The Status of Bystander Damage Claims in Louisiana: A Less-Than-Perfect Fit in the Tort Puzzle

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I. INTRODUCTION

While playing outside in the front yard of her house, a little girl, Suzie, is seriously injured when a man riding a bicycle negligently runs over her. The mother of the young girl, Rose, witnesses the entire accident from the front porch and suffers severe emotional distress and mental anguish from the experience.

This hypothetical is the precise situation the legislature was seeking to redress in enacting Louisiana Civil Code article 2315.6, approving the recovery of bystander damages. By allowing certain classes of bystanders to recover for mental anguish and emotional distress suffered after witnessing injury to another person or coming upon the scene soon thereafter, the legislature is promoting the tort goals of compensating true injury and deterring undesirable conduct. Unfortunately, in doing this, the legislature failed to address many issues, which resulted in numerous unanswered questions. Specifically, what is the nature of the


"A. The following persons who view an event causing injury to another person, or who come upon the scene of the event soon thereafter, may recover damages for mental anguish or emotional distress that they suffer as a result of the other person’s injury:
(1) The spouse, child or children, and grandchild or grandchildren of the injured person, or either the spouse, the child or children, or the grandchild or grandchildren of the injured person.
(2) The father and mother of the insured person or either of them.
(3) The brothers and sisters of the injured person or any of them.
(4) The grandfather and grandmother of the injured person, or either of them.
B. To recover for mental anguish or emotional distress under this Article, the injured person must suffer such harm that one can reasonably expect a person in the claimant’s position to suffer serious mental anguish or emotional distress from the experience, and the claimant’s mental anguish or emotional distress must be severe, debilitating, and foreseeable. Damages suffered as a result of mental anguish or emotional distress for injury to another shall be recovered only in accordance with this Article."

bystander claim, i.e., is the claim derivative of the primary victim’s injury? Also, in the context of automobile liability insurance policies and the Medical Malpractice Act (MMA), is the claim subject to a separate ceiling of applicable liability limits or is the bystander required to share the same cap as that of the primary tort victim? Lastly, what is the bystander’s role in the Workers’ Compensation Act (WCA)? These are the questions which this comment addresses.

When the lack of legislative guidance is combined with the inconsistent statements of the lower courts and the dodging of the issue by the Louisiana Supreme Court, the nature of the bystander claim is far from clear. In addition to the need to reconcile the conflicting court opinions, the nature of the bystander claim is a serious concern in the context of automobile insurance coverage, medical malpractice liability and workers’ compensation. Although the extent of coverage in the various contexts largely turns on the particular language of the policies and statutory provisions, the extent of the policy limits available is oftentimes dependent on whether or not the asserted claim is derivative of the injured victim’s claim.

3. A derivative claim is one which “does not come into existence until someone else is injured.” Crabtree v. State Farm Mutual Insurance Co., 93-0509 (La. 1994), 632 So. 2d 736, 740. The distinction between derivative and non-derivative is important, as it is applied in determining statutory or contractual limits on recovery. Maraist & Galligan, supra note 2, § 7-2(d), at 156.

4. Compare Moody v. United National Insurance Co., 95-1 (La. App. 5th Cir. 05/10/95), 657 So. 2d 236, 240 (“[C]laims for damages under article 2315.6 . . . are derived from the bodily injury to the tort victim . . . .” (citing Sandoz v. State Farm Mutual Automobile Insurance Co., 620 So. 2d 441, 444 (La. App. 3d Cir. 06/09/93))), with Sandoz, 620 So. 2d at 445 (specifically declining to “address whether we find Mr. Sandoz’s claim is derivative . . . .”).

5. Crabtree, 632 So. 2d at 741 (finding it “unnecessary to decide in this case whether a Lejeune claim ‘derives from’ or ‘results from’ the other tort victim’s bodily injuries.”).

6. E.g., Ferrell v. Fireman’s Fund Insurance Co., 96-3028 (La. 07/01/97), 696 So. 2d 569, 577 (holding that a wife’s loss of consortium claim is derivative of her husband’s claim and, therefore, can only be satisfied out of the per person bodily injury limits of the automobile liability insurance policy); Moody, 675 So. 2d at 240 (finding the parents’ bystander damage claims derived from the malpractice injury to their son and, therefore, are included within the same cap as their son’s claim). See generally Raney v. Walter O. Moss Regional Hospital, 93-145 (La. App. 3d Cir. 01/05/94), 629 So. 2d 485, 488–89 (discussing the application of workers’ compensation exclusivity to loss of consortium based on the claim’s derivative nature (citing Cushing v. Time Saver
An independent duty exists to protect a plaintiff from mental anguish damages occasioned by the injury to a third person. This is largely the reason why a bystander claim is not a derivative claim. Consequently, in addition to other reasons, a bystander should not be constrained to the single person limits of automobile liability insurance policies, medical malpractice liability caps, or workers’ compensation exclusivity provisions, especially when those constraints are based on the derivative nature of the claim.

Since many answers are reached based on the derivative nature of a claim, the initial purpose of this paper is to resolve the conflict regarding the nature of the bystander claim. The non-derivative nature of the bystander claim is evidenced through the comparison of the claim with established derivative claims of loss of consortium, wrongful death, and survival actions and by emphasizing the independent duty owed to the bystander. The establishment of the bystander claim as non-derivative aids in the explanation of why a bystander claimant should be allotted the aggregate limits of liability under automobile insurance policies, separate caps under the MMA, and excluded altogether from the provisions of workers’ compensation exclusivity.

Part II provides a brief background surrounding the enactment of Louisiana Civil Code article 2315.6. Part III analyzes the nature of the bystander claim, resolving the contested issue concerning the claim’s derivative status in favor of the non-derivative nature of the claim. Part IV addresses the treatment of bystander damages within the framework of automobile liability insurance policies and the MMA, stressing the need to allow the bystander access to increased limits of coverage, and the exclusion of the claim from the workers’ compensation exclusivity provision. Finally, Part V concludes with a reiteration that the bystander claim is not derivative of the trauma victim’s injury, the bystander’s entitlement to separate limits of liability, and the non-applicability of workers’ compensation exclusivity. By eliminating any temptation to treat bystander claims as derivative actions, this paper calls for Louisiana courts to recognize the independent nature of the bystander claim, necessitating the individual treatment of the claim in automobile liability insurance policies and the MMA and excluding the claim altogether from the WCA.

Stores, Inc., 552 So. 2d 731, 731–32 (La. App. 1st Cir. 11/14/89), writ denied, 556 So. 2d 1281 (1990)).

7. Lejeune v. Rayne Branch Hospital, 556 So. 2d 559, 569 (La. 1990).
II. BYSTANDER DAMAGE CLAIMS: 135 YEARS IN WAITING

"We cannot let the difficulties of adjudication frustrate the principle that there be a remedy for every substantial wrong."

–Justice Tobriner

The Louisiana Supreme Court decision of Black v. The Carrollton Railroad Company in 1855 set the stage for 135 years of jurisprudence denying recovery for mental anguish based on injury to another. Black involved a train wreck caused by the Carrollton Railroad Company’s negligence. A fourteen-year-old boy who was a passenger on the train suffered two broken legs. The boy’s father, who was not a passenger, attempted to recover for the shock to his parental feelings and the anxiety stemming from his son’s injuries.

Several reasons were advanced in support of the rule announced by the supreme court in Black. First, there was the concern that defendants and the courts would be subject to “spurious and fraudulent claims.” Second, allowing bystander recovery may subject the defendant to a “myriad of claims.” Third, allowing bystander recovery may open the floodgates of

8. Dillon v. Legg, 441 P.2d 912, 919 (Cal. 1968). Justice Tobriner was the California Supreme Court Justice who wrote the opinion in Dillon. This is a noteworthy statement made by him in the opinion which allowed a mother who witnessed her child’s death at the hands of a negligent driver to recover for her emotional distress. Id. at 919.

