INSURANCE LAW

Proposed Amendments To the No-Fault Law

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New York's No-Fault Law (Ins. L. Article 51) was controversial when it was enacted 36 years ago (L. 1973, ch. 13, in full effect Feb. 1, 1974), and it remains so today. Adopted by the Legislature to correct certain infirmities recognized to exist under the common-law tort system of compensating automobile accident claimants, the Comprehensive Automobile Insurance Reparations Act, as it was officially known, changed the legal landscape by providing a compromise: prompt payment for basic economic loss to injured persons regardless of fault, in exchange for a limitation on litigation to cases involving "serious injury." See *Pommells v. Perez*, 4 NY3d 566, 570-571 (2005); *Licari v. Elliott*, 57 NY2d 230, 234-235 (1982); *Montgomery v. Daniels*, 38 NY2d 41, 50-51 (1975).

The legislative intent underlying this statute was "to weed out frivolous claims and limit recovery to significant injuries," thereby lowering insurance premiums and reducing the burden on the courts. *Toure v. Avis Rent A Car Systems Inc.*, 98 NY2d 345, 350 (2002); *Dufel v. Green*, 84 NY2d 795, 798 (1995); *Licari*, supra. "Tacit in this legislative enactment is that any injury not falling within the new definition of serious injury is minor and a trial by jury is not permitted under the no-fault system." *Pommells v. Perez*, 4 NY3d 566 (2005).

As originally enacted, the No-Fault Law contained a two-part definition of the term "serious injury" which was "keyed to the nature of the injuries and the amount of the medical expenses." *Licari v. Elliott*, supra, The monetary part provided that if reasonable medical costs exceeded $500, a "serious injury" automatically would be established. That provision was repealed in 1977, when "experience demonstrated to the Legislature that the $500 threshold provided a target for plaintiffs which was too easily met and that the standard was unsuitable to fulfill the purpose of the No-Fault Law. (Memorandum of State Executive Dept., 1977 McKinney's Session Laws of N.Y., p. 2450)." *Licari*, supra.

It was then replaced with the present definition of "serious injury," i.e., a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus[1]; (6) permanent loss of use of a body organ, member, function, or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment. Ins. L. §5102(d).

> The goal of fixing and/or improving the current No-Fault statute is, indeed, a laudable one.

Complaints and Criticisms

How well has the No-Fault Law met its goals? From the very beginning, the statute has had its detractors and, indeed, there have been numerous calls over the years for its total repeal. It appears that this movement has gained strength in recent years, as not only the parties to "serious injury" threshold litigation, but also the courts, have begun to voice their dissatisfaction and complaints.

For example, in *Pommells v. Perez*, 4 NY3d 566, 571-572 (2005), then-Chief Judge Judith S. Kaye, stated, as follows:

> Abuse nonetheless abounds. From 1992 to 2000, reports of No-Fault fraud rose more than 1,700 percent and constituted 75 percent of all automobile fraud reports received by the Insurance Department in 2000 (see *Matter of Medical Socy. of State of N.Y. v. Serio*, 100 NY2d 854 [2003]; see also *State Farm Mut. Auto. Ins. Co. v. Mallela*, 4 NY3d 313 [2005]). There is, similarly, abuse of the No-Fault Law in failing to separate "serious injury" cases, which may proceed in court, from the mountains of other auto accident claims, which may not. That "basic economic loss" has remained capped at $50,000 since 1973 provides incentive to litigate. In the context of soft-tissue injuries involving complaints of pain that may be difficult to observe or quantify, deciding what is a "serious injury" can be particularly vexing. Additionally, whether there has been a 'significant' limitation of use of a body function or system (the threshold statutory subcategory into which soft-tissue injury claims commonly fall) can itself be a complex, fact-laden determination. Many courts have approached injuries of this sort with a well-deserved skepticism. Indeed, failure to grant summary judgment even where the evidence justifies dismissal, burdens court dockets and impedes the resolution of legitimate claims.

More recently, Bronx Supreme Court Justice Paul Victor, in *Vidal v. Maldonado*, 23 Misc.2d 186 (Sup. Ct. Bronx Co. 2008), bemoaned what he perceived as the deficiencies in the existing No-Fault Law, and implicitly urged legislative reform of that statute. In a lengthy, well-written decision punctuated by paragraph headings such » Page 9

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as "Another Frustrating Assembly Line 'Serious Injury' Motion," "The Dilemma Continues" and "A Difficult and Frustrating Task," Justice Victor disapproved of both moving defendants and opposing plaintiffs for their submission of "assembly line 'cookie cutter'" papers, which predictably and in "boiler plate fashion," state and support the parties' respective positions; complained about the "great expenditure of limited judicial time" required for the court to review the "usually copious" submissions by both sides, as well as the extensive current appellate decisions in this area; criticized the litigants for appealing "many (too many)" of these cases, and the appellate courts for issuing "non-unanimous (and sometimes acrimonious) decisions which are often difficult to reconcile with prior precedent"; and reproved the lack of guidance to the bench and bar in the enabling legislation as to the scope of the terms used in the statute.

