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## TORT LAW—THE SUDDEN MEDICAL EMERGENCY DEFENSE IN CONNECTICUT: INSURERS BENEFIT WHILE THE INNOCENT INSURED IS LEFT TO SUFFER

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**TORT LAW—THE SUDDEN MEDICAL EMERGENCY  
DEFENSE IN CONNECTICUT<sup>1</sup>: INSURERS BENEFIT WHILE  
THE INNOCENT INSURED IS LEFT TO SUFFER***Caitrin Ellen Kiley*

*Every individual in the United States who purchases and registers a vehicle is involved with the automobile insurance industry. Like many other types of insurance, there is much longstanding debate regarding the difficulty associated with receiving the benefits one has paid for. This debate is particularly complicated in Connecticut. Unlike many other jurisdictions that have a no-fault automobile insurance system, Connecticut relies on a tort-based liability system for determining compensation for an injured party.*

*In Connecticut, when a driver or passenger is injured in a car accident as a result of the actions of another driver, damages are recovered by proving legal liability. Connecticut courts currently allow a defendant and their insurer to escape liability if the defendant driver caused the accident due to a “medical emergency.” When a defendant proves that they suffered a “medical emergency,” the plaintiff is also barred from recovering underinsured or uninsured motorist coverage under their own insurance policy. The injured person is left with the financial burden, despite the fact that both parties were covered by insurance.*

*This Note argues that Connecticut should, either through legislation or regulation, disallow automobile insurance companies from taking advantage of the Sudden Medical Emergency Defense as a way to*

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1. *Bushnell v. Bushnell*, 131 A. 432 (Conn. 1925). The “Sudden Medical Emergency” defense goes by many different names, such as “Sudden Incapacitation Defense,” a “Blackout Defense,” and an “Act of God Defense.” *Goodrich v. Blair*, 646 P.2d 890, 892 (Ariz. Ct. App. 1982); *Rogers v. Wilhelm-Olsen*, 748 S.W.2d 671, 673 (Ky. Ct. App. 1988); *Eatmon v. Weeks*, 746 S.E.2d 886, 889 (Ga. Ct. App. 2013). For purposes of uniformity, this Note will refer to the defense as “Sudden Medical Emergency” throughout.

*deny providing coverage after an automobile accident. This would allow a plaintiff who was injured due to the incapacitation caused by a sudden medical emergency of another driver to recover from the other driver's insurance company, up to their policy limits, and from their own insurance company if uninsured or underinsured motorist coverage applies.*

#### INTRODUCTION

It seems like a simple case: you are driving down the road, abiding by all traffic laws, when suddenly a car traveling in the opposite direction crosses the double yellow lines and collides with you head-on.<sup>2</sup> You are left with serious injuries that have rendered you unable to work, with exorbitant medical bills, and with a totaled car. Since the other driver crossed the double lines, which was in violation of a state statute, your attorney tells you that you have a *prima facie* case of negligence.<sup>3</sup> After collecting your medical and property damage bills, your attorney sends a demand package<sup>4</sup> to the defendant driver's insurer, expecting a prompt settlement.<sup>5</sup> Instead of offering a settlement, the insurer responds by denying coverage, claiming that their insured suffered from an unforeseeable physical incapacity.<sup>6</sup>

Your attorney informs you that if the other driver *did* suffer from an unforeseeable physical incapacity, which caused him to cross the double yellow lines, you will likely be unable to bring a flegal claim to collect your damages from the driver. This is because of the legal defense known as a Sudden Medical Emergency and its effect: "as between an innocent injured party and an innocent ill driver, the innocent injured party must suffer."<sup>7</sup> While both the ill driver and the innocent injured party have automobile insurance, the innocent injured party still "must suffer."<sup>8</sup> Even

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2. See generally David M. Kopstein, *Defeat the 'Sudden Medical Emergency' Defense* 24 AM. ASS'N FOR JUST. (2009).

3. *Zeni v. Anderson*, 243 N.W.2d 270, 276 (Mich. 1976). Prima facie means "[s]uch evidence as . . . is sufficient to establish a given fact, or the group or chain of facts . . . and which if not rebutted or contradicted, will remain sufficient." *Kruzich v. Martin-Harris Gallery*, 126 P.3d 867, 874 (Wyo. 2006) (emphasis omitted). Generally, the violation of a standard set by a statute or ordinance is prima facie evidence of negligence. RESTATEMENT (SECOND) OF TORTS § 288A (1965). See *Pietrycka v. Simolan*, 120 A. 310, 312 (Conn. 1923).

4. A "demand package" is prepared by an attorney during the pre-litigation phase of a personal injury claim process. Richard P. Console Jr., *What Is a Demand Package*, HG.ORG LEGAL RES., <https://www.hg.org/legal-articles/what-is-a-demand-package-34473> (last visited Mar. 25, 2020). The "package" is created after collecting "medical bills and documents that illustrate your injuries and wage loss." *Id.* This begins the negotiation process between your attorney and the insurance companies. *Id.*

5. Kopstein, *supra* note 2.

6. *Id.*

7. *Bashi v. Wodarz*, 53 Cal. Rptr. 2d 635, 639 (Cal. Ct. App. 1996).

8. See *id.*

though the insurance company is not denying that their insured caused the accident, in Connecticut's tort-based system, the insurance company will be able to take the benefit of the Sudden Medical Emergency Defense, and deny liability and coverage.<sup>9</sup>

Part I of this Note will discuss the application of the Sudden Medical Emergency Defense, the different jurisdictional approaches to this defense, and both the validations and criticisms of the defense. Part II of this Note will provide a general background of automobile insurance law in the United States, with a specific focus on Connecticut's automobile insurance law. Part II will also discuss how public policy has shaped Automobile Insurance Law, and how the automobile insurance industry is often paradoxical. After considering public policy, Part III will then argue that Connecticut, either through legislation or regulation, should disallow automobile insurance companies from escaping the responsibility of coverage solely because an incapacitated driver caused the automobile accident.

#### I. THE HISTORY AND USE OF THE SUDDEN MEDICAL EMERGENCY DEFENSE IN AUTOMOBILE ACCIDENT LIABILITY CASES

In automobile accidents, the cause of action is often negligence.<sup>10</sup> The essential elements of a cause of action in negligence are well established: the defendant must owe a duty to the plaintiff, the defendant must have breached that duty, and the breach must have caused actual injuries to the plaintiff.<sup>11</sup> When driving, all drivers have a duty to drive with reasonable care under the circumstances.<sup>12</sup> In considering liability and negligence, the defendant may assert an affirmative legal defense.<sup>13</sup> An affirmative defense is pleaded with the purpose of defeating or avoiding a plaintiff's cause of action.<sup>14</sup> It "alleges that even if [the] plaintiff's petition is true, [the] plaintiff cannot prevail because there are

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9. See, e.g., *Miller v. Porter*, 242 A.2d 744 (Conn. 1968); *Pareles v. McCarthy*, 178 A.2d 155 (Conn. 1962); *Gilgrados v. State*, No. HHDCV136042521, 2016 WL 1266040 (Conn. Super. Ct. Mar. 2, 2016).

10. *What Is Car Accident Law?*, HG.ORG LEGAL RES., <https://www.hg.org/car-accident.html> [<https://perma.cc/3U55-G4AQ>].

11. See *Grenier v. Comm'r Transportation*, 51 A.3d 367, 379 (Conn. 2012).

12. See generally *Hesse v. McClintic*, 176 P.3d 759, 762 (Colo. 2008). Since automobile statutes are created with the purpose of safety in mind, drivers also have a duty to obey all traffic laws and statutes. *Id.*

13. Travis Peeler, *Auto Accident Defenses*, LEGAL MATCH, <https://www.legalmatch.com/law-library/article/auto-accident-defenses.html> [<https://perma.cc/X7MS-WTH4>]. See *Delott v. Roraback*, 426 A.2d 791, 795 (Conn. 1980).