9. 10 La. Ann. 33 (La. 1855), overruled by Lejeune, 556 So. 2d 559. In rejecting the existence of a claim based on the negligent infliction of injury on another, the court stated “we are not disposed to admit the soundness of a doctrine, which would extend vindictive damages to a case like the present” Id. at 38.

10. Id. at 37.

11. Id.

12. Id. at 38.

13. See, e.g., Blackwell v. Oser, 436 So. 2d 1293, 1295 (La. App. 4th Cir. 07/08/83) (summarizing the reasons employed by jurisdictions for limiting or prohibiting bystander recovery).

14. Cullen J. Dupuy, Negligent Infliction of Emotional Distress: The Effect of Article 2315.6, 53 La. L. Rev. 555, 571 (1992). This was an obvious concern of the supreme court, which stated in Black, “the consequence of an offense to the offender would be greater or less, in proportion to the larger or smaller circle of friends of him who has been offended.” Black, 10 La. Ann. at 38–39.
litigation.\textsuperscript{15} Lastly, moral factors influenced the court in \textit{Black}:\textsuperscript{16} An important reason for denying recovery in the case was the Court's perception that mental anguish damages were punitive in nature, implying moral culpability on the part of the defendant when that culpability may be lacking.\textsuperscript{17}

While other jurisdictions in this country were adopting exceptions for allowing recovery,\textsuperscript{18} Louisiana adhered to the \textit{Black} decision until 1990.\textsuperscript{19} In fact, it took Louisiana twenty-two years\textsuperscript{20} to recognize and approve what the California Supreme Court accepted in its 1968 decision of \textit{Dillon v. Legg}.\textsuperscript{21}

In the 1990 case of \textit{Lejeune v. Rayne Branch Hospital},\textsuperscript{22} the Louisiana Supreme Court overruled its decision in \textit{Black}, reversing 135 years of jurisprudence. \textit{Lejeune} involved a widow who brought an action against the defendant hospital to recover for the mental anguish she suffered upon discovering that her hospitalized,

\textsuperscript{15} Dupuy, \textit{supra} note 14, at 571 (citing Holland v. St. Paul Mercury, 135 So. 2d 145, 155 (La. App. 1st Cir. 1961)).

\textsuperscript{16} \textit{Blackwell}, 436 So. 2d at 1295.

\textsuperscript{17} \textit{Id.} (citing \textit{Black}, 10 La. Ann. 33).

\textsuperscript{18} The two exceptions are the impact rule and the zone of danger rule. The impact rule allowed recovery of claims for mental anguish if accompanied by physical injury. The zone of danger rule permitted bystanders who were sufficiently close to the danger to recover. \textit{Lejeune v. Rayne Branch Hospital}, 556 So. 2d 559, 564 (La. 1990). Although these rules are often described as "exceptions," it is important to recognize that the rules may not be exceptions at all, but completely different theories of recovery in which the tortuous conduct is actually directed at the mental anguish victim and there is an "especial likelihood of genuine and serious mental distress." \textit{Marais} and \textit{Galligan}, \textit{supra} note 2, § 5-8, at 124 (citing Moresi v. State, 567 So. 2d 1081, 1096 (La. 1990)).

\textsuperscript{19} Although the Louisiana Supreme Court did not recognize bystander recovery until 1990, some lower court decisions did. \textit{Marais} and \textit{Galligan}, \textit{supra} note 2, § 5-8, p. 126–27.

\textsuperscript{20} This is not to say that Louisiana was slow to react, as Louisiana was not alone in its hesitancy to recognize bystander damages. \textit{See}, \textit{e.g.}, James \textit{v. Lieb}, 375 N.W.2d 109 (Neb. 1985); Ramirez \textit{v. Armstrong}, 673 P.2d 822 (N.M. 1983); Nielson \textit{v. AT&T Corp.}, 597 N.W.2d 434 (S.D. 1999).

\textsuperscript{21} \textit{Dillon}, 441 P.2d 912. This case was cited by the Louisiana Supreme Court in support of its decision in \textit{Lejeune}. \textit{Lejeune}, 556 So. 2d at 564. The California Supreme Court set the stage by allowing recovery to a mother who suffered emotional trauma and shock to her nervous system after witnessing the collision which caused the death of her child. The court's justification partially being that "when a child is endangered, it is not beyond contemplation that its mother will be somewhere in the vicinity, and will suffer serious shock." 441 P.2d at 914 (citing Prosser, \textit{Law of Torts} 353 (3d ed. 1964)).

\textsuperscript{22} 556 So. 2d 559.
comatose husband had been bitten by rats.\textsuperscript{23} Rewarding damages to the widow, the court clearly upheld recovery for the mental pain and anguish sustained by a person due to the negligent infliction of injury on a third person.\textsuperscript{24} However, this endorsement of bystander damages was not limitless. The court imposed restrictions on this bystander recovery: (1) the claimant must view the accident or injury-causing event or come upon the accident scene soon thereafter; (2) the mental pain and anguish must be reasonable; (3) the mental pain and anguish must be serious and foreseeable; and (4) the claimant must have a close relationship with the person injured.\textsuperscript{25}

The supreme court did not provide an answer to all bystander recovery questions, "leav[ing] for another day a decision whether recovery should be allowed only for close relatives (and if so, which ones), or rather, for those with simply a close relationship to the victim."\textsuperscript{26} However, the legislature stepped in and provided an answer to this question by adopting Louisiana Civil Code article 2315.6 on July 19, 1991, codifying the supreme court's holding in \textit{Lejeune}.\textsuperscript{27} Article 2315.6 is nearly identical to the restrictions listed in \textit{Lejeune}, the sole exception being the legislature's clarification of the close relationships necessary to recover—the spouse, children, grandchildren, parents, siblings, and grandparents of the trauma victim.\textsuperscript{28}

After the supreme court decision in \textit{Lejeune} and the legislature's adoption of Civil Code article 2315.6, the policy reasons underlying the \textit{Black} ruling are highly questionable. First, the worry of spurious and fraudulent claims is unwarranted

\begin{itemize}
  \item \textsuperscript{23} \textit{Id.} at 561.
  \item \textsuperscript{24} \textit{See id.} at 559.
  \item \textsuperscript{25} \textit{Id.} at 570.
  \item \textsuperscript{26} \textit{Id.} at 570–71. The court found it unnecessary to define the class of claimants, as the bystander in the case was the wife of the trauma victim and, therefore, however narrowly the court chooses to limit the class, "the wife of the directly injured victim qualifies." \textit{Id.} at 571.
  \item \textsuperscript{27} \textit{E.g.,} \textit{Trahan v. McManus, 97-1224 (La. 03/02/99), 728 So. 2d 1273, 1278.} Since La. Civ. Code art. 2315.6 is a codification of \textit{Lejeune}, which involved a negligent act, it is possible that although the article states that "damages suffered as a result of mental anguish or emotional distress for injury to another shall be recovered only in accordance with this article," La. Civ. Code art. 2315.6, the article may not be applicable to bystander claims based on, particularly, the intentional infliction of injury on a third person. \textit{See Dupuy, supra} note 14, at 570 and Louisiana State Senate Committee on Judiciary, Section A, Minutes of Meeting of May 21, 1991.
  \item \textsuperscript{28} \textit{Compare Lejeune, 556 So. 2d at 570, with} La. Civ. Code art. 2315.6.
\end{itemize}
because it is dealt with by "careful scrutiny of the evidence supporting the claim," as is done in any other case. As stated by one legal writer Cullen Dupuy, "The elimination of trivialities calls for nothing more than the same common sense which has distinguished serious from trifling injuries in other fields of the law." In addition, the legislature helped to forestall this concern by requiring that the mental anguish be reasonable, serious, and foreseeable, and that the direct victim suffer such harm as to make it reasonable for the claimant to suffer such serious emotional distress.

