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## IN THIS ISSUE




Steven G. Friedman

# Underinsured Motorist Coverage And Stacking of Coverages

*By Steven G. Friedman*

A few years ago, the Virginia legislature passed a new law to improve motor vehicle insurance coverage. The new law targets underinsured motorist coverage for all Virginia motorists. It took effect July 1, 2023, and affects auto insurance policies issued or renewed in Virginia after this date. *See* Va. Code § 38.2-2202(C). Prior to the new law's effective date, Marks & Harrison previously published a blog post on this topic. *See* https://www.marksandharrison.com/blog/dont-be-tricked-changes-in-virginia-insurance-law-took-effect-on-july-1-2023/. But this issue is so important that we thought it was worth addressing again now, especially since all current policies are now affected by the new law.

First, some background is useful to understand this change in the law. When you purchase auto insurance in Virginia, you are automatically purchasing two types of coverage: liability coverage and uninsured/underinsured motorist coverage (UM/UIM). If you negligently cause

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injury while driving your liability coverage pays, up to the limits of the coverage, the amount you owe to the injured person for their injuries. Thus, your liability coverage benefits other persons who are injured when you are at fault for causing a wreck. Your UM/UIM coverage benefits you if you are injured due to another's negligent use of a vehicle. The uninsured motorist (UM) provisions provide coverage (up to the coverage limits) when the tortfeasor has no liability coverage. *See* Va. Code § 38.2-2206(B). The underinsured motorist (UIM) provisions provide additional coverage (up to the coverage limits) when the tortfeasor has liability coverage but it is not enough to fully compensate you for your injuries. *See id*.

Under the old law, for policies issued before July 1, 2023, you could only recover under your UIM policies if and to the extent that the total UIM coverage available exceeded the liability coverage available. Stated otherwise, the UIM carrier got a "credit" or "off set" in the amount of the tortfeasor's liability coverage. For example: While driving, Allison negligently hits Bob. Allison has $100,000 in liability coverage. Bob has $100,000 in UIM coverage. Because Allison's liability coverage equals Bob's UIM coverage, Bob's UIM coverage is effectively nullified; Bob cannot "stack" the two policies and collect under both. So in this case, Bob only has a total of $100,000 of available insurance coverage to compensate him for his injuries. Bob would not recover any UM/UIM benefits under his own policy; only Allison's liability coverage would be exposed.

But under the new law, for policies issued on and after July 1, 2023, there is no longer a "credit" or "off set" for the amount of the liability coverage. *See* Va. Code § 38.2-2206(A). This means you can recover under your UIM policy in addition to the liability coverage regardless of whether the total UIM exceeds the liability coverage. So in the above-stated example, Bob would have total insurance coverage of $200,000 available ($100,000 from Allison's liability policy + $100,000 from Bob's UIM policy). So the net effect of the new law is that Bob's coverage doubled (a 100% increase!) from the old law.

As demonstrated above, this change in the law is beneficial to injured persons because it provides more (often a lot more) insurance coverage if they are injured due to the negligent operation of a motor vehicle. The change is automatic – meaning, unless you affirmatively opt out, you will have this benefit under any policy issued in Virginia on and after July 1, 2023. Insurance carriers are required to notify you of this change and any election to opt out must be in writing. *See* Va. Code § 38.2-2206(A) & § 38.2-2202(C). **We recommend that automobile insurance policy holders should not opt out of the provisions of the new law regarding UM/UIM coverage.**

However, insurance companies may try to encourage insureds to opt out (so as to minimize their potential exposure in a crash) by explaining that insureds can lower their premiums by opting out of this new coverage. While technically true, such an assertion is not the full story. Frequently, the amount that the premium would drop is probably minimal and thus not worth giving up the enhanced benefits of the new law. Typically, for just a few dollars more in premiums you can substantially increase your auto insurance coverage. An honest cost benefit analysis of your situation will likely dictate that you should take advantage of the new UIM stacking law.


So before you agree to anything or sign paperwork from your insurance carrier, consider your car insurance needs and financial situation carefully. And do not let the insurance carriers trick you into saving a few pennies in premiums in exchange for giving up many thousands of dollars in insurance coverage.

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# Understanding Personal Injury Protection Insurance Under D.C.'S Compulsory/No-Fault Motor Vehicle Insurance Law

*By John D. Ayers*

In the District of Columbia, insurers are required to offer optional personal injury protection (PIP) insurance to any person required to have automobile insurance and as part of the policyholder's automobile insurance policy. D.C. Code § 31-2404(a). PIP insurance is designed to provide no-fault coverage for victims for injuries arising from the operation or use of a motor vehicle. For example, if a person having D.C. PIP insurance is injured in an automobile collision with another motorist, she can access the PIP benefits in her own policy to redress her injuries and without the need to establish fault of the other motorist.