14. CONN. PRACTICE BOOK Sec.10-50 (1998); *Wilmes v. Consumers Oil Co. of Maryville*, 473 S.W.3d 705, 716 (Mo. Ct. App. 2015) (citing *City of Peculiar v. Effertz Bros. Inc.*, 254 S.W.3d 51, 59 (Mo. Ct. App. 2008)).

additional facts that permit the defendant to avoid legal responsibility.”<sup>15</sup>

A. *What Is the Sudden Medical Emergency Defense?*

Most jurisdictions treat a sudden medical emergency as a complete defense to negligence in automobile accidents.<sup>16</sup> In order to successfully plead this defense, a defendant must demonstrate that they became incapacitated, that the ensuing accident was a result of the incapacitation, and that the incapacitation was not reasonably foreseeable.<sup>17</sup> “To fall within the scope of this defense, a defendant’s alleged incapacity need not include unconsciousness, as long as the incapacity is severe enough to render the defendant suddenly incapable of controlling a motor vehicle.”<sup>18</sup> A common example of when this defense is used is when a defendant driver has a heart attack and loses control of their vehicle, causing an accident.<sup>19</sup>

There are certain factual situations that will bar a defendant from using the Sudden Medical Emergency Defense. For example, if the defendant is on notice of facts that would be sufficient to cause a reasonable person to anticipate that her driving might injure another, the defense is unavailable.<sup>20</sup> The defense is also unavailable if, right before the incapacitation occurred, the incapacitated driver was violating a statutory duty, such as the duty to refrain from driving while intoxicated,<sup>21</sup> or the duty to drive within the posted speed limit.<sup>22</sup>

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15. *Id.*

16. A complete defense completely bars a plaintiff from recovering from a defendant, unlike some defenses that act only as a partial bar resulting in a percentage deduction from otherwise recoverable damages. JOHN L. DIAMOND ET. AL., UNDERSTANDING TORTS 228 (5<sup>th</sup> ed. 2013). *Rogers v. Wilhelm-Olsen*, 748 S.W.2d 671, 673 (Ky. Ct. App. 1988). *See also* Lutzkovitz v. Murray, 339 A.2d 64, 66 (Del. 1975) (holding that if a driver unexplainably blacked-out prior to an accident and the accident was therefore unavoidable, culpability could not be contributed to that driver). *See, e.g.*, MICHAEL P. THOMAS ET AL., CAL. CIV. PRAC. TORTS § 25:87 SUDDEN ILLNESS OR DISABILITY, Westlaw (database updated Nov. 2020).

17. *Rogers*, 748 S.W.2d at 673; *Miller v. Porter*, 242 A.2d 744 (Conn. 1968); *Pareles v. McCarthy*, 178 A.2d 155 (Conn. 1962); *see also* Lutzkovitz v. Murray, 339 A.2d 64, 66 (Del. 1975) (holding that if a driver unexplainably blacked-out prior to an accident and the accident was therefore unavoidable, culpability could not be contributed to that drive). *See e.g.*, SUDDEN ILLNESS OR DISABILITY, CAL. CIV. PRAC. TORTS § 25:87 (updated Nov. 2020).

18. KOPSTEIN, *supra* note 2, at 24 (citing *Word v. Jones ex rel. Moore*, 516 S.E.2d 144, 147–48 (N.C. 1999)).

19. *Roman v. Estate of Gobbo*, 791 N.E.2d 422, 423–24 (Ohio 2003).

20. *Rogers*, 748 S.W.2d at 673. For example, if a driver suffers from a hypoglycemia-induced seizure and causes an accident, but he was previously diagnosed with diabetes and was not taking his medication, the Sudden Medical Emergency Defense will not be available to him. *See generally* Ghaffar v. Foster, 170 A.D.3d 674 (N.Y. App. Div. 2019).

21. *Lehman v. Haynam*, 133 N.E.2d 97, 101 (Ohio 1956).

22. *Rogers*, 748 S.W.2d at 673. If a defendant was negligent before the sudden medical emergency in question occurred, they will still be legally liable for causing the accident. *Id.* “While a driver may not be negligent after the emergency arose, the driver may be liable for

### B. *Applying the Defense During Trial*

Throughout a trial in which a defendant is asserting a Sudden Medical Emergency Defense, there will be facts presented by both sides regarding whether a “sudden medical emergency” actually occurred.<sup>23</sup> The factual considerations relate to whether the driver was incapacitated, whether the incapacitation was the proximate cause of the accident, and whether the incapacitation was foreseeable.<sup>24</sup> This is unlike other automobile cases, where the main factual consideration is whether a defendant driver was driving unreasonably.<sup>25</sup>

During a trial that involves liability stemming from an automobile accident, “the jurors are triers of fact, but the court, not the jury, is the judge of the law.”<sup>26</sup> This means that before deliberating on the facts of the case to determine a verdict, the jurors are instructed by the court as to the law that they must apply.<sup>27</sup> Connecticut has a jury instruction specific to a Sudden Emergency, which is drafted from the standpoint of the defendant.<sup>28</sup>

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negligence or tortious actions which caused the emergency.” Vanessa L. Anderson, *Collision of Negligence Theory: Does A “Blackout” Constitute an Unavoidable, Sudden Emergency in North Dakota?*, 87 N.D. L. REV. 233, 243 (2011).

23. See MATTHIESEN, WICKERT & LEHRER, S.C., SUDDEN MEDICAL EMERGENCIES WHILE DRIVING IN ALL 50 STATES 13, <https://www.mwl-law.com/wp-content/uploads/2018/02/SUDDEN-MEDICAL-EMERGENCIES-WHILE-DRIVING-CHART.pdf> [<https://perma.cc/MK38-2MCN>].

24. *Rogers*, 748 S.W.2d at 673. See also *Lutzkovitz v. Murray*, 339 A.2d 64, 66 (Del. 1975). See, e.g., *Miller v. Porter*, 242 A.2d 744 (Conn. 1968); *Pareles v. McCarthy*, 178 A.2d 155 (Conn. 1962); *Gilgrados v. State*, No. HHDCV136042521, 2016 WL 1266040 (Conn. Super. Ct. Mar. 2, 2016).

25. David Goguen, *Car Accident Injury Cases: The Basics*, ALL LAW, <https://www.alllaw.com/articles/nolo/auto-accident/car-accident-case-basics.html> [<https://perma.cc/4JJ2-6ET7>].

26. § 24:22 Jury instructions, 2 TENN. CIR. CT. PRAC. (Dec. 2018).

27. *Id.*

28. The Jury Instruction reads:

As previously stated, negligence is the failure to exercise reasonable care under all of the circumstances presented. One of the circumstances for you to consider in this case is whether a sudden emergency situation existed. The existence of a sudden emergency is a factor to be considered in the evaluation of whether the defendant acted as a reasonable person under the circumstances. An individual, choosing a course of action in an emergency, is required to exercise the care of an ordinarily prudent person acting in such an emergency.

You are to consider the evidence in this case to determine whether an emergency situation existed. If you find that an emergency existed which was not caused by the conduct of the defendant and that, as a result of the emergency, the defendant chose a course of action which a reasonable person would have done under the circumstances, then the defendant’s conduct would not be negligent. However, if you find that plaintiff’s injuries resulted from the conduct of the defendant and that either an emergency did not exist, or the emergency situation was caused by the

Generally, a plaintiff “is entitled to an instruction on the sudden[] emergency doctrine when there is evidence that would permit the jury to conclude that an emergency existed within the rule, but not where the evidence introduced fails to establish one of the elements necessary to invoke the sudden[] emergency doctrine.”<sup>29</sup> While providing the Sudden Medical Emergency Defense is a practice that has been upheld by many jurisdictions,

appellate courts frequently instruct that the better practice is ordinarily not to give a sudden emergency instruction, because despite the basic logic and simplicity of the sudden emergency doctrine, it is all too frequently misapplied on the facts or misstated in jury instructions, and the risk of prejudicial error in instructing the jury on the sudden-emergency doctrine exceeds by far the possibility of error in not doing so.<sup>30</sup>

While the jury instruction for considering a Sudden Medical Emergency Defense is still granted in some trials, the practice of giving this instruction has become “increasingly criticized as being confusing and misleading.”<sup>31</sup> In instances where the jury instruction is not given, jurors are only considering the facts and determining if the defendant acted unreasonably under the circumstances.<sup>32</sup>

### C. *Acceptance and Use of the Defense in American Jurisdictions*

“[C]ases decided under negligence theories have *uniformly* held that

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defendant’s own conduct, or that the defendant, in the face of an emergency, failed to act as a reasonable person would have done under the circumstances, then the defendant would be negligent.

CIVIL JURY INSTRUCTION COMM., CONNECTICUT JUDICIAL BRANCH CIVIL JURY INSTRUCTIONS 3.7-18 (Revised Jan. 1, 2008), <https://www.jud.ct.gov/JI/Civil/Civil.pdf> [<https://perma.cc/9P6C-QC8Y>].

29. *Daly v. McFarland*, 812 N.W.2d 113, 115 (Minn. 2012) (holding that when given, a jury instruction on the emergency rule requires a jury to consider the fact of sudden peril as a circumstance in determining the reasonableness of a person’s response thereto); *Pelletier v. Lahm*, 111 A.D.3d 807, 809 (N.Y.S.2d 2013) (holding a jury instruction on the emergency doctrine is warranted when the evidence supports a finding that the party requesting the charge was confronted by a sudden and unexpected circumstance which leaves little or no time for thought, deliberation, or consideration); LAURA H. DIETZ ET AL., 57A AM. JUR. 2D NEGLIGENCE § 214 JURY INSTRUCTIONS, Westlaw (database updated May 2020).

30. *Laura Hunter Dietz*, *Negligence* § 214, 57 A. AM. JUR. 2D (Nov. 2019).