Second, the bystander recovery rule in 2315.6 takes care of the "myriad of claims" problem by limiting the bystanders who may recover to close family members who view the accident or come upon the scene soon thereafter. Third, the possibility of opening the floodgates of litigation is not an acceptable excuse for denying bystanders access to the courts. Dupuy recognized the fallacy of this reason noting, "The job of the courts is to resolve disputes between parties. When the parties have genuine claims that should be redressed, they should not be denied access merely because there may be many others with similar claims." This is an unacceptable "argument of expediency rather than of justice." Lastly, the concern of the court in Black based on the punitive nature of the bystander claim is of no consequence any longer because mental anguish is now recognized as compensatory or actual in this state.

III. THE INDEPENDENT DUTY OWED TO THE BYSTANDER

"If he is negligent, where danger is to be foreseen, a liability will follow—and foresight of the consequences involves the creation of a duty."

—Judge Benjamin Cardozo

29. Dupuy, supra note 14, at 572.
30. Id.
32. Id. See also Dupuy, supra note 14, at 571.
33. Dupuy, supra note 14, at 571.
34. Id.
A. The Bystander as a Derivative Victim: An Erroneous Assumption

A derivative claim is one which "does not come into existence until someone else is injured." Based on this definition, as well as other factors, an individual is not completely unjustified in initially presuming that a bystander claim is derivative in nature. Without knowledge of and inquiry into the history surrounding the bystander claim, it is an easy assumption to make. The statutory language chosen by the legislature in article 2315.6 only contributes to this presumption. For instance, article 2315.6 is entitled "liability for damages caused by injury to another." In addition, the article states that the bystander may recover damages for the mental anguish and emotional distress suffered "as a result of the other person's injury." In terms of strict statutory construction, all of this language seems to indicate that bystander damages are derivative. However, as will soon be shown, this interpretation falls in the face of the history surrounding the development of the bystander claim.

Article 2315.6 dictates that "the injured person suffer such harm that one can reasonably expect a person in the claimant's position to suffer serious mental anguish or emotional distress from the experience." The requirement that the injured person suffer a particular magnitude of harm could also easily lead one to infer that the claim is derivative of the trauma victim's claim. However, another viable explanation for this requisite is the assurance of the meritoriousness of a bystander's claim.

Individuals are not alone in their assumption, as some of the courts have also succumbed to the assumption that bystander


38. See William E. Crawford, Torts: Recent Developments, 59 La. L. Rev. 415 (1999). Crawford cites an alternate definition for a derivative claim than that utilized by Louisiana Courts: A claim that is "viable only if it arises from the injury to a primary victim whose claim itself is viable; i.e., a defendant not liable to the primary victim for his injury would not be liable to the derivative claimant." From this definition, he merely draws the conclusion that bystander damages are derivative. The bystander is a "primary victim," which evidences the fallacy in this definition and the error in concluding that the bystander claim is derivative.


40. Id. (emphasis added).

41. Id. (emphasis added).
damages are derivative in nature. In the fifth circuit case of Crabtree v. State Farm Insurance Co., the court erroneously analogized bystander damages to loss of consortium and wrongful death claims, which jurisprudence uniformly holds are derivative of a single bodily injury. As a result, the court stated, “Article 2315.6 claims are derived from the bodily injury to the tort victim.” Although the Louisiana Supreme Court reversed the fifth circuit on different grounds, expressing “no opinion regarding the correctness of the lower courts’ findings,” they implied that if the issue had been before them they would have come to the opposite conclusion: “In Lejeune, this court found the defendant hospital owed an independent duty to protect the plaintiff . . . .” The existence of this independent duty is explored further in Subpart C.

B. The Distinguishing Features of Bystander Damage Claims

The derivative analysis should not apply to claims for bystander mental anguish under Louisiana Civil Code article 2315.6. Although a derivative claim is one which “does not come into existence until someone else is injured,” as will be demonstrated, all claims that come into existence only when someone else is injured are not and should not be deemed derivative. As a matter of law, claims for loss of consortium are derivative of the primary victim’s injuries. Wrongful death claims are also probably derivative in nature. In addition, not only is the survival action derivative in nature, but it is actually the victim’s claim surviving his death. However, bystander damage claims are distinguishable from these derivative claims.

42. Moody v. United National Insurance Co., 95-1 (La. App. 5th Cir. 05/10/95), 657 So. 2d 236, 240.
43. 613 So. 2d 701 (La. App. 5th Cir. 1993), rev’d on other grounds, 93-0509 (La. 02/28/94), 632 So. 2d 736.
44. Id. at 702.
45. Crabtree, 632 So. 2d at 741–42 n.11.
46. Id.
47. Id. at 740.
50. See La. Civ. Code art. 2315.1; Maraist & Galligan, supra note 2, § 18-6, at 423–24.
A loss of consortium claim is based on damage to the relationship with a living person, the tort victim. Similarly, a claim for wrongful death is for damage to a relationship caused by the death of the tort victim. Unlike both of these claims, a claim for bystander damages is not a claim asserting harm to a relational interest. The bystander is not seeking damages to soothe the grief and bereavement resulting from the injury or death of the tort victim. Bystander damages are independent of these relational losses, as the bystander is seeking recompense for an independent injury inflicted on the bystander by the defendant.

A loss of consortium claim "hinges" not only on the injury to the victim, but is "directly intertwined" with the behavior and abilities of the victim after the event. Loss of consortium results from the deterioration of the tort victim, which in turn, causes the family losses, i.e., loss of society, services, support, and impairment of sexual relations. Thus, until an injured party’s condition deteriorates to such an extent that his family is actually deprived of his consortium, they have suffered no injury. In fact, if the injurious effects on the victim end up being minimal, the impact on the society, services, support, and sexual relations is lessened, entitling the consortium claimant to fewer damages. These losses are not immediate and may not arise at all if the status quo of the relationship is not affected by the injury.

On the other hand, the bystander claim exists immediately at the moment of the injury-causing event. Of crucial relevance and importance in bystander damages is the event causing injury to the tort victim and the likelihood that the event is so traumatizing as to result in mental anguish and emotional distress. Although "the

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51. Id.
52. Id.
54. See Lejeune v. Rayne Branch Hospital, 556 So. 2d 559, 567 (citing Louisiana appellate cases recognizing an "independent duty owed to an aggrieved non-traumatically injured plaintiff.").
55. Raney v. Walter O. Moss Regional Hospital, 93-145 (La. App. 3d Cir. 01/05/94), 629 So. 2d 485, 489.
56. See id.
57. Maraist & Galligan, supra note 2, § 7-2(d), at 154.
58. See, e.g., Lejeune, 556 So. 2d at 570 n.11 (acknowledging the recognition in other states that "the essence of the tort is the shock caused by the perception of the especially horrendous event"); Trahan v. McManus, 97-1224 (La. 03/02/99), 728 So. 2d 1273, 1277 ("[S]hock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous
injured person must suffer such harm that one can reasonably expect a person in the claimant's position to suffer serious mental anguish or emotional distress from the experience," the amount of bystander recovery has no correlation to the future disposition of the tort victim. The fact that the victim's long-term injurious effects end up being minimal does not minimize the bystander's claim. The differences between bystander damages and loss of consortium claims are exemplified in the fifth circuit case of Spears v. Jefferson Parish School Board stating, "Prior to trial the parents stipulated that they did not have an individual cause of action which met the requirements of 2315.6, but reserved their right to seek damages for loss of consortium."

