involved in near-miss accidents. Such outcomes would be impossible under Asaro’s clear, conservative rules. The court should provide a policy rationale for this change in precedent and either acknowledge or refute the potential for such widespread recovery.

Finally, the court’s interpretation of the Missouri Financial Responsibility Law is debatable. The Eastern District’s opinion in Derousse held that the statute only compensated for emotional diseases that result from a physical injury— in essence, that the statute codified the “impact rule.” The Supreme Court of Missouri in Derousse, however, decided to interpret the meaning of the words in today’s society, not the intent of the legislature at the time. Modern courts and current society are more comfortable in recognizing and sympathizing with psychological trauma as a “sickness” or “disease.” Though the Restatement (Third) explicitly opposes this trend, few among us today would deny that a person in Derousse’s shoes suffers trauma. The court’s decision reflects that trend: By finding ways around the old distinctions between bodily harm and pure emotional harm, such claims are now, in a word, undeniable.

If the means are troubling, the ends cannot be clearer. Missouri’s “era of conservatism” and its concerns over imaginary claims are gone. The new school of thought permits broad recovery for emotional distress claims.


251. See Derousse, 298 S.W.3d at 896 (Wolff, J., concurring).

252. See supra notes 139-42 and accompanying text; see also, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 4 cmt. d (2010) (citing cases).