31. *Id.*

32. Negligence generally means that someone failed to behave with the level of care someone with “ordinary prudence” would have acted with under the same circumstances. *Negligence*, CORNELL LAW SCHOOL LEGAL INFO. INST., <https://www.law.cornell.edu/wex/negligence> (last visited Mar. 27, 2020). If there are no jury instructions, the jury is normally just considering whether there was a duty, and whether the parties acted reasonably under the circumstance. *See id.*

a sudden loss of consciousness while driving is a complete defense to an action based on negligence or gross negligence, if such loss of consciousness was not foreseeable.<sup>33</sup> The rationale behind the defense is that a driver who cannot weigh and consider the best means to avoid impending danger should not be held to the same standard of control, care, and caution as someone who can fully exercise judgment and reason.<sup>34</sup>

In most jurisdictions where the defense is available, the sudden emergency doctrine is given as a jury instruction.<sup>35</sup> In such a jurisdiction, the jury is tasked with determining whether the defendant driver was confronted with a sudden emergency and has proven all the elements of the defense.<sup>36</sup> If the jury determines that a sudden emergency occurred, the jury is then tasked with finding whether the driver acted reasonably under the circumstances.<sup>37</sup> If they find that the defense applied and the defendant acted reasonably, no liability is imposed.<sup>38</sup>

#### D. *Criticism and Abandonment of the Defense in American Jurisdictions*

Most jurisdictions have the defense<sup>39</sup> and have had cases that have addressed its use.<sup>40</sup> Numerous jurisdictions, however, have abolished or heavily restricted the sudden emergency doctrine.<sup>41</sup> For example, in 2013,

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33. Roman v. Estate of Gobbo, 791 N.E.2d 422, 428 (Ohio 2003).

34. This is the rationale used to discuss the “Sudden Emergency Defense.” Manno v. Gutierrez, 934 So. 2d 112, 117 (La. Ct. App. 2006). A sudden emergency has the same elements as a “sudden medical emergency,” but the “emergency” is not a medical event. *See id.* An example of a sudden emergency is a deer jumping out in front a driver’s car.

The rationale for the doctrine is the principle that a person confronted with a sudden emergency, who does not have sufficient time to weigh and consider the best means to avoid an impending danger, should not be held to the same standard of control, care, and caution as someone who has ample opportunity to fully exercise judgment and reason.

*Id.*

35. Anderson, *supra* note 22, at 243.

36. *Id.* at 242–43.

37. *Id.*

38. *Id.*

39. Carol DiBari, *Car Accidents Caused by a Medical Emergency*, NOLO, <https://www.nolo.com/legal-encyclopedia/car-accidents-caused-medical-emergency.html> [<https://perma.cc/ZEV2-S7TB>].

40. *Id.* (citing Jeffrey F. Ghent, Annotation, *Modern Status of Sudden Emergency Doctrine*, 10 A.L.R. 5th 680, 687 (1993 & Supp. 2010) (citing cases from Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming)).

41. *See* Lyons v. Midnight Sun Transp. Servs. Inc., 928 P.2d 1202, 1206 (Alaska 1996) (holding that sudden emergency instruction should rarely, if ever, be used); DiCenzo v. Izawa,



the Colorado Supreme Court departed from the principle of stare decisis,<sup>42</sup> effectively abandoning the law established by earlier cases and abolishing the Sudden Emergency Defense.<sup>43</sup> The rationale of the Colorado court, like many others, was that the minimal utility for the defense in a comparative negligence jurisdiction<sup>44</sup> is greatly outweighed by the potential danger of the instructions misleading the jury.<sup>45</sup> This risk is present because instead of weighing the incapacitation as a factor in the overall consideration of reasonableness under the circumstances, the jury may believe that the defendant does not have any burden of proof beyond establishing that a medical event occurred.<sup>46</sup>

Even in states that have upheld the Sudden Medical Emergency Defense,<sup>47</sup> there have been justices that have disagreed and believe that the defense goes against public policy, because it results in an innocent plaintiff being the sole party bearing the damages caused by another's medical emergency.<sup>48</sup> In 2003, the Ohio Supreme Court upheld the Sudden Medical Emergency Defense.<sup>49</sup> The majority made its decision based on precedent, stating that “the cases decided under negligence

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723 P.2d 171, 181 (Haw. 1986) (strongly discouraging use of sudden emergency instruction); *Simonson v. White*, 713 P.2d 983, 989–90 (Mont. 1986) (abolishing sudden emergency instruction in automobile accident cases); *Bjorndal v. Weitman*, 184 P.3d 1115, 1121 (Or. 2008) (abolishing sudden emergency instruction in automobile accident cases). *See, e.g.*, *Wiles v. Webb*, 946 S.W.2d 685, 689 (Ark. 1997); *McClymont v. Morgan*, 470 N.W.2d 768, 772 (Neb. 1991); *Dunleavy v. Miller*, 862 P.2d 1212, 1216–19 (N.M. 1993).

42. Stare decisis is a “doctrine that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it[.]” JANET P. BROOKS, 15 CONN. PRAC., ENVIRONMENTAL PROTECTION ACT § 3:13, Westlaw (database updated Nov. 2019).

43. *Bedor v. Johnson*, 292 P.3d 924, 928–29 (Colo. 2013).

44. In all but four states and the District of Columbia, contributory negligence has been replaced by some form of comparative negligence. JOHN L. DIAMOND ET. AL., UNDERSTANDING TORTS 232 (5<sup>th</sup> ed. 2013).

Under comparative negligence, “the conduct on the part of the plaintiff which falls below the standard of conduct which he should conform to for his own protection and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff’s harm is only a partial bar to the plaintiff’s recovery.”

*Id.* (internal quotation marks omitted). The Third Restatement of Torts endorses the use of comparative negligence. *Id.*; RESTATEMENT (SECOND) OF TORTS: EFFECT OF PLAINTIFF’S NEGLIGENCE WHEN PLAINTIFF SUFFERS AN INDIVISIBLE INJURY § 7 (2000).

45. *Bedor v. Johnson*, 292 P.3d 924, 929 (Colo. 2013).

46. *See id.*

47. Forty-four states have some form of the sudden medical emergency defense, but there are many different names and approaches to the defense. Alaska, Colorado, Hawaii, Kansas, and Utah do not have the defense, and Idaho discourages its use. MATTHIESEN, *supra* note 23, at 3.

48. *See Roman v. Estate of Gobbo*, 791 N.E.2d 422, 433–34 (Ohio 2003) (Pfeifer, J., concurring in part and dissenting in part). *See also* *Young v. Clark*, 814 P.2d 364, 369 (Colo. 1991), *abrogated by* *Bedor v. Johnson*, 292 P.3d 924 (Colo. 2013).

49. *See Roman*, 791 N.E.2d at 422.

theories have *uniformly* held that a sudden loss of consciousness while driving is a complete defense to an action based on negligence or gross negligence, if such loss of consciousness was not foreseeable.”<sup>50</sup> The concurrence in part provided by Justice Pfeifer, however, disagreed with the decision and proposed a new rule.<sup>51</sup> While he agreed that having a heart attack did not make the driver negligent, he argued that the doctrine is not sensible because the innocent plaintiff bears the *harsh* consequences by being unable to recover any damages from the defendant or through uninsured motorist coverage.<sup>52</sup> He recommended a “better rule” which would “allow individuals . . . to pursue damages against a person whose sudden medical emergency resulted in a statutory violation and was the proximate cause of the death or injury.”<sup>53</sup> This rule is “better” because it recognizes and accommodates for the unfairness of the harsh consequences of the sudden medical emergency on an innocent plaintiff.<sup>54</sup>

#### E. *Connecticut’s Application of the Defense*

The Connecticut Supreme Court has not considered the validity and use of the Sudden Medical Emergency Defense since 1925.<sup>55</sup> While the law has not changed, there has been criticism regarding the confusion associated with the doctrine, specifically with respect to the level of care owed and its effect on the application of comparative negligence.<sup>56</sup>

There is currently a split among Connecticut Superior Courts regarding how a Sudden Medical Emergency Defense should be pleaded, in part because the Connecticut Practice Book does not specifically address this issue.<sup>57</sup> The majority rule is that a sudden emergency should be pleaded as a general denial, leaving the burden of proof on the

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50. *Id.* at 428.

51. *See id.* at 433–34 (Pfeifer, J., concurring in part and dissenting in part).

52. *Id.* at 433.

53. *Id.* at 434. This Note does not suggest that this should be the new rule, as this suggested rule would unfairly punish a driver who had a sudden medical event, such as a heart attack. Rather than shifting the “suffering” from the plaintiff to the defendant, this Note suggests that instead of the defendant bearing the total cost of damages, the defendant’s insurance company should be responsible and pay up to the policy limits. By having insurance companies be liable up to policy limits, an injured plaintiff will also be able to collect underinsured or uninsured coverage from their own insurer if such coverage is applicable.