Of consequence to the analysis of the nature of bystander recovery and a reason adverse to any analogy between bystander recovery and wrongful death, consortium, and survival claims is the range of individuals permitted to seek recovery for the claims. Although the list of beneficiaries permitted under all means of recovery are the same, i.e. the spouse, children, grandchildren, parent(s), and siblings, in the context of wrongful death, loss of consortium, and survival actions the legislature specifically preempts recovery by those in a lower category when there is a beneficiary in a higher category. On the other hand, in bystander recovery claims any and all of the beneficiaries may recover damages as long as the codal requirements are satisfied. The impact of this distinction is explained further in Subpart C.

observance of the accident." (citing Dillon v. Legg, 441 P.2d 912, 920 (Cal. 1968)).

60. 94-352 (La. App. 5th Cir. 11/16/94), 646 So. 2d 1104.
61. Id. at 1107 (citations omitted) (emphasis added).
63. La. Civ. Code arts. 2315.6, 2315.5.
64. La. Civ. Code art. 2315.5. The articles states: "[T]he other child or children of the deceased, or if the deceased left no other child surviving, the other survivors enumerated in the applicable provisions . . . , in order of preference stated, may bring a survival action . . ." (emphasis added).
65. La. Civ. Code art. 2315. The article states: "Loss of consortium . . . shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death . . . ."
67. La. Civ. Code art. 2315.6. The article states: "The following persons . . . may recover damages . . . ." Id. There is no hierarchical limitation in the statutory language.
Individuals have an interest in freedom from mental disturbances. This is an independent interest that is compensable when it is interfered with by another. The corollary to this independent interest is the existence of an independent duty to protect an individual from mental anguish damages occasioned by the infliction of injury to a third person. Many of the cases stress the existence of this independent duty as a prerequisite to bystander recovery. If the bystander claim was merely derivative of the primary victim's injuries, then the focus on the independent duty owed to the bystander would be unnecessary, as the duty owed to the trauma victim is of prime importance in a derivative claim.

In the words of the Louisiana third circuit, there is "no distinction between emotional distress and physical injury with respect to the right of recovery." In fact, Louisiana recognizes the torts of intentional infliction of emotional distress and negligent infliction of emotional distress. These are independent torts, not parasitic to a physical injury or traditional tort. There is

68. See Lejeune v. Rayne Branch Hospital, 556 So. 2d 559, 563 (La. 1990).
69. See id.
70. Id. at 569.
71. See, e.g., Wartelle v. Women's & Children's Hospital, Inc., 97-0744 (La. 12/02/97), 704 So. 2d 778, 785 ("[Bystander action] results from the breach of an independent duty owed by the tortfeasor to a bystander who is closely related to the victim." (citing Crabtree v. State Farm Mutual Insurance Co., 93-0509 (La. 02/28/94), 632 So. 2d 736, 741 n.11; Lejeune, 556 So. 2d 559)).
73. White v. Monsanto Co., 585 So. 2d 1205, 1209 (La. 1991) (affirming the viability in Louisiana of a cause of action for intentional infliction of emotional distress). Recovery for intentional infliction of emotional distress lies against "[o]ne who by extreme and outrageous conduct intentionally causes severe emotional distress to another . . . ." Id. The court cited Lejeune, 556 So. 2d at 570, for the assertion that "[l]iability arises only where the mental suffering or anguish is extreme." Id. at 1210.
74. Maraist & Galligan, supra note 2, § 5-8, at 124.
75. See White v. Monsanto Co., 585 So. 2d 1205, 1208 (La. 1991) (citing Annotation, Modern Status of Intentional Infliction of Mental Distress as Independent Tort; "Outrage", 38 A.L.R. 4th 998 (1985)). Louisiana requires neither impact nor ripening. An award is proper when the conduct is directed at
no reason why a separate tort does not also exist for the benefit of the bystander. As stated by the Louisiana Supreme Court in Lejeune, "The essence of the tort is the shock caused by the perception of the especially horrendous event."76 In recognition of this separate tort and "independent duty owed to an aggrieved, non-traumatically injured [claimant],"77 the bystander claim is not derivative in nature even though the distress results from witnessing injuries to another.

Although the victim of the traumatic event must suffer such harm to render reasonable the mental anguish and emotional distress of the bystander,78 the focus of the bystander claim is on the traumatic circumstances surrounding the injury.79 The trauma victim may be severely injured, but the bystander can be foreclosed from recovery if the events surrounding the injury are not sufficiently traumatic.80 If the bystander claim was truly derivative in nature, the severity of the tort victim's injury would be determinative and not the circumstances of the accident.81 However, in the context of bystander damage claims, bodily injury to the trauma victim is not adequate. This is understandable since a bystander claim is not just an alternate theory of recovery for the injury to the direct tort victim. A traumatic injury-inducing event is necessary in order to hinder spurious and fraudulent claims.

Based on the interpretation of Louisiana courts, the legislature "intended to allow recovery of bystander damages to compensate for the immediate shock of witnessing a traumatic event which cause[s] the direct victim immediate harm that is severe and apparent . . . ."82 Hence, bystander damages are not intended to be compensation for the "anguish and distress that normally

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76. Lejeune, 556 So. 2d at 570 n.11 (citing Gates v. Richardson, 719 P.2d 193 (Wyo. 1986)).
77. See id. at 567.
79. See Lejeune, 556 So. 2d at 570 n.11.
80. See Trahan v. McManus, 97-1224 (La. 03/02/99), 728 So. 2d 1273.
81. See Raney v. Walter O. Moss Regional Hospital, 93-0145 (La. App. 3d Cir. 12/08/93), 629 So. 2d 485, 489, writ denied, 94-0347 (La. 04/07/94), 635 So. 2d 1134.
82. Held v. Aubert, 02-1486 (La. App. 1st Cir. 05/09/03), 845 So. 2d 625, 632 (citing Trahan, 728 So. 2d at 1279).
accompany an injury to a loved one under all circumstances." If this was the intention of the legislature, then an assertion of the derivative nature of the bystander claim is advanced. However, this requirement of real and serious shock experienced by a bystander substantiates the bystander claim as an independent tort and, therefore, is not derivative in nature.

Also, since there can be recovery of bystander damages for anyone in the denominated list of beneficiaries regardless of hierarchy, in addition to serving as a distinguishing factor from other derivative claims, this independently supports the contention that the claim is not derivative in nature. If the claim was simply derivative in nature, allowing multiple classes of beneficiaries to recover for bystander damages would move the claim further toward the status of punitive damages, essentially permitting duplicate recovery. This was a major concern for the supreme court in *Black* because Louisiana disfavors punitive damages. If the legislature had intended bystander damages to be punitive in nature, they would have specifically enumerated the claim as an instance in which punitive damages can be recovered. Since they did not, the only viable alternative is to recognize bystander damages as non-derivative.

The independent nature of the bystander is furthered by the *Lejeune* court's application of a duty-risk analysis in determining whether bystander damages were warranted. The application of this analysis to bystander claims is significant because the analysis is the basis for establishing a duty owed to the bystander. The court focused on the foreseeability of the mental distress injury to the bystander in determining whether a duty on the part of the tortfeasor existed.