As to this latter point, Justice Victor observed, "For example, one should reasonably assume that the Legislature sought to distinguish 'significant limitations of a body function or system' from a 'consequential limitation of a body organ or member,' however, there appears to be no practical difference. Some courts have held that 'consequential' means 'significant' [citation omitted]; and there are abundant cases in which all of the above terms (including body function, system, organ or member) are used interchangeably. The guidelines, conditions and examples provided by the Court of Appeals in a series of decisions, including *Toure*... although very helpful, have not entirely unburdened the trial courts, and these serious injury claims continue to be the cause of incessant motion practice, and an abundant use of judicial resources at both the trial and appellate levels."

In addition, Justice Victor expressed his frustration at the current system of resolving No-Fault "serious injury" disputes, as follows: "There are those who harbor a flawed assumption that judges (on papers) rather than medical scientists and jurors, are more able and equipped to discern and distinguish the false, frivolous and/or insignificant claims of serious injury from those which can cause legitimate, sometimes profound and 'more than frivolous' limitations, pain and quality of life impairments. This legislatively imposed task has caused more than a season of judicial discontent and frustration, it has resulted in an extremely difficult and flawed process which results too often in an inconsistent and unfair application of the law."

Different Problem

It should be noted that although Justice Victor has identified the apparent similarity between the "permanent consequential limitation" and "significant limitation" statutory categories as a problem worthy of correction, we have long been concerned with, and, we admit, confused by, the difference between these categories, as drafted by the Legislature. Experience has shown that in almost all cases in which the plaintiff is asserting an injury to his or her neck or back—be it a herniated disc or a bulging disc—claims are made under both the "permanent consequential limitation of use" and the "significant limitation of use" categories. However, as previously noted, for reasons that we have never understood, the "permanent consequential limitation of use" category is limited, by its terms, to a "body organ or member," while the "significant limitation of use" category is restricted to a "body function or system."[2]

The medical definitions of the terms "organ," "member," "function," and "system," reveal their distinction. Dorland's Illustrated Medical Dictionary (27th ed. 1988), for example, defines these terms as follows:

> member... 1. a part of the body distinct from the rest in function or position. 2. a limb. See also membrum (1000).
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> membrum... a limb, or member, of the body...a general term for one of the limbs, that is, the upper (arm, forearm, hand), or lower (thigh, leg, foot). Called also...extremity...(1003).
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> organ... a somewhat independent part of the body that performs a special function or functions; see organum... (1187).
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> organum... an organ; a somewhat independent part of the body that is arranged according to a characteristic structural plan, and performs a special function or functions; it is composed of various tissues, one of which is primary in function....(1189).

function... 1. the special, normal or proper physiologic activity of an organ or part.... (1667).

system... 1. a set or series of interconnected or interdependent parts or entities (objects, organs or organisms) that function together in a common purpose or produce results impossible of achievement by one of them acting or operating alone (1652).[3]

Such medical/legal authority strongly suggests that claimed limitations of the neck and/or back do not involve a body "organ" (heart, liver or skin), or a "member" (limb or extremity), and, therefore, do not fall within the scope of coverage of the "permanent consequential limitation of use" category of serious injury under Insurance Law §5102(d). Rather, such claimed limitations would involve a "function" or "system," and, thus, would potentially qualify only under the "significant limitation of use" category (or the "90/180 day" category, if applicable).[4] Several cases have so suggested or held,[5] while several others have explicitly or inferentially rejected that argument.[6]

New Bill Introduced

Against this backdrop, we have recently learned of a proposed bill that was introduced to both houses of the New York State Legislature on April 16, 2010 (A10734 and S07518), which, if passed, would dramatically change the definition of "serious injury" and radically alter the litigation of personal injury lawsuits arising out of automobile accidents.

The "Justification" section of the Sponsor's Memorandum for the Assembly's bill makes the following argument in support of its proposed changes to the No-Fault Law, which are remarkably reminiscent of Justice Victor's complaints:

> When the legislature originally passed N.Y.S. Ins. Law §5102, it never intended that New York's citizens would be deprived of their constitutional right to a trial by jury where they actually sustained a serious injury. The judicial transformation and interpretation of this statute has produced overwhelming obstacles never intended by the legislature and has clogged the courts with boilerplate "threshold motions" which monopolize judicial resources. Over the past twenty years developments in technology have enabled medical practitioners to identify injuries to ligaments, tendons, tissue, nerves and other non-bony structures through the use of CT Scans, MRIs, EMGs and other methods. Prior to these advances in technology significant injuries would not have been revealed or adequately appreciated but they are now readily identifiable, and the seriousness of their effects are understood far better than ever before.
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> Unfortunately, current law has not kept pace with modern medicine. As a result numerous cases where a serious injury was clearly present have been dismissed because the existing law does not clearly and specifically list and identify such injuries as actionable, regardless of how the injury affected the accident victims' lives. The proposed amendments would curtail summary dismissal of legitimate cases involving significant injuries not objectively verifiable when the law was originally enacted in 1977.... The Judiciary has repeatedly asked the Legislature for clarification of the statute and firm guidance as to its application, to ensure fairness and consistency in applying the "serious injury threshold" and ease the enormous burden the current law inflicts on the bench and upon citizens that have suffered serious injuries. The amendments proposed by this Bill would remedy these problems by clarifying what qualifies as a "serious injury" and promote fairness and consistency in its application, taking into account modern medicine and technology which have enabled medical practitioners to identify with more specificity and clarity those injuries having real and serious consequences. The amendment would further call for jury determinations on factual