54. *See generally id.*

55. MATTHIESEN, *supra* note 23, at 3. *See* Caron v. Guiliano, 211 A.2d 705, 706 (Conn. Supp. 1965) (“In an automobile negligence case, the jury determines the credibility of the witnesses and decides whether or not the defendant was stricken suddenly by a fainting spell and was thus unable to control his automobile.”). *See generally* Bushnell v. Bushnell, 131 A. 432 (Conn. 1925).

56. *See supra* Section I.D; Bushnell v. Bushnell, 131 A. 432 (Conn. 1925).

57. Carter v. Philadelphia Indemnity Insurance Co., No. FBTCV156051233S, 2017 WL 3011643, at \*2 (Conn. Super. Ct. 2017); CONN. PRACTICE BOOK Sec.10-50 (1998).

plaintiff.<sup>58</sup> This means that the plaintiff must prove that the defendant did *not* have a medical emergency, or that the medical emergency was foreseeable.<sup>59</sup> “It [is] difficult, if not impossible, for a plaintiff to prove a defendant [was] conscious, and . . . to prove that if he were unconscious [that] such condition was foreseeable, such as sleepiness or an intoxicated condition[,] . . .” yet this is the burden that is put on the plaintiff in the majority of cases in Connecticut.<sup>60</sup>

The minority rule is that if the defendant wishes to allege a sudden emergency, they may do so as a special defense, and assume the burden of proof.<sup>61</sup> This means that the defendant must prove that he suffered a sudden medical emergency, and therefore should not be held to the normal standard of care, and was not negligent.<sup>62</sup> In reaching this conclusion, the court reasoned that Connecticut has liberal rules of pleading based on Section 10–50 of the Connecticut Practice Book, which are permissive, not mandatory.<sup>63</sup>

While an automobile insurer has the legal duty to defend their insured person,<sup>64</sup> the jury is not aware of whether the defendant has any insurance, or how much insurance they have.<sup>65</sup> An insurance company has the “[d]uty to indemnify the policyholder for *any* insurable damages arising from a covered claim. If the insurance policy provides a duty to defend, the insurance company must defend the policyholder in any lawsuit or proceeding alleging a potentially covered claim.”<sup>66</sup>

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58. *Pinsker v. Fleming*, No. CV010382908, 2002 WL 853632, at \*1, 2 (Conn. 2002).

59. *See id.*

60. *Lehmen v. Haynam*, 133 N.E.2d 585, 590 (Ohio Ct. App. 1959).

61. *Carter v. Phila. Indem. Ins. Co.*, No. FBTCV156051233S, 2017 WL 3011643, at \*1, 2 (Conn. 2017).

62. *See generally id.*

63. *Pinsker v. Fleming*, No. CV010382908, 2002 WL 853632, at \*2 (Conn. Super. Ct. Apr. 12, 2002).

64. JANET KAMINSKI LEDUC, NO-FAULT AUTOMOBILE INSURANCE, OFFICE OF LEGISLATIVE RESEARCH R-0255, at 1 (Oct. 24, 2016), <https://www.cga.ct.gov/2016/rpt/pdf/2016-R-0255.pdf> [<https://perma.cc/34KN-X34N>]; CONN. GEN. STAT. ANN. §§ 38a-336-43 (West 2015).

65. *Gigliotti v. United Illuminating Co.*, 193 A.2d 718, 722–23 (Conn. 1963). The jury instruction states that “[i]n the course of the trial there has been a passing reference to insurance. There is no issue pertaining to insurance before you, and that reference to insurance should play no part in your deliberations.” JUDGE SUPPORT SERVICES, CONNECTICUT JUDICIAL BRANCH CIVIL JURY INSTRUCTIONS 2.9-2 (Jan. 1, 2008), <https://www.jud.ct.gov/JI/Civil/Civil.pdf> [<https://perma.cc/9P6C-QC8Y>] (citing *Bryar v. Wilson*, 204 A.2d 832, 832 (Conn. 1964)).

66. Elizabeth J. Stewart & Rachel Snow Kindseth, *Insurance Bad Faith Litigation: Connecticut Law Developments*, 89 CONN. BAR J. 285, 286 (2016). “Most liability policies provide not only for indemnity payments to the insured or to the beneficiary, but also require that the company provide a defense for its insured in court, so long as the insured gives the company timely notice of the inception or the threat of litigation.” § 49:105. *Defense of Insured*, 16 WILLISTON ON CONTRACTS § 49:105 (4th ed. 2020).

## II. AUTOMOBILE INSURANCE

When an individual purchases and registers a motor vehicle, that individual is *required* to purchase automobile insurance.<sup>67</sup> “Automobile insurance generally protects the insured, the insured’s property, and damages sustained to the person and property of individuals as a result of an accident involving the insured.”<sup>68</sup> The personal automobile insurance policy that an individual purchases can include up to five types of coverage: liability coverage, medical coverage, collision coverage, comprehensive coverage, and uninsured or underinsured motorist coverage.<sup>69</sup>

Liability coverage in automobile insurance policies “indemnifies the insured for the cost of bodily injury and property damage losses sustained [by] a third party where the insured is determined to be at fault for the accident.”<sup>70</sup> Liability coverage, in general, is a “relatively recent development.”<sup>71</sup> Originally, liability policies were sold to manufacturers and merchants to compensate them for general accidents and risk liability.<sup>72</sup> In the late nineteenth and early twentieth century, however, liability insurance expanded into automobile liability policies, which provided the policyholder with coverage of damages resulting from an automobile accident.<sup>73</sup> “Liability insurance expanded to other areas gradually but took root as a form of commercial insurance protection in the 1920s and 1930s.”<sup>74</sup> Now, liability insurance is something that most all of American drivers have.<sup>75</sup> Virtually all states require this insurance, and the public generally supports compulsory liability automobile insurance so that there is financial security if someone negligently causes a car accident.<sup>76</sup>

Medical coverage, which is also called “personal injury protection,”<sup>77</sup>

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67. CONN. GEN. STAT. ANN. § 38a-334 (West 2015); MARGARET C. JASPER, *THE LAW OF NO-FAULT INSURANCE* 2 (2d ed. 2002). “All states require an individual who registers a car to purchase automobile insurance.” *Id.*

68. JASPER, *supra* note 67, at 2–3.

69. *Id.* See also Thomas O. Farrish, “Diminished Value” In *Automobile Insurance: The Controversy and Its Lessons*, 12 CONN. INS. L.J. 39, 42–43 (2005).

70. JASPER, *supra* note 67, at 2–3.

71. RANDY MANILOFF & JEFFREY STEMPEL, *GENERAL LIABILITY INSURANCE COVERAGE* 2 (2d ed. 2012).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Background on: Compulsory Auto/Uninsured Motorists*, INS. INFO. INST. (Aug. 11, 2020), <https://www.iii.org/article/background-on-compulsory-auto-uninsured-motorists> [<https://perma.cc/3ACL-CPMT>].

77. “Personal injury protection” (PIP) is a form of “first-party benefits.” *Background on: No-Fault Auto Insurance*, INS. INFO. INST., 3 (Nov. 6, 2018),

indemnifies the insured for medical expenses incurred by anyone who is covered under the policy.<sup>78</sup> Collision coverage, which usually is not mandatory, compensates the insured for the cost of damage to a vehicle arising out of impact from an automobile accident.<sup>79</sup> Comprehensive coverage, which is also not mandatory, compensates the insured for damages to a vehicle that arise from something other than an accident, such as vandalism, flooding, or fire.<sup>80</sup>

Uninsured and underinsured motorist coverage is mandatory in some states, including Connecticut.<sup>81</sup> “Uninsured motorists coverage compensates the insured for injuries sustained in accidents with individuals who have no automobile insurance.”<sup>82</sup> “Underinsured motorists coverage permits the insured to increase liability payments for personal injury and property damage they suffer where the other driver has insufficient coverage.”<sup>83</sup> The purpose of this coverage is to provide a minimum level of available insurance for the protection of a person injured at the hands of an uninsured or underinsured motorist.<sup>84</sup>

#### A. *Automobile Insurance Law throughout the United States*

In the United States, state automobile insurance laws fall into four broad categories: tort liability, no-fault, choice-no fault, and add-on.<sup>85</sup> The main difference between these categories is whether there are restrictions on the “right to sue and whether the policyholder’s own insurer pays first-party benefits, up to the state maximum amount,

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<https://www.iii.org/article/background-on-no-fault-auto-insurance> [https://perma.cc/3ACL-CPMT]. First Party Benefits “covers medical expenses for the policyholder in case of an accident. It also includes coverage for other drivers listed in the policy as well as relatives who are living with the main policyholder.” *Id.*

78. Thomas O. Farrish, “*Diminished Value*” In *Automobile Insurance: The Controversy and Its Lessons*, 12 CONN. INS. L.J. 39, 42 (2005); JASPER, *supra* note 67, at 3. These “first party” expenses may arise as a result of accidents involving the insured’s vehicle or accidents involving other vehicles driven with the owner’s permission. *Id.*

79. See JASPER, *supra* note 67, at 4; Farrish, *supra* note 69, at 43.

80. *Id.*

81. See CONN. GEN. STAT. ANN. § 38a-336 (West 2015); see discussion *infra* Section III.A.

82. JASPER, *supra* note 67, at 4.

83. *Id.* “Insufficient coverage” means the underinsured motorist has lower policy limits than the insured. *Id.*

84. RICHARD L. NEWMAN & JEFFREY S. WILDSTEIN, TORT REMEDIES IN CONNECTICUT §11-5 (2014) (“The purpose of such coverage is simply to provide an insured who is in an accident with the same resources that he or she would have had if the tortfeasor had liability insurance equal to the amount of the insured’s uninsured or underinsured motorist coverage.”). See also *Roy v. Centennial Ins. Co.*, 370 A.2d 1011 (Conn. 1976); *American Universal Ins. Co. v. DelGreco*, 530 A.2d 171 (Conn. 1987).