83. *Id.*
86. The duty-risk analysis simply asks "(1) did the defendant violate a duty owed to this plaintiff and (2) did that duty protect this plaintiff from this risk, which arose in this manner." Maraist & Galligan, *supra* note 2, § 5-4, at 104.
87. Lejeune v. Rayne Branch Hospital, 556 So. 2d 559, 564 (La. 1990).
89. *Lejeune*, 556 So. 2d at 564 (discussing Dillon v. Legg, 441 P.2d 912, 920 (Cal. 1968)).
of the risk, and the breach of the duty resulting in damages.\(^9\) The legislature codified these principles in Civil Code article 2315.6, requiring, among other things, that the claimant's mental anguish or emotional distress be foreseeable.\(^9\)

The application of these negligence principles makes the bystander claim analogous to the non-derivative tort of negligent infliction of emotional distress. The presence of these negligence principles in the context of bystander damages further demonstrates the independent nature of the bystander claim, negating the derivative assertion. The duty-risk analysis is unwarranted in the context of a derivative claim, as the emphasis in a derivative claim is on the duty owed to the injured victim (and not the bystander) and the foreseeability of the damages resulting therefrom.\(^9\)

Since the reasonable foreseeability of mental anguish and emotional distress is a primary consideration in the awarding of bystander damages,\(^9\) the weights in favor of establishing bystander damages as a derivative claim are lifted. As stated by the first circuit in the 1961 case of \textit{Holland v. St. Paul Mercury Insurance Co.},\(^9\) "the defendant's duty . . . [is] neither secondary, derivative nor dependent upon injury to a third party, but, on the contrary, is direct, primary and independent of an alleged tort in relation" to the trauma victim.\(^9\)

III. A Bystander's Place in the Insurance Scheme

A. A Passenger Standing By

Suppose instead of involving a negligent bicycler, the hypothetical introducing this comment involves the negligent driver of a vehicle who ran over Suzie with his automobile. Rose, the mother, institutes a claim for bystander damages for the mental anguish arising from her observance of the accident. The issue in

\(^{90}\) See Bishop v. Callais, 533 So. 2d 121, 123 (La. App. 4th Cir. 1989), writ denied, 536 So. 2d 1214 (1989).


\(^{92}\) See Ferrell v. Fireman's Fund Insurance Co., 92-3028 (La. 07/01/97), 696 So. 2d 569, 574 ("[B]ecause loss of consortium is not an injury to the person who bore the direct impact of the defendant's negligence but to another person whose relationship to the primary victim is diminished as a consequence, it may be regarded as a secondary layer of tort liability to the primary victim." (citing Berger v. Weber, 303 N.W.2d 424, 435 (Mich. 1981) (emphasis added))).

\(^{93}\) E.g., La. Civ. Code art. 2315.6.

\(^{94}\) 135 So. 2d 145 (La. App. 1st Cir. 1961).

\(^{95}\) \textit{Id.} at 158.
this hypothetical concerns the applicable limits of insurance coverage, i.e., whether Rose is constrained to the single person limits of the driver's automobile liability insurance policy, or if her claim is subject to the aggregate per accident limit.

Automobile liability insurance policies provide coverage of a particular dollar limit per person who suffers "bodily injury" in an accident. However, these "per person" limits are not infinite. When two or more persons suffer "bodily injury" in the same accident, the aggregate amount of coverage for each accident applies, without regard to the per person limits. For example, a policy may provide limits of $25,000 per person with an aggregate of $50,000 per accident. If only one person is "injured," then the $25,000 limit applies. If more than one person is "injured" in the same accident, the $50,000 aggregate limit is applicable.

The answer to the question posed in the hypothetical is largely dependent on the interpretation of the automobile liability insurance policy, i.e., what coverage is provided under the particular contract of insurance. Louisiana jurisprudence applicable to loss of consortium and wrongful death claims uniformly holds that the per person limits of the insurance policy apply. The underlying reasoning in this jurisprudence is that while more than one person may suffer damages, when those damages are derived from a "bodily injury" to only one person, the single person limit is applicable. Although some decisions finding loss of consortium and wrongful death claims subject to the single person limits are based on the derivative nature of the claim, other decisions reach the same conclusion after determining that the claims are not "bodily injuries," as that term is used in insurance policies.

Whether the basis of the decision is the derivative nature of the claim or the claim's fit within the "bodily injury" term utilized in the insurance policy, the bystander claim should be subject to the

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96. See, e.g., Crabtree v. State Farm Mutual Insurance Co., 93-0509 (La. 02/28/94), 632 So. 2d 736, 742.
97. Id.
98. Id. (involving the interpretation of the term "bodily injury" as used in the automobile liability insurance policy).
100. Crabtree, 632 So. 2d at 742.
101. Albin v. State Farm Mutual Automobile Insurance Co., 498 So. 2d 171, 174 (La. App. 1st Cir. 1986), writ denied, 498 So. 2d 1088 (1986) (holding that "loss of consortium and society ... is not a bodily injury within the meaning of [the] automobile liability insurance policy.").
COMMENTS

per accident aggregate limit. Ordinarily in automobile insurance policies, “bodily injury” means “bodily injury to a person and sickness, disease or death which results from it.”102 Earlier Louisiana cases rejected the assertion that purely emotional damages constitute bodily injury, adhering to the traditional understanding of the term as “hurt or harm to the human body or some member thereof by contact with some external force or violence . . . .”103 As a result, mental distress unaccompanied by physical injury was not generally regarded as bodily injury.104 In accordance with this definition, the courts held that bystander mental anguish claims were not “bodily injuries;” hence, the per person limits applied to the claims.105

In Crabtree v. State Farm Insurance Co.,106 the Louisiana Supreme Court held that the bystander claim as applied to the automobile insurance policy in the case was a separate bodily injury, making applicable the per accident aggregate policy limit.107 In arriving at this conclusion, the court stated, “an insurance policy should not be interpreted in an unreasonable or strained manner so as to enlarge or restrict its provisions beyond what is reasonably contemplated by its terms or so as to achieve an absurd conclusion.”108 The policy at issue in the case defined “bodily injury to one person” as including “all injury and damages to others resulting from this bodily injury.”109 State Farm contended that “bodily injury to one person” includes all injury, including bodily injury resulting from this bodily injury.110 Rejecting this contention, the court determined that “bodily injury

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102. E.g., Crabtree, 632 So. 2d at 739 (citing the language of the policy before the court) (emphasis added).
103. Albin, 498 So. 2d at 173 (citing Nickens v. McGehee, 184 So. 2d 271 (La. App. 1st Cir. 1966)) (emphasis added).
104. Id.
105. Sandoz v. State Farm Insurance Co., 620 So. 2d 441, 444 (La. App. 3d Cir. 1993) (finding that the per person limit applies to the father’s mental anguish claim).
106. 632 So. 2d 736.
107. Id. at 745.
108. Id. at 741 (emphasis added). See also La. Civ. Code art. 2056 (1985) (“In case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text. A contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party.”).
109. Id. at 742.
110. Crabtree, 632 So. 2d at 742 (emphasis added).
to one person' does not reasonably encompass bodily injury to others under the single person limit."

In addition to the interpretation and application of the insurance contract at issue, the court found that bystander damages constitute bodily injury based on prior jurisprudence of the court. Specifically, in order to succeed in a bystander claim, the mental anguish must be severe and debilitating, which serves to raise bystander damages to the level of "bodily injury." In addition, an individual's mental health is an essential component to the overall operation of the physical structure of the body. Therefore, the preclusion of bystander damages from bodily injury merely based on the lack of actual physical injury is arbitrary.