Again, a key aspect of DC PIP is that it is no-fault coverage. It is payable irrespective of fault. PIP benefits are available "without regard to, and irrespective of, negligence, freedom from negligence, fault, or freedom from fault on the part of any person." D.C. Code § 31-2404(b).

Although the insurer is required to offer PIP insurance to its policyholder, PIP is optional. The policyholder can elect to waive PIP altogether. A common misunderstanding is that all policyholders have PIP coverage in D.C. Most but not necessarily all policyholders will have PIP coverage, electing not to waive coverage.

Taxicabs and buses are not required to maintain PIP insurance. D.C. Code § 31-2402. Likewise, companies like Uber and Lyft, private vehicle-for-hire companies, are not required to have PIP. D.C. Code § 50-301.29c. This means that passengers injured in a taxicab or bus accident, or injured while travelling in an Uber/Lyft vehicle, may not be able to collect PIP.

The scope of PIP benefits is comprehensive, covering medical and rehabilitation expenses, work loss, and funeral costs. The current minimum coverage is $50,000 for medical and rehabilitation expenses, $12,000 for work loss, and $4,000 for funeral costs. D.C. Code § 31-2404(c), (d), and (e). These are the minimums and a policyholder can chose higher amounts (e.g. $100,000 for medical expenses).

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PIP benefits are available "to a victim who is an insured or an occupant of the insured's vehicle or of a vehicle which the insured is driving." D.C. Code § 31-2404(a). Thus, one does not have to be driving the vehicle to receive PIP benefits; one can be a passenger to receive PIP benefits. Moreover, it is possible for a victim to access multiple PIP policies to redress her injuries under certain situations. For example, if the victim is injured while a passenger in a friend's motor vehicle, she could potentially stack and collect benefits under her own PIP policy and under the friend's PIP policy.

PIP benefits apply not only to collisions occurring in D.C. but also outside of D.C. For example, if the policyholder covered by a D.C. PIP policy is driving her vehicle in nearby Maryland and injured in a collision there, she can still collect her PIP benefits.

Significantly, there is a lawsuit restriction for a person collecting PIP. Pursuant to D.C. Code § 31-2405(b), a person electing to receive PIP benefits is precluded from maintaining a civil action based on the liability of the wrongdoer unless certain criteria met. Under D.C.'s lawsuit restriction law, the victim has 60 days to notify the insurer of the victim's election to receive PIP benefits. D.C. Code § 31-2405(a). This 60-day period can be extended by the mutual written agreement of the victim and the insurer. D.C. Code § 31-2405(e). An untimely election (failure to elect within 60 days or within the agreed upon extended period) forecloses the right to receive PIP benefits. D.C. Code § 31-2405(g). **Importantly, if the victim makes a timely election to receive PIP benefits,** she is generally foreclosed from suing the alleged wrongdoer (e.g. the motorist of the other vehicle involved in the collision). A timely election for PIP benefits triggers a lawsuit restriction. *Lee v. Jones,* 632 A.2d 113, 116 (D.C. 1993) ("[T]heir election to receive PIP benefits bars them from maintaining a negligence action."). Of course, if there is an untimely election, or no election at all, the victim can proceed with a lawsuit.

**However, the lawsuit restriction law contains certain exceptions that allow the most seriously injured victims to bring a lawsuit even after having received PIP benefits.** D.C. Code § 35-2105(b)(1), for example, requires a showing that "The injury directly results in substantial permanent scarring or disfigurement, substantial and medically demonstrable permanent impairment which has significantly affected the ability of the victim to perform his or her professional activities or usual and customary daily activities, or a medically demonstrable impairment that prevents the victim from performing all or substantially all of the material acts and duties that constitute his or her usual and customary daily activities for more than 180 continuous days." Likewise, subsection (b)(2) requires that, "The medical and rehabilitation expenses of a victim or work loss of a victim exceeds the amount of personal injury protection benefits available." Thus, only if the victim can meet these exceptions (meet the severity threshold) will the victim be entitled to receive PIP benefits and also bring a lawsuit. The severity threshold is difficult to meet and only applies to situations involving quite serious injuries.

Finally, there could be an interesting twist on D.C.'s lawsuit restriction law if the motor vehicle collision occurs outside of D.C. Under that scenario, the victim may be able to collect the PIP benefits and bring a lawsuit against the wrongdoer outside of D.C. For example, if the accident occurs in nearby Maryland; the victim can collect D.C. PIP benefits and still sue in Maryland. *Ward v. Nationwide Mut. Auto. Ins. Co.,* 328 Md. 240, 614 A.2d 85 (1992) (court holding that the plaintiffs, passengers travelling in a vehicle covered by a D.C. PIP policy and involved in a collision in Maryland, could elect the PIP benefits and still sue in Maryland and recover damages from the negligent motorist of another vehicle).