85. *Background on: No-Fault Auto Insurance*, *supra* note 77.

regardless of who is at fault in the accident.”<sup>86</sup> Tort-based liability insurance law was the standard in the United States before the introduction of the no-fault system, which has been adopted in a number of states.<sup>87</sup> Today, twenty-four states, and the District of Columbia and Puerto Rico, have some form of no-fault insurance.<sup>88</sup>

### 1. Tort Liability Insurance Law

In states that use a traditional tort liability approach, “there are no restrictions on lawsuits.”<sup>89</sup> Accordingly, a policyholder that causes an automobile accident “can be sued by the other driver and by the other driver’s passengers for the pain and suffering the accident caused as well as for out-of-pocket expenses such as medical costs.”<sup>90</sup> In this tort-based system, to recover damages, the injured party must prove that the other party was responsible for causing the accident.<sup>91</sup> “[T]he standard automobile policy does not contain a definition of the terms ‘legal liability’ or ‘legally obligated to pay’ and, instead, relies on ‘exclusions’ to preclude coverage in situations where the injured claimant is legally barred from recovering damages from the tortfeasor operator or owner.”<sup>92</sup>

### 2. The New Systems of Insurance Law

In states that have adopted a no-fault system,<sup>93</sup> insurance companies

86. *Id.*

87. JASPER, *supra* note 67, at 9; *Background on: No-Fault Auto Insurance*, *supra* note 77. In the 1960s, the traditional tort liability system was criticized for being a time-consuming and expensive process. *Id.* at 3. In the 1970s, numerous states introduced legislation which would allow automobile accident victims to recover compensation from their losses from their own insurance companies. *Id.*

88. *Background on: No-Fault Auto Insurance*, *supra* note 77.

89. *Id.*

90. *Id.*

91. JASPER, *supra* note 67, at 9.

Under this tort-based system, an accident victim recovers damages for both economic and non-economic damages from the party who was responsible for causing the accident and recovers under the bodily injury protection coverage of that party’s insurance policy. Such damages include economic losses—e.g., property damages, medical expenses, lost wages; and non-economic damages—e.g. pain and suffering.

*Id.*

92. Irvin E. Schermer & William J. Schermer, *Legal liability requirement—Scope of requirement*, 1 AUTO. LIABILITY INS. 4TH § 4A:1 (updated May 2020).

93.

“[N]o-fault automobile insurance” is often used to refer to automobile insurance that permits a person to recover financial losses from his or her own insurance company regardless of who caused the loss (i.e., no-fault first-party benefits or personal injury protection). But this is an oversimplification. In the strictest sense, a no-fault insurance program is one that both (1) provides payment of no-fault first party benefits and (2) restricts the right to sue by establishing an injury severity

compensate their own policy holders for the cost of injuries, regardless of who was “at fault.”<sup>94</sup> In strict “no-fault” jurisdictions, the term no-fault applies only to states where insurance companies pay first-party benefits,<sup>95</sup> and where there are restrictions on the right to sue.<sup>96</sup> This type of compensation varies by state.<sup>97</sup> Additionally, a no-fault system does not mean there are no law suits regarding liability; rather, it means that an injured driver may sue only for severe injuries.<sup>98</sup>

Some states, such as New Jersey, Pennsylvania, and Kentucky,<sup>99</sup> have a “choice no-fault” insurance system.<sup>100</sup> As the name suggests, when signing up for an insurance policy, a driver has the option of purchasing a no-fault auto insurance policy or a traditional tort liability policy.<sup>101</sup> In states that have an “add-on” system “drivers receive compensation from their own insurance company as they do in no-fault states, but there are no restrictions on lawsuits.”<sup>102</sup>

### B. *The Paradox of Automobile Insurance*

“The basic premise of insurance is collective responsibility for harms that befall individuals, because insurance pools people’s savings to pay for individuals’ future losses.”<sup>103</sup> By participating in insurance, a “risk-pooling scheme,”<sup>104</sup> an individual agrees to pay into a system that is not only benefitting them, but also others, who may suffer a future loss, and

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threshold that, if not met, prohibits a person from suing for damages.

JANET KAMINSKI LEDUC, AUTOMOBILE INSURANCE REQUIREMENTS IN CONNECTICUT, OFFICE OF LEGISLATIVE RESEARCH R-0493 (Aug. 28, 2008), <https://www.cga.ct.gov/2008/rpt/2008-R-0493.htm> [<https://perma.cc/UX5D-PJHN>].

94. *Background on: No-Fault Auto Insurance*, *supra* note 77.

95. JASPER, *supra* note 67, at 3 (“First party” expenses may arise as a result of accidents involving the insured’s vehicle or accidents involving other vehicles driven with the owner’s permission.)

96. *Id.*

97. *Background on: No-Fault Auto Insurance*, *supra* note 77. “In states with the most comprehensive benefits, a policyholder receives compensation for medical fees, lost wages, funeral costs and other out-of-pocket expenses. The major variations involve dollar limits on medical and hospital expenses, funeral and burial expenses, [and] lost income.” *Id.*

98. *Id.* “These conditions are known as the tort liability threshold and may be expressed in verbal terms such as death or significant disfigurement (verbal threshold) or in dollar amounts of medical bills (monetary threshold).” *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* In these states, first-party coverage may not be mandatory, and benefits may be less than no-fault states. *Id.*

103. Deborah A. Stone, *Beyond Moral Hazard: Insurance as Moral Opportunity*, 6 CONN. INS. L.J. 11, 16 (1999).

104. *Id.* at 14.

who also pay into the “scheme.”<sup>105</sup> “Much of the collective nature of insurance is disguised, or at least not readily obvious to the policyholders, especially in private insurance.”<sup>106</sup> The insurance holder pays into the system with the intent to protect themselves, but until they need to collect an insurance benefit, all of their payments go towards paying for other insured drivers’ damages.<sup>107</sup>

Unlike insurance companies in the late nineteenth century, modern insurance companies are so massive “that individuals rarely have any face-to-face contact with managers and virtually never have any contact with other policyholders.”<sup>108</sup> In the tort-based system of automobile insurance compensation, “[n]ot only is payment . . . often nonexistent or a fraction of [the] true loss, but it is [often] long delayed.”<sup>109</sup> In this system, many victims, even those who are seriously injured, are not paid *at all* from automobile insurance, or are paid only a small fraction of their losses.<sup>110</sup>

The basic difficulty with the automobile insurance system is that it turns on “*legal liability*” rather than just the occurrence of an injury during an automobile accident.<sup>111</sup> Automobile insurance is “particularly conspicuous” when compared to other kinds of insurance, such as life insurance or medical insurance, which are written by the same companies:

When you die, your life insurance company does not refuse to pay your widow on the ground that you contributed to the unfortunate result by smoking too many cigarettes or eating too much. When your house burns down, your insurance company does not refuse to pay on the ground that you should have had your roof resingled with fire-resistant materials. When you are hospitalized for a broken leg, your health insurance company does not refuse payment on the ground that if you had replaced the burned out bulb over your staircase, you would [not] have fallen down the stairs. Yet, defenses parallel to these are the common grist of automobile cases.<sup>112</sup>

Unlike other forms of insurance, automobile insurance companies

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105. *Id.*

106. *Id.* at 16. The author argues “private insurers deliberately work to mask the collective nature of the insurance enterprise in the way they market insurance and frame it in public debates, because it is not in their interest to have policyholders unite as a collective interest.” *Id.*

107. *See id.*

108. *Id.* at 17.

109. JEFFREY O’CONNELL, *THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE*, 6 (1971).

110. *Id.* at 4.

111. *Id.* at 3.

112. *Id.* at 3–4 (quoting *Needed: A Basic Reform of Auto Liability Insurance*, 406 CONSUMER REPORTS (Aug. 1962)).



often deny coverage at first, or make it difficult for an injured party to recover.<sup>113</sup>

“Private insurers market their policies chiefly by trying to induce a sense of vulnerability in their target audiences. Therefore, much insurance advertising portrays or just alludes to some kind of terrible harm that can befall people.”<sup>114</sup> In their advertisements, large insurance companies portray “insurance [as] a helping institution,”<sup>115</sup> making their audience think that they “will be there when you need [them], and [that they are] a reliable and effective place to turn for help.”<sup>116</sup> While many individuals have the expectation that when they are injured in an automobile accident the insurance company of the person who caused the accident, or their own insurance company, will compensate them, that is often not the case.<sup>117</sup> Rather,

[t]he result is not a system for paying people automobile insurance after automobile accidents, but a system for *fighting* people about paying them automobile accident insurance after automobile accidents. The result is a system where the traffic victim—already battered enough from the accident itself—cannot know after the accident *when* he will be paid, *what* he will be paid[,], or *if* he will be paid.<sup>118</sup>

The idea of “third-party” insurance, or liability insurance,<sup>119</sup> establishes a “public expectation of community aid.” That is, insurance that one party carries for the express purpose of paying for injuries and losses that he or she causes to others.<sup>120</sup>

### C. Connecticut’s Approach to Automobile Insurance

Automobile insurance is one of the most frequently used types of personal insurance in Connecticut.<sup>121</sup> Any driver in Connecticut who

113. *See id.*

114. Stone, *supra* note 103, at 17.

115. *Id.* at 18, n. 20 (citing Tom Baker, *Constructing the Insurance Relationship: Sales Stories, Claims Stories, and Insurance Contract Damages*, 72 TEX. L. REV. 1395, 1403–07 (1994)).

116. *Id.* *See, e.g.*, Allstate’s slogan is “you’re in good hands,” and often advertises “mayhem is everywhere. An Allstate Agent can help protect you from mayhem.” Allstate, *Check Out Allstate’s Latest TV Commercials*, <https://www.allstate.com/advertising.aspx> (last visited Mar. 31, 2020); Nationwide advertises that their insurance “gives you peace of mind.” NATIONWIDE, *Auto Insurance*, <https://www.nationwide.com/personal/insurance/auto/> (last visited Mar. 31, 2020).

117. *Id.*

118. JEFFREY O’CONNELL, *THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE*, 4 (Commerce Clearing House, Inc. ed. 1971).

119. *See supra* notes 66–71.

120. Stone, *supra* note 103, at 17. *See supra* Section II.A.

121. State of Conn. Ins. Dep’t, *What is Auto Insurance?*, CT.GOV,

wants to receive a driver's license, retain a driver's license, or register a motor vehicle must provide proof of, and continuously maintain, a minimum amount of insurance,<sup>122</sup> including liability coverage,<sup>123</sup> as well as uninsured and underinsured coverage.<sup>124</sup> Connecticut follows the tort liability approach to automobile insurance law.<sup>125</sup> In this system, there are no restrictions on lawsuits to recover damages, and the injured party can recover damages after proving that the other party was liable for causing the accident.<sup>126</sup> From 1973 to 1993, Connecticut had a no-fault automobile insurance system.<sup>127</sup> The statute requiring no-fault automobile insurance was repealed<sup>128</sup> after much criticism, saying it led to higher premiums and clogged courts.<sup>129</sup> Now, "a person injured in an automobile accident because of another's negligent operation of a private passenger motor vehicle can seek compensation for their injuries from the at-fault driver, and, if necessary, initiate a personal injury lawsuit to determine fault and the amount of damages to be awarded."<sup>130</sup> Under the terms of a standard automobile insurance policy, an insurer has a duty to defend the insured and has a right to recover any payments it makes to an insured from those at fault.<sup>131</sup>

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<https://portal.ct.gov/CID/General-Consumer-Information/What-Is-Auto-Insurance>  
[<https://perma.cc/2ECL-CEUR>].

122. The minimum coverage that a driver insured in Connecticut must have is \$25,000 in coverage per person per accident for bodily injury liability, \$50,000 in coverage per accident for bodily injury liability, \$25,000 in coverage per accident for property damage liability, and Uninsured/Underinsured Motorist coverage of at least \$25,000 per person/\$50,000 per accident. *Id.*

123. *See supra* notes 66–71 and accompanying text.

124. LEDUC, *supra* note 64; *see also* CONN. GEN. STAT. ANN. §§ 38a-336–43 (West 2015); CONN. GEN. STAT. ANN. § 38a-371 (West 2017). Beginning in 1973, the Connecticut Statute required all automobile insurance companies to provide uninsured and underinsured motorist coverage. CONN. GEN. STAT. ANN. § 38a-336 (West 2015).

125. *See supra* Section I.A; *see also Background on: No-Fault Auto Insurance*, INS. INFO. INST., 3, 5–6 (Nov. 6, 2018), <https://www.iii.org/article/background-on-no-fault-auto-insurance> [<https://perma.cc/3ACL-CPMT>]. Since Connecticut has a tort liability approach "there are no restrictions on lawsuits." *Id.*

126. *See supra* Section I.B; JASPER, *supra* note 67, at 9; *Background on: No-Fault Auto Insurance*, *supra* note 77.

127. LEDUC, *supra* note 64, at 1; *see Background on: No-Fault Auto Insurance*, *supra* note 77.

128. *Background on: No-Fault Auto Insurance*, *supra* note 77.

129. Kirk Johnson, *Senate Repeals No-Fault Insurance Law*, N.Y. TIMES (June 8, 1993), <https://www.nytimes.com/1993/06/08/nyregion/senate-repeals-no-fault-insurance-law.html> [<https://perma.cc/B7A5-YF63>]. *See also* CONSUMER WATCHDOG, *A Failed Experiment: Analysis and Evaluation of No-Fault Laws* (last visited Aug. 2, 2020); NAT'L ASS'N INS. COMM'R, NO-FAULT AUTO INSURANCE: A SURVEY (2000), [https://www.naic.org/documents/prod\\_serv\\_special\\_nfs\\_om.pdf](https://www.naic.org/documents/prod_serv_special_nfs_om.pdf) [<https://perma.cc/5T8K-TWTZ>].

130. LEDUC, *supra* note 93.

131. *Id.*

### III. CONNECTICUT SHOULD DISALLOW INSURANCE COMPANIES FROM BENEFITING FROM THE SUDDEN MEDICAL EMERGENCY DEFENSE

Connecticut has a tort-based system to automobile insurance claims,<sup>132</sup> which means that in a legal claim, the defendant must be at fault for the accident to be liable.<sup>133</sup> The Sudden Medical Emergency Defense confuses this idea, because it is often not contested that the defendant violated a statute and caused the accident.<sup>134</sup> While the defendant is technically “at-fault” in such a scenario, courts have recognized that the defendant could not foresee incapacitation, and therefore could not be held to the legal standard of a “reasonable person would have exercised under the circumstance[s].”<sup>135</sup> So, while the courts agree that it is consistent with public policy to allow the defendant to raise the Sudden Medical Emergency Defense, because the defendant did not have any control over the harm they caused, it is against public policy to allow insurance companies to escape the responsibility of coverage solely because their insured had a medical incapacitation. The purpose of liability insurance is to provide coverage when the insured directly causes damages.<sup>136</sup>

This Note does not suggest that the Connecticut legislature reenact a no-fault insurance system, that would “permit[] a person to recover financial losses from his or her own insurance company regardless of who caused the loss . . . .”<sup>137</sup> Instead, this Note recommends that Connecticut bar insurance companies from benefitting from the Sudden Medical Emergency Defense at the expense of the innocently injured plaintiff. This bar would allow a plaintiff in a case which involves a sudden medical emergency defense to collect up to policy limits from the defendant’s insurer, and underinsured or uninsured from their own insurer. This solution can be accomplished through either a new statute passed by the Connecticut legislature, or by a new regulation promulgated by the Connecticut Insurance Department.

#### A. *The Public Policy Interest Motivating This Change*

In validating the Sudden Medical Emergency Defense, a California court held that “as between an innocent injured party and an innocent ill driver, the innocent injured party must suffer.”<sup>138</sup> This assertion, however,

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132. NAT’L ASS’N INS. COMM’R, *supra* note 129.

133. *See* discussion *supra* Section II.B; *see also* LEDUC, *supra* note 64, at 1.

134. *See* Anderson, *supra* note 22. The defendant conceded that they were the but-for cause of the accident, but argues they owe no damages because they suffered a medical emergency. *Id.*

135. Hesse v. McClintic, 176 P.3d 759, 761 (Colo. 2008).

136. *See supra* Section II.B.

137. LEDUC, *supra* note 130.

138. Bashi v. Wodarz, 53 Cal. Rptr. 2d 635, 639 (Cal. Ct. App. 1996). *See also supra*

fails to consider the other parties that are involved in the compensation scheme of tort liability: the insurers of the parties. While the rationale in support of the defense is correct: a person who becomes unforeseeably incapacitated cannot be held to a reasonable person standard;<sup>139</sup> the defense has a harsh burden, that rests solely on the innocent injured party,<sup>140</sup> that many in society may not agree with. This is because even though the defendant would not have the “harsh burden,” the plaintiff will now be suffering the harsh consequences.<sup>141</sup> After all, insurance is designed to indemnify an insured against the risk of loss.<sup>142</sup>

One’s automobile insurance policy is governed by their insurance contract,<sup>143</sup> not by the subjective beliefs of when someone thinks their insurance should cover a loss.<sup>144</sup> It is a well-held rule in the United States that a party is free to contract, as long as the contract does not violate any statutory scheme or public policy.<sup>145</sup> While contracts govern coverage, public policy interests are also involved, as set forth in the statutes, regulations, and judicial decisions.<sup>146</sup> Even if a term in an insurance policy is unambiguous, it will not be enforced if it violates public policy by attempting to dilute, condition, or limit statutorily mandated insurance coverage.<sup>147</sup> An insurance contract violates public policy when it “so obviously [goes] against the public health, safety, morals, or welfare.”<sup>148</sup> In that circumstance the court “may constitute itself as the voice of the community in so declaring that the contract is against public policy.”<sup>149</sup>

Courts are hesitant to invoke “public policy” to override the express terms of an insurance policy; they will only do so in the clearest cases.<sup>150</sup> However, courts are not the only entity that has the power to make a decision based on public policy; constitutions and statutes are also created

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note 34 and accompanying text.

139. See *supra* notes 10–13 and accompanying text.

140. *Bashi*, 53 Cal. Rptr. 2d at 639.

141. See generally *id.*

142. Sean W. Gallagher, *The Public Policy Exclusion and Insurance for Intentional Employment Discrimination*, 92 MICH. L. REV. 1256, 1265 (1994).

143. See *id.*

144. See *id.*

145. *Gordon v. Musser*, No. X04HHDCV106014879S, 2012 WL 1509798, at \*3 (Conn. Super. Ct. Apr. 4, 2012); *Hill v. American Family Mutual Insurance Co.*, 249 P.3d 812, 816 (Idaho 2011) (quoting *J.F. v. D.B.*, 879 N.E.2d 740, 741 (Ohio 2007)). “The ‘liberty of contract is not an absolute and unlimited right, but upon the contrary is always subservient to the public welfare.’” *Id.*

146. *Bakker v. Thunder Spring-Wareham, L.L.C.*, 108 P.3d 332, 336 (Idaho 2005).

147. Robert E. Anderson et al., *Basis of Public Policy*, 43 AM. JUR. 2D INSURANCE § 276 (Feb. 2020).

148. *Id.*

149. *Id.*

150. *Id.*

in line with public policy.<sup>151</sup>

The public policy of the state is reflected in its constitution, statutes, and judicial decisions for purposes of determining whether the terms of an insurance policy are contrary to public policy. It is said that public policy invalidating a contract or insurance policy provision is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest.<sup>152</sup>

Public policy interests persuading state legislators vary from state to state.<sup>153</sup> There have been statutes and regulations passed in Connecticut with the purpose of protecting the insured.<sup>154</sup> A statute that disallows insurance companies from denying coverage because of a sudden medical emergency would further this purpose.

B. *The Legislative and Regulatory Mechanism to Bring About This Change*

Automobile insurance is provided to individuals by private companies, but those companies must adhere to both statutes created by the legislature, and regulations created by the Connecticut Insurance Department.<sup>155</sup> To protect law-abiding drivers who are injured by an incapacitated driver, from bearing the high cost of damages alone,<sup>156</sup> Connecticut should create a statute or regulation that requires insurance companies to provide coverage if an accident is caused by a Sudden Medical Emergency.

1. Change by Legislation

The Connecticut legislature should pass a statute implementing a rule that requires every insurance company to provide liability coverage if their insured would have been considered negligent but-for a Sudden Medical Emergency. The interest behind this statute would be comparable to the

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151. *Id.*

152. *Id.*

153. *Compare* Hill v. American Family Mutual Insurance Co., 249 P.3d 812, 816 (Idaho 2011) (“Neither the Idaho legislature nor the courts have declared that there exists a public policy applicable to underinsured motorist coverage.”), *with* Gormbard v. Zurich Ins. Co., 904 A.2d 198, 202 (Conn. 2006) (reasoning the statute mandating underinsured motorist coverage was creating in the public policy interest that “every insured is entitled to recover for the damages he or she would have been able to recover if the uninsured motorist had maintained a policy of liability insurance.”).

154. *See infra* Section III.B.1.

155. STATE OF CONN. INS. DEP’T, *Mission & Divisions*, CT.GOV, <https://portal.ct.gov/CID/About-Us/Divisions> [<https://perma.cc/ZQ7K-SRP2>]. Connecticut General Statute 38a gives the Connecticut Insurance Department authority to regulate insurance. CONN. GEN. STAT. ANN. § 38a (West 2015).

156. *Bashi v. Wodarz*, 53 Cal. Rptr. 2d 635, 639 (Cal. Ct. App. 1996).

public policy interests behind the Connecticut legislative decision to require every insurance policy in the state to include uninsured and underinsured motorist coverage. It would show the legislature's public policy interest in protecting the insured and their willingness to create legislation reflecting in that interest.<sup>157</sup> In 1967, the legislature enacted General Statutes section 38-175c,<sup>158</sup> now codified at section 38a-336,<sup>159</sup> which requires every insurance policy to include uninsured and underinsured motorist coverage.<sup>160</sup> This statutory mandate was enacted for the public policy interest<sup>161</sup> of providing protection to insured persons.<sup>162</sup> Uninsured and underinsured coverage is purchased to protect the insured, not a third party who causes harm to the insured.<sup>163</sup> It is "wholly independent" of the tortfeasor.<sup>164</sup>

The insurer shall undertake to pay on behalf of the insured all sums which the insured shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured caused by an accident involving the uninsured [or underinsured] motor vehicle.<sup>165</sup>

The policy reasons behind underinsured and uninsured motorist coverage echo the reasons why individuals purchase automobile insurance in the first place: to pay into a system so they can receive coverage if they fall victim to an automobile accident.<sup>166</sup>

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157. *Streitweiser v. Middlesex Mut. Assur. Co.*, 593 A.2d 498, 500–01 (Conn. 1991).

158. CONN. GEN. STAT. ANN. § 38-175c (West 1967).

159. CONN. GEN. STAT. ANN. § 38a-336 (West 2015).

160. *Gorbard v. Zurich Ins. Co.*, 904 A.2d 198, 202 (Conn. 2006).

161. *Id.* at 203. The public policy rationale is the belief that "every insured is entitled to recover for the damages he or she would have been able to recover if the uninsured motorist had maintained a policy of liability insurance. Insurance companies are powerless to restrict the broad coverage mandated by the statute." *Id.*

162. *See id.* at 210.

163. *Haynes v. Yale-New Haven Hosp.*, 699 A.2d 964, 981 (1997).

164. *Id.*

[An][u]ninsured [or underinsured] motorist [payment] is not for the benefit of the tortfeasor. The disposition of an uninsured [or underinsured] motorist claim generally has no relation to or effect on the liability of the uninsured motorist (or other joint tortfeasors). One reason for this is that in most states the insurer is entitled to be subrogated to the insured's tort claim against the uninsured [or underinsured] motorist. Thus, courts have repeatedly concluded that ordinarily . . . the insurance payment does not diminish the damages that may be recovered from an uninsured [or underinsured] tortfeasor or a joint tortfeasor who is insured.

*Id.*

165. *Gorbard v. Zurich Ins. Co.*, 904 A.2d 198, 203 (Conn. 2006) (citing *Streitweiser v. Middlesex Mutual Assurance Co.*, 593 A.2d 498, 501 (Conn. 1991)).

166. *See supra* Section II.B and accompanying text. Automobile insurance companies market their product as being there for you when you have loss or when you cause loss to

## 2. Change by Connecticut Insurance Department Regulation

The Connecticut Insurance Department enforces state insurance laws and “ensures [that] policyholders are treated fairly.”<sup>167</sup> Additionally, Connecticut is part of the [United States] insurance regulatory framework which is a highly coordinated state-based national system designed to protect policyholders and to serve the greater public interest through the effective regulation of the [United States] insurance marketplace.<sup>168</sup>

The Connecticut Insurance Department provides “regulatory oversight to better protect the interests of consumers while ensuring a strong, viable insurance marketplace.”<sup>169</sup> This department creates regulations, supplementing federal and state law, to ensure the insurance industry is fair.<sup>170</sup> For example, the Connecticut Insurance Department has regulations regarding the minimum standards for insurance policies issued in the state.<sup>171</sup> Through their power, the Connecticut Insurance Department should create a regulation requiring insurance companies to provide coverage when a sudden medical emergency caused the accident.

### C. How the Recommended Change Would Affect a Trial Involving a Sudden Medical Emergency Defense

The majority of automobile accident cases settle before a trial.<sup>172</sup> If Connecticut enacted the statute or regulation addressed above, automobile insurance companies in the state would be required to abide by the new rule. Accordingly, instead of denying liability, insurance companies would be more eager to settle with the injured plaintiffs because the insurance companies would want to avoid the high costs of a trial.

If the case does not settle and goes to a jury trial, Connecticut has procedural mechanisms that would assist in dividing liability between the defendant and their insurance company.<sup>173</sup> After both the defendant and the plaintiff have presented their case, evidence has been submitted, and any motions have been heard and disposed of, it is time to submit the case to the jury.<sup>174</sup> The process of submitting the case to the jury involves both

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another. *See also Gormbard*, 904 A.2d at 203.

167. CONN. AGENCIES REGS. § 38a-8-1 (1992); STATE OF CONN. INS. DEP’T, *supra* note 155.

168. STATE OF CONN. INS. DEP’T, *supra* note 155.

169. *See id.*

170. *See id.*

171. CONN. AGENCIES REGS. § 38a-327-3 (1992).

172. Wood R. Foster, Jr., *How Trial Lawyer Became an Oxymoron*, 74 BENCH & B. MINN. 16, 16 (2017).

173. *See generally* CONN. GEN. STAT. ANN. § 52-224 (West 2019); *Trial Practice: Submission of the Case to the Jury*, 6 CONN. PRAC., § 10.3, 2d ed. (updated Nov. 2019); *Interrogatories to the Jury*, CONN. PRAC. BOOK § 16-18 (2019).

174. *Trial Practice: Submission of the Case to the Jury*, 6 CONN. PRAC., § 10.1, 2d ed. (updated Nov. 2019).

the judge and the jury.<sup>175</sup> Before the jury deliberates, the judge gives the “judge’s charge,”<sup>176</sup> where the judge “instructs the jury about the relevant laws that should guide its deliberations,”<sup>177</sup> “define[s] any terms or words that may not be familiar to the jurors,”<sup>178</sup> and “advise[s] the jury that it is the sole judge of the facts and of the credibility (believability) of witnesses.”<sup>179</sup>

“Section 52–224 of the Connecticut General Statutes permits the use of a ‘special verdict,’”<sup>180</sup> while *Connecticut Practice Book* Section 16–18 authorizes the use of a general verdict with interrogatories.<sup>181</sup> Accordingly, in Connecticut, trial courts have broad discretion as to whether to use a special verdict or interrogatories with a general verdict.<sup>182</sup>

The special verdict procedure is used to allow the jury to make decisions of fact, while avoiding prejudice and bias in doing so.<sup>183</sup> It accomplishes this by having the jury “answer each question according to the evidence, regardless of the effect or supposed effect of the answer on the rights of the parties as to recovery.”<sup>184</sup> Then, the judge applies the law to their individual findings of fact.<sup>185</sup> While special verdicts are not

175. *Id.* The judge determines questions of law, while the jury determines questions of fact. *Id.*

176. *Id.*

177. *How Courts Work: Steps in a Trial*, AM. B. ASS’N (Sept. 9, 2019), [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/juryinstruct/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryinstruct/) [<https://perma.cc/9ZFG-BW47>].

178. *Id.*

179. *Id.*; *Trial Practice: Submission of the Case to the Jury*, 6 CONN. PRAC., § 10.1, 2d ed. (updated Nov. 2019). In Connecticut, attorneys are able to “request to charge,” meaning they can request that the judge give certain statements of law to the jury. *Id.*

180. CONN. GEN. STAT. ANN. § 52-224 (West 2019); Robert B. Yules, *Interrogatories to the Jury*, CONN. PRAC. BOOK § 16-18 (2019).

181. *Trial Practice: Submission of the Case to the Jury*, 6 CONN. PRAC., § 10.3, 2d ed. (updated Nov. 2019).

Though they may to some extent both subserve the same purpose, there is still a material difference between special verdicts and findings by responses to interrogatories. By the former no unconditional general verdict is rendered, but the jury find [] the facts and submit the question of law arising upon them to the court . . . .By the latter, answers pertinent to, and perhaps controlling, although not necessarily fully covering, an issue framed, are given, always in connection with a general verdict . . . .The purpose of the former is to furnish the basis of a judgment to be rendered, and of the latter, by eliciting a determination of material facts, to furnish the means of testing the correctness of the verdict rendered, and of ascertaining its extent . . . .

*Id.* (citations and footnotes omitted).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* The jury makes the determination of evidential facts, rather than ultimate facts, and then the judge applies the law and directs entry for a verdict. *Trial Practice: Submission of the Case to the Jury*, 6 CONN. PRAC., § 10.4, 2d ed. (updated Nov. 2019).



frequently used by Connecticut courts,<sup>186</sup> general verdicts with interrogatories have long been an accepted practice and are becoming much more common.<sup>187</sup> “The trial court is vested with wide discretion to submit interrogatories to the jury for the purpose of ascertaining the jury’s decision on contested issues.”<sup>188</sup> Interrogatories are used to elicit certain factual information from the jury, so the court can make a determination of law.<sup>189</sup>

Special verdicts and interrogatories for the jury provide the procedural mechanism needed for dealing with the proposed legislation. In automobile accident liability cases, the jury is prohibited from taking into account automobile coverage when deciding their verdict.<sup>190</sup> When deciding the case, the jury is provided evidence relating to the defendant driver and innocent plaintiff, but the insurance company is not one of the named parties in the case. So, while the legislation would still allow a defendant to use a Sudden Medical Emergency Defense, their insurance company and the plaintiff’s insurance company would not be able to benefit from the defense. Instead, the court would provide the jurors with interrogatories, eliciting factual findings of whether the defendant violated a statute, and whether the jury found facts supporting the finding that a sudden medical emergency existed. Then, after receiving the answers of the jurors, the court can apply the law. If the jury found factually that the defendant was not liable because of the defense, the court can legally impose a duty on the insurance company to pay damages, up to the policy limits.

#### CONCLUSION

When a defendant asserts a Sudden Medical Emergency Defense in a motor vehicle accident negligence claim, it becomes more difficult for a plaintiff to prove that the defendant was negligent or “legally liable.” In these cases, there are often no factual contentions over whether the defendant violated a statute.<sup>191</sup> Rather, the factual question for the jury is whether a sudden medical emergency was the direct cause of the accident, and if that excuses the defendant from legal liability.<sup>192</sup> However, the

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186. *Trial Practice: Submission of the Case to the Jury*, 6 CONN. PRAC., § 11.4, 2d ed. (updated Nov. 2019).

187. *Id.*

188. *Trial Practice: Submission of the Case to the Jury*, 6 CONN. PRAC., § 10.3, 2d ed. (updated Nov. 2019).

189. *Id.*

190. JUDGE SUPPORT SERVICES, CONNECTICUT JUDICIAL BRANCH CIVIL JURY INSTRUCTIONS 2.9-2 (Oct. 1, 2018), <https://www.jud.ct.gov/JI/Civil/Civil.pdf> [<https://perma.cc/9P6C-QC8Y>].

191. *See Roman v. Estate of Gobbo*, 791 N.E.2d 422, 423–24 (Ohio 2003) (the parties agreed to the facts that the driver was accelerating and swerving about the road).

192. *See supra* notes 23–32 and accompanying text. *Roman*, 791 N.E.2d at 423–24 (Ohio

defendant is not the only party escaping liability through this defense;<sup>193</sup> since a Sudden Medical Emergency Defense is often a *complete* defense in an automobile accident trial, the injured innocent plaintiff is left with little to no recovery from the defendant, the defendant's insurance company, or their own insurance company.

Many jurisdictions have discussed the sudden emergency doctrine but have decided to follow case law precedent in upholding a complete defense.<sup>194</sup> Connecticut has enacted legislation to protect an innocent plaintiff against an uninsured or underinsured motorist if that motorist is found to be a tortfeasor.<sup>195</sup> The creation of the underinsured motorist statute was strongly based on public policy considerations.<sup>196</sup> For the same public policy reasons, Connecticut should enact a statute or regulation to disallow automobile insurance companies from benefitting from the Sudden Medical Emergency Defense. Unlike jurisdictions that have overturned the defense completely, this change would not shift the losses from the innocent plaintiff to the incapacitated driver. Rather, this change in Connecticut would protect both the innocent plaintiff and the incapacitated driver, while requiring the insurance company to pay the policy limits. This limited statute or regulation would ensure that insurance companies do what they advertise: protect the insured when another causes an automobile accident.

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2003). Instead of a factual question, at trial, the issue was solely about liability and whether the heart attack the driver suffered made him not responsible and not negligent. *Id.*

193. *See supra* Section I.A.

194. *See supra* Section I.A and Section I.D.

195. CONN. GEN. STAT. ANN. § 38a-336 (West 2015). *See supra* Section II.A and Section II.C.

196. *See Gornbard v. Zurich Ins. Co.*, 904 A.2d 198, 203 (Conn. 2006).