Claims for loss of consortium, unlike bystander claims, are not considered bodily injuries within the meaning of automobile liability insurance policies, subjecting the claim to the single person limits. Because the bystander claim is considered a bodily injury, its treatment should be different than loss of consortium claims, permitting the application of the per accident aggregate limits. In addition, if the bystander is constrained to the single person limits and these limits are exhausted by the claims of the injured party, then the bystander claim is essentially extinguished as the bystander has no funds from which to recover. This is an unacceptable result and in direct opposition to the tort goal of compensating true injury.

The Crabtree court found it unnecessary to decide whether a bystander claim derives from the other tort victim's bodily

111. Id. The court interpreted the policy to mean that "where one person suffers bodily injury, or where one person suffers bodily injury and one or more other persons suffer injury and damages other than bodily injury as a result of the former's bodily injury, the amount of coverage for bodily injury to one person applies." Id.
112. Id. at 744 (citing Lejeune v. Rayne Branch Hospital, 556 So. 2d 559, 570 (La. 1990)).
113. Id.
114. See Sparks v. Tulane Medical Center Hospital & Clinic, 546 So. 2d 138, 146 (La. 1989). Although the case involved the application and interpretation of the Workers' Compensation Act, I feel that the conclusions reached also have application in the context of automobile liability insurance policies and the interpretation of the term bodily injury.
116. Maraist & Galligan, supra note 2, § 5-2, at 101.
injuries. However, it is necessary to make the determination as
courts have reached conclusions regarding automobile policy
limits citing the derivative nature of the claim. For instance,
claims for loss of consortium are restricted to the single person
limits for reasons including the derivative nature of the claim. As
discussed in Part III, bystander damage claims are not
derivative of the primary victim’s injury. The different treatment
allotted to the bystander claim is evidenced in a statement by the
have separate causes of action for mental anguish and emotional
distress under 2315.6 and, therefore, are not entitled to recover a
separate per person limit under the policy.” As a result, when
the claimant does have a separate cause of action for mental
anguish and emotional distress, the bystander should be allowed to
access the extended per accident liability coverage and not be
restricted to the per person policy limits.

In conclusion, there is no basis on which a bystander can be
restricted to the per person limits of an automobile liability
insurance policy. Bystander damages are a form of bodily injury,
resulting in the availability of the aggregate per accident coverage.
Also, the non-derivative nature of the bystander claim precludes
finding that the bystander is entitled only to the excess of the per
person limits, as the injury does not simply result from the bodily
injury of the accident victim.

2d 736, 741 (finding the answer to the question regarding whether bystander
damages constitutes bodily injury determinative of the policy limits available).

118. Ferrell v. Fireman’s Fund Insurance Co., 96-3028 (La. 07/01/97), 696
So. 2d 569, 577 (holding that a wife’s loss of consortium claim is derivative of
her husband’s claim and, therefore, can only be satisfied out of the per person
bodily injury limits of the automobile liability insurance policy); Shariff v. Ohio
Casualty Insurance Co., 584 So. 2d 1223, 1226 (La. App. 2d Cir. 1991), writ
denied, 589 So. 2d 1055 (La. 1991) (finding that “because the right of action and
the claim for loss of consortium are derived from the injured person’s injuries,
recovery is restricted to the per person limits.”); and Shepard v. State Farm
Mutual Automobile Insurance Co., 545 So. 2d 624, 630 (La. App. 4th Cir. 1989)
determining that “any loss of consortium claim is only derivative . . . . Such a
claim is therefore restricted to the monetary limits placed in the insurance
policy, to a per person total.”).

119. Conner v. Stanford, 96-1211 (La. App. 3d Cir. 03/05/97), 692 So. 2d
1146.

120. Id. at 1148. The children did not have a bystander claim because they
were “not involved in the accident, did not witness the accident, and did not
come upon the scene shortly thereafter.” Id.
B. The Bystander: Another Person Entitled to Reasonable Care

As the plot in the hypothetical thickens, not only is Suzie injured after being hit by the bicycler, but upon arriving at the hospital, the doctor negligently cuts an artery. Rose saw the entire scene as she watched the staff furiously trying to save her daughter, blood squirting out of the severed artery. Fortunately, they were able to save Suzie’s life. Now, Rose seeks recovery from the doctor who committed the act of malpractice, not only for Suzie’s injuries, but for her own mental anguish and emotional distress.

Malpractice is any “unintentional tort or breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient . . . .”121 The Louisiana Legislature provides a mechanism whereby a health care provider can qualify for limited liability. Under the MMA, the health care provider’s liability for malpractice on one patient is limited to $100,000.122 A patient’s maximum recovery against all qualified health care providers for one tort causing one injury is $500,000.123

The MMA applies exclusively to claims arising from injury to or death of a patient.124 However, since the MMA applies to claims not only for the actual injury to the patient, but all claims arising from injury to or death of the patient, the claimant need not be a patient.125 Nothing in the MMA distinguishes between damage claims by a patient, by a statutory survivor of the patient, or by a statutorily-limited relative of the patient.126 For these reasons, the Louisiana Supreme Court in Trahan v. McManus,127 held that although article 2315.6 provides a cause of action to bystanders for mental anguish damages resulting from injury to or death of the patient caused by the doctor, this cause of action is

122. La. R.S. 40:1299.42(B)(2) (2001) (“A health care provider qualified under this part is not liable for an amount in excess of $100,000 for all malpractice claims because of injuries to or death of any one patient.”).
123. La. R.S. 40:1299.42(B)(1) (2001). (“The total amount recoverable for all malpractice claims for injuries to or death of a patient . . . shall not exceed $500,000 . . . .”)
124. Trahan v. McManus, 97-1224 (La. 03/02/99), 728 So. 2d 1273, 1277 (citing Hutchinson v. Patel, 93-2156 (La. 05/23/94), 637 So. 2d 415, 428) (emphasis added).
125. Id. (emphasis added).
126. Id.
127. Id.
subject to the procedures and limitations of the MMA.\textsuperscript{128} In other words, the MMA applies to the bystander recovery action. As a result, Rose’s opportunity for recovery of bystander damages is largely dependent on the interpretation and application of the MMA.

A physician’s negligence is not multiplied by the number of plaintiffs.\textsuperscript{129} Hence, the $500,000 statutory cap applies to the patient’s claim and any claims for loss of consortium, wrongful death, or survival damages arising out of the patient’s injuries.\textsuperscript{130} As repeatedly stated, the bystander claim is distinguishable from these derivative claims. The bystander’s claim is a separate and independent injury resulting from the negligence of the physician. However, in the context of the MMA, the non-derivative nature of the claim is not sufficient to allow the bystander to reap the benefits of a separate statutory cap. The statutory language poses an additional obstacle, especially in light of the supreme court’s holding in \textit{Trahan} regarding the applicability of the MMA to bystander damage claims.\textsuperscript{131}

In the case of a bystander damage claim, the negligence of the physician is not being multiplied by the number of plaintiffs; the physician’s negligence caused damage to two different people. First, the physician caused damage to the actual patient, i.e., the malpractice. The physician also caused damage to the bystander who experienced severe emotional distress after witnessing the act of malpractice. In doing this, the physician breached the independent duty owed to the bystander by interfering with the bystander’s interest in freedom from mental disturbance.\textsuperscript{132} Nonetheless, the MMA clearly states, “the total amount recoverable for all malpractice claims for injuries to or death of a patient . . . shall not exceed $500,000 plus interest and cost.”\textsuperscript{133} The $500,000 cap applies collectively to all claims which flow from one act of malpractice resulting in a victim’s injury.\textsuperscript{134}

\textsuperscript{128} Id.
\textsuperscript{129} Moody v. United National Insurance Co., 95-1 (La. App. 5th Cir. 05/10/95), 657 So. 2d 236, 240 (citing Todd v. Sauls, 94-10 (La. App. 3d Cir. 12/21/94), 647 So. 2d 1366, 1381).
\textsuperscript{130} See Turner v. Southwest Louisiana Hospital Assoc., 03-0237 (La. App. 3d Cir. 2003), 856 So. 2d 1237, 1242 (stating that the “single $500,000 cap applies collectively to all claims which flow from one act of malpractice resulting in a victim’s injury or wrongful death.”).
\textsuperscript{131} Trahan, 728 So. 2d at 1277.
\textsuperscript{132} See Lejeune v. Rayne Branch Hospital, 556 So. 2d 559, 563 (La. 1990).
\textsuperscript{134} Turner, 856 So. 2d at 1242.
Although the bystander's claim results from a separate injury than that of the patient, the claim is not based on malpractice, as the bystander is not a patient.\textsuperscript{135} This conclusion can only be reconciled with the decision in \textit{Trahan} by holding the bystander subject to the same statutory cap as the patient.

This determination does not destroy the non-derivative nature of the bystander claim. Contrary to the fifth circuit case of \textit{Moody v. United National Insurance Co.},\textsuperscript{136} the cap is based not on the derivative nature of the claim, but on the application of the statute. The fifth circuit erroneously drew the conclusion that article 2315.6 derived from the bodily injury to the tort victim, i.e., the malpractice injury to the patient and, thus, did not constitute an independent injury.\textsuperscript{137} Not only did the court misconstrue the holdings of a string of cases,\textsuperscript{138} but, the court failed to recognize that the bystander claim can arise from a single claim of \textit{malpractice} and still not be regarded as derivative. The cap is based on the act of \textit{malpractice} and not the patient's injuries.

Another alternative is to hold that the decision in \textit{Trahan} is wrong and the bystander claim is not governed by the MMA at all because the bystander is not a "patient." As recognized by the Louisiana Supreme Court, the "$500,000 limitation is special legislation in derogation of the rights of the tort victim and, therefore, should be strictly construed against the limitation of damages otherwise recoverable."\textsuperscript{139} Casting further doubt on the earlier decision of the supreme court in \textit{Trahan} is the court's very recent opinion in \textit{Williamson v. Hospital Service District No. 1 of Jefferson}.\textsuperscript{140} In finding that the medical center's alleged negligence in failing to repair a wheelchair did not arise from "medical malpractice" and, therefore, excluding the patient from

\textsuperscript{135}. La. R.S. 40:1299.41(A)(3) (2001 & Supp. 2005). The statute defines patient as any "natural person . . . who receives or should have received health care from a licensed health care provider, under contract . . . ."

\textsuperscript{136}. Moody v. United National Insurance Co., 95-1 (La. App. 5th Cir. 05/10/95), 657 So. 2d 236, 240 (holding that the parents' bystander claims are derivative of the malpractice injury and, therefore, included within the same cap as their son's malpractice claim).

\textsuperscript{137}. \textit{Id.}

\textsuperscript{138}. \textit{Id.} The court stated that the holding of \textit{Sandoz v. State Farm Mutual Automobile Insurance Co.}, 620 So. 2d 441, 445 (La. App. 3d Cir. 06/09/93) was that bystander claims were derivative in nature when, in fact, the court specifically declined to address whether the claim is derivative.

\textsuperscript{139}. Batson v. South Louisiana Medical Center, 99-0232 (La. 11/19/99), 750 So. 2d 949, 959 (Lemmon, J., concurring).

\textsuperscript{140}. 04-0451 (La. 12/01/04), 888 So. 2d 782.
the ambit of the MMA, the court stated, "[The] coverage of the MMA should be strictly construed because the limitations of the MMA on the liability of qualified health care providers is special legislation in derogation of the rights of tort victims."\textsuperscript{141}

The bystander claim should not be easily inserted within the ambit of the MMA based on this rule of strict construction. The bystander’s situation is more analogous to a third person who is injured as a result of a psychiatrist’s failure to warn that the psychiatrist’s patient intended to harm the third person: The third person’s claim against the psychiatrist is not covered by the MMA because the third person is not a patient, thus, there is no treatment and no malpractice.\textsuperscript{142} In addition, as a blood donor is not a "patient" of a blood bank within the meaning of the MMA because "he did not receive any health care or medical treatment whatsoever,"\textsuperscript{143} for the same reason a bystander should not be considered a "patient."

However, freeing the bystander from the provisions of the MMA has negative repercussions. One drawback of allowing the bystander to sue the health care provider in tort is that it subjects the physician to an unlimited amount of personal liability. This is not a beneficial solution from a societal standpoint as it will result in increased health care costs and other unattractive consequences, hindering the purpose of the cap in the MMA to ensure the availability and affordability of medical care.\textsuperscript{144}

Allowing the bystander claimant to tap into a separate statutory cap promotes the tort goals of compensating true injury. Unfortunately, this does not comport with the statutory language of the MMA. A possible solution to this conflict is to rank the tort recovery theories subject to the $500,000 limit. This provides greater sureness that the bystander will receive some form of recovery. First and foremost, the patient is entitled to recover. The bystander should then be allowed to recover since a bystander claim is based on a completely separate injury. Since loss of

\textsuperscript{141} ld. at 787–88.
\textsuperscript{142} Maraist & Galligan, supra note 2, § 21-3(e), at 468.
\textsuperscript{143} Delcambre v. Blood Systems, Inc., 03-1130 (La. App. 3d Cir. 02/04/04), 866 So. 2d 352, 355.
\textsuperscript{144} See LaMark v. NME Hospitals, Inc., 542 So. 2d 753, 755–56 (La. App. 4th Cir. 1989); Turner v. Southwest Louisiana Hospital Assoc., 03-0237 (La. App. 3d Cir. 10/01/03), 856 So. 2d 1237.
consortium and wrongful death claims are derivative, their priority for recovery should be last.\textsuperscript{145}

The legislature could also solve this problem and at the same time make the solution more equitable by amending the MMA to either allow bystander claimants to tap into their own statutory cap or to overrule the decision in \textit{Trahan} by excluding bystander claims from the governance of the MMA. In order to ensure the availability and affordability of medical care, the best solution is not only to uphold the decision of \textit{Trahan}, but also to amend the statute to allow bystanders their own statutory cap. This strikes a suitable balance between ensuring an injured victim recovery and, at the same time, allowing the qualified health care provider to reap the benefits of limited liability.

\textbf{C. The Bystander's Exclusion from Workers' Compensation Exclusivity}

Suppose that one day, Rose decides to meet her husband, Pascal, for lunch. When she arrives at his place of employment, she proceeds to look for him. As she walks into a room, she sees an enormous barrel of caustic chemicals spill on Pascal. He is severely burned as a result of the incident. She experiences severe mental anguish and emotional distress from witnessing the accident. Pascal’s claim is governed by the WCA. However, Rose’s tort suit should not be precluded by the exclusivity provisions of the WCA.

If an employee suffers a personal injury from an accident arising out of and in the course of employment, the employer shall pay compensation under the WCA.\textsuperscript{146} The rights and remedies under the WCA are exclusive as against the employer, except for intentional acts.\textsuperscript{147} Unless the bystander is an employee, the bystander damage claim does not arise out of the employer-employee relationship. This is a prerequisite to the application of

\textsuperscript{145} Courts have not hesitated to limit recovery based on the derivative nature of a claim in other contexts, therefore, placing the claims lower on the totem pole of recovery should not be questionable.
\textsuperscript{147} La. R.S. 23:1032 (A)(1)(a) (2001). "Except for intentional acts . . . the rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights, remedies, and claims for damages . . . as against his employer . . . for said injury, or compensable sickness or disease."
the WCA. Since this prerequisite is lacking in the context of a bystander claim, any discussion of the WCA is misplaced.

The legislative intent of the workers' compensation system is complete tort immunity for the employer in exchange for assumed liability for all work-related injuries. This guarantees economic stability to the employee and his dependants. Consequently, courts consistently sustain exceptions of no right and no cause of action because of this exclusive remedy provision in the workers' compensation law. The WCA is "focused on injuries to employees, and resultant losses by them and certain of their family members" based on the injuries to the employees. Thus, the employer's immunity from tort liability applies to loss of consortium and wrongful death claims. These claims of family members are derivative of the employee's injuries and, therefore, within the reach of workers' compensation exclusivity.

As exemplified in Part III, the bystander damage claim is distinguishable from derivative claims such as loss of consortium. The analysis employed by the Louisiana Supreme Court in Raney v. Walter O. Moss Regional Hospital, in distinguishing a claim involving fear of future illness from loss of consortium and other derivative claims, serves as an excellent precedent because, like a bystander claim, the case involved the application of the exclusivity provision to non-employees seeking recovery for the breach of an independent duty. In the bystander claim, the individual is seeking compensation for mental pain and anguish based not only on a separate, distinct, and independent injury, but the breach of a separate, distinct, and independent duty. The claim is for the emotional distress and mental anguish that the

148. See Mundy v. Kulkoni, Inc., 503 So. 2d 66, 68 (La. App. 5th Cir. 1987) (stating that "[a]ny injury suffered by Mr. Mundy with regard to National Marine arises out of the employer-employee relationship. Therefore, any remedy or recovery to him or his wife is exclusively governed by the compensation laws.").
150. Raney v. Walter O. Moss Regional Hospital, 93-145 (La. App. 3d Cir. 01/05/94), 629 So. 2d 485, 488.
151. Id. (emphasis added).
152. E.g., Flynn, 373 So. 2d at 583.
153. See id. at 489.
154. 629 So. 2d 485.
155. Id. at 489. In upholding a worker's family members' suit in tort against the employer for fear of future illness, the court emphasized that the "[p]laintiffs are not claiming ... loss of consortium."
156. Lejeune v. Rayne Branch Hospital, 556 So. 2d 559, 569 (La. 1990).
bystander experiences and will continue to experience as a result of witnessing the traumatic event. The bystander is not claiming "injury" as the term is used in the WCA, as the injury for which the bystander is seeking recompense is not based on "violence to the physical structure" of the employee.\textsuperscript{157}

Not only are claims such as loss of consortium, wrongful death, and survival actions hinged upon the injury to the injured employee, but, more importantly, the claims are "directly intertwined with the employee's injury."\textsuperscript{158} A claimant bringing an action for loss of consortium experiences a loss because the employee injured on the job is suffering.\textsuperscript{159} On the other hand, a bystander does not experience the mental anguish and emotional distress simply because the injured employee is suffering. If that was the case, then the claim would be superfluous when considered in light of an action for loss of consortium. The suffering of the injured employee is only one factor in addressing the reasonableness of the bystander claim.\textsuperscript{160} The focus of the claim is on the severity of the traumatic event and the suffering of the bystander; the suffering of the injured employee is not dispositive.

When a suit in tort is barred upon the determination that the claim falls within the provisions of the WCA, the claimant, whether an employee or a relation of the employee, is limited to recovery of those benefits specifically recognized under the WCA.\textsuperscript{161} Therefore, if the bystander claim is in the ambit of workers' compensation exclusivity, then bystander damages would not be compensable, as those damages are not specifically recognized under the WCA. This is an unacceptable result and incompatible with the rule of strict construction applicable to statutes in derogation of an individual's rights.\textsuperscript{162} Since workers'
compensation exclusivity is in derogation of general tort rights, in the absence of explicit statutory language limiting or excluding such rights of the bystander, a bystander suit should not be barred.

The legislature uses broad and clear language in their drafting of the exclusivity provision in the WCA.163 This broad and clear language has facilitated the ease within which claims such as loss of consortium have been engulfed within the ever-expanding reach of workers’ compensation exclusivity.164 This sweeping language makes it all too easy for individuals to assert that if the legislature had meant to exclude a bystander claim from the exclusivity provision, they would have simply done so explicitly. The flip-side of this allegation is the possibility that the legislature did not feel the need to waste their breath excluding a claim, which so apparently does not fall within the reach of workers’ compensation exclusivity.

If the wife in the hypothetical had instead been splashed by the chemicals, no one would question her ability and right to sue her husband’s employer in tort for her injuries. There is no justification to draw an arbitrary line between this right to sue and the wife’s right to sue for bystander mental anguish damages. In the supreme court case of Sparks v. Tulane Medical Center Hospital and Clinic,165 the court stated that “when an employee suffers from a mental disability which is serious enough to render that employee unable to work, then the injury has done violence to the physical structure of the body.”166 There is no distinction between emotional distress and physical injury with respect to the right of recovery.167 There is no reason to make a distinction in this context.

drawn, i.e., the application of strict construction when the claim involves a bystander in which the statute is not concerned of relieving the economic burden of work-connected injuries.

164. See, e.g., Whiddon, 809 So. 2d at 430 (the loss of enjoyment of life, loss of earning capacity, and mental anguish claims of the worker’s children and spouse fell within workers’ compensation exclusivity).
165. 546 So. 2d 138.
166. Id. at 145.
167. See Guillory v. Arceneaux, 580 So. 2d 990, 996 (La. App. 3d Cir. 05/22/91), writ denied, 587 So. 2d 694. See also Sparks, 546 So. 2d at 146 (stating that “there is no bright-line distinction between ‘physical’ and ‘mental’ injuries, either in medicine or in law, which provides a reliable basis for awarding or denying workmen’s compensation benefits.”).
The role of article 2315.6 within the current framework of the tort system and broader legislative scheme is now clarified. The initial concern involved the dispute regarding the nature of the bystander claim. Since many answers are arrived at on the basis of the derivative nature of a claim, resolving this issue was a prerequisite if any further discussions were to have any value. A bystander claim is not derivative of the trauma victim’s injury. An independent duty is owed to an aggrieved, non-traumatically injured plaintiff based on an individual’s interest in freedom from mental disturbance. As a result, the bystander has a right to seek compensation for this mental anguish and emotional distress.

Since the bystander claim is not derivative in nature, when the underlying accident involves an automobile, the claimant is not constrained to the per person limits of the automobile liability insurance policy when that limit is based on the derivative nature of the claim. The bystander is also not constrained by the per person limits of the policy when the limit is based on the application of the term “bodily injury,” as a bystander’s mental anguish is “bodily injury.”

The bystander is claiming a separate and independent injury from the injury to the patient in the context of a medical malpractice suit. Although the bystander claim is independent and not derivative of the injury to the patient, the bystander is still subject to the same statutory cap as the patient due to the statutory language of the MMA. The Louisiana Legislature is invited to remedy this defect by excluding the claim from the governance of the MMA or allowing the bystander a separate cap of liability.

Lastly, when the bystander is not an employee, the workers’ compensation exclusivity provision is not applicable to the bystander claim. The bystander should be free to seek compensation for his mental pain and anguish through a suit in tort.168

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168. This comment is not intended to condone the limitations of liability based merely on the derivative nature of a claim. It is simply a recognition of a current pattern in this state and the need to fit bystander damage claims within the pattern.

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