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Andrea R. Carver

# Absence of Prior Incidents Is Not Admissible in Negligence Case

*By Andrea R. Carver*

When addressing evidentiary issues in court proceedings, trial attorneys sometimes argue that if one side can introduce a particular type of evidence the other side must be allowed to introduce evidence of the same type. The argument goes: "Judge, the road runs both ways. What's good for the goose is good for the gander. If they can introduce that type of evidence, so can I." These arguments often have merit, but they do not always apply. For example, although evidence of prior similar incidents **is** admissible in a premises liability case, evidence of the alleged absence of prior incidents is **not** admissible.

***Evidence of prior incidents is admissible to prove notice or knowledge of hazard***

"Evidence of other similar accidents or occurrences, when relevant, is admissible to show that the defendant had notice and actual knowledge of a defective condition[.]" *Roll 'R' Way Rinks, Inc. v. Smith,* 218 Va. 321, 325, 237 S.E.2d 157, 160 (1977) (*quoting Spurlin, Administratrix v. Richardson,* 203 Va. 984, 989, 128 S.E.2d 273, 277 (1962)). In order to introduce such evidence, however, the plaintiff must show "that those prior accidents or occurrences happened at substantially the same place and under substantially the same circumstances, and had been caused by the same or similar defects and dangers as those in issue, or by the acts of the same person." *Id.* (footnote omitted). As the Supreme Court of Virginia has explained:

> This rule springs from the lessons of human experience that similar causes can be expected to produce similar effects. By definition, the test of admissibility is not identity but substantial similarity. If the place, the circumstances, and the defect associated with a prior accident are substantially the same as those in issue, evidence of that accident is admissible to show notice of the existence of the defect and notice of its dangerous potential.

218 Va. at 325-26, 237 S.E.2d at 160. In *Roll 'R' Way Rinks,* the parties agreed, however, that "evidence of prior accidents is not admissible for the purpose of proving negligence or causation at the time of the accident in issue." 218 Va. at 325, 237 S.E.2d at 160.

In *Roll 'R' Way Rinks,* the plaintiff, who was roller skating at the defendant's rink, fell when crossing over a steel transition plate which was placed between two areas of the skating rink. The Supreme Court held that the trial court properly admitted evidence of previous incidents in which skaters fell when crossing over steel transition plates at the rink. Even though the falls did not all occur at the same transition plates, the court held that the "substantial similarity" requirement was met since "the testimony of defendant's manager had established earlier that the five plates were made of identical material, were designed in identical fashion, and were installed in the same manner, and that the screws by which they were fastened repeatedly worked loose and had to be replaced." 218 Va. at 326, 237 S.E.2d at 160 (footnote omitted).

***Evidence of absence of prior incidents is not admissible***

On the other hand, evidence of the absence of previous injuries is not admissible in a negligence case. In *Goins v. Wendy's International, Inc.*, 242 Va. 333, 410 S.E.2d 635 (1991), Rebecca G. Goins sued Wendy's International, Inc. (Wendy's) to recover damages

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allegedly sustained when she consumed tainted food in a Wendy's restaurant. Prior to trial, Goins filed a motion in limine seeking to prevent Wendy's from introducing into evidence the testimony of two restaurant employees that they had received no other complaints of food poisoning relating to food served by the restaurant on the day Goins consumed the allegedly tainted food. The trial court denied the motion and permitted the introduction of the challenged evidence.

At trial, the restaurant's manager was allowed to testify that, although approximately 117 food bar meals were sold on June 9, 1989 (the date Goins ate at Wendy's), he was not aware of any other complaints about the food. The restaurant's shift manager also testified that she received no complaints about food other than from Goins. The jury returned a verdict for Wendy's, and the trial court entered a judgment thereon. Goins appealed.

The Supreme Court of Virginia held that the trial court committed reversible error by admitting into evidence the testimony of the restaurant's manager and shift manager. The Supreme Court held:

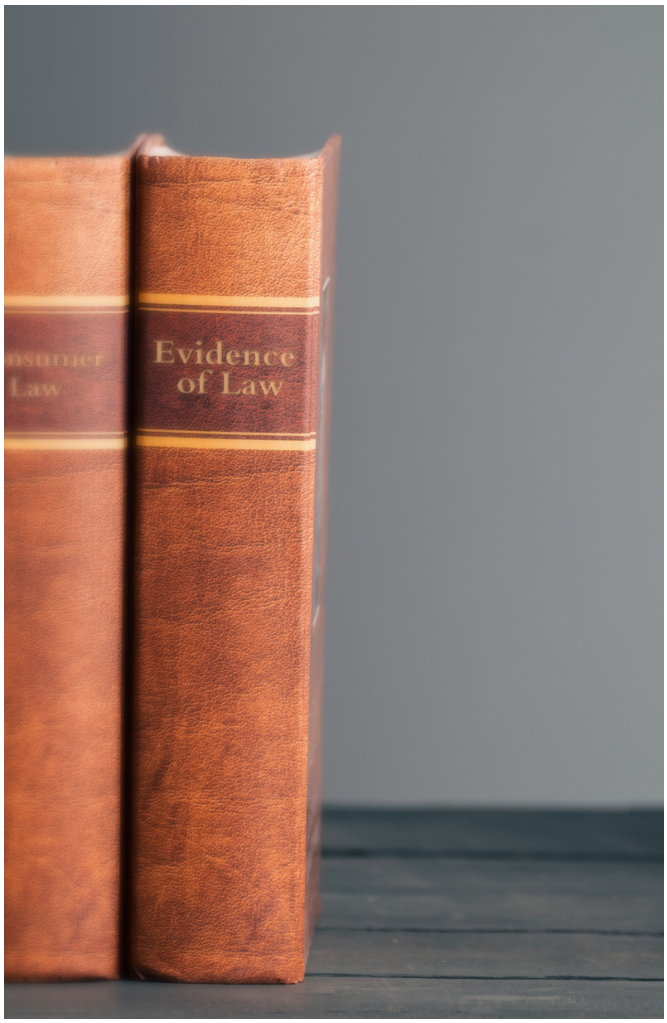
> It is firmly established that evidence of the **absence** of other injuries is not admissible in a negligence action when timely objection to it is made. *Sykes, Adm'r v. Railway Company,* 200 Va. 559, 564-65, 106 S.E.2d 746, 751 (1959); *Sanitary Gro. Co. v. Steinbrecher,* 183 Va. 495, 500, 32 S.E.2d 685, 687 (1945). Such evidence introduces into the trial collateral issues, remote to the issue at trial, which would tend to distract, mislead, and confuse the jury. *See City of Radford v. Calhoun,* 165 Va. 24, 36, 181 S.E. 345, 350 (1935); *Moore v. City of Richmond,* 85 Va. 538, 539, 8 S.E. 387, 388 (1888). The rationale for not admitting evidence of the absence of other injuries is the same, whether the opposing party's case is based upon direct evidence, circumstantial evidence, or a combination thereof, and whether the action lies in negligence or implied warranty.

242 Va. at 335, 410 S.E.2d at 636 (emphasis added).

Later in its opinion, the Supreme Court noted additional reasons for excluding such evidence. The Court observed that allowing evidence of the absence of other incidents

> would interject evidence so problematical, due to the potential for a lack of reporting and the variables of circumstances and conditions, that such evidence would have slight, if any, relevancy or probative value. This is especially true in the present case because the absence of other complaints does not necessarily mean that there were no other incidents of sickness.

242 Va. at 335-36, 410 S.E.2d at 636.

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The Supreme Court of Virginia has excluded evidence of the absence of other incidents in numerous other cases. *See Sanitary Gro. Co. v. Steinbrecher,* 183 Va. 495, 500, 32 S.E.2d 685 (1945) (trial court properly excluded evidence that 1,000 customers had entered the store each day for the previous eleven months and no one had been previously hurt by the shelving which plaintiff alleged caused her injury); *Wood v. Woolfolk Props., Inc.,* 258 Va. 133, 515 S.E.2d 304 (1999) (trial court erred by allowing evidence regarding the absence of prior accidents at the curb area where the plaintiff fell). *See also Harman v. Honeywell Int'l, Inc.,* 288 Va. 84, 758 S.E.2d 515 (2014) (trial court erred by allowing defense counsel's argument that autopilot system on airplane had been used for 35 years without any problem).[1]

As the foregoing authorities show, evidentiary issues must be carefully researched and analyzed. A particular type of evidence may be admissible when offered by the plaintiff, but evidence of the same type may be inadmissible when offered by the defendant. The "goose-gander rule" does not always apply.

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[1] The *Harman* case was not a premises liability case but instead involved a product liability claim. In *Harman,* the trial court had entered a pretrial order that excluded evidence of the absence of other injuries. Because Honeywell did not assign cross-error to the court's pretrial order, it was "the law of the case" and Honeywell could not challenge that ruling on appeal. 288 Va. at 102, 758 S.E.2d at 525. In a later decision, the Supreme Court of Virginia declined to decide "whether and under what circumstances evidence of absence of injuries might be admissible in a products liability case." *Dorman v. State Indus.,* 292 Va. 111, 120, 787 S.E.2d 132, 138 (2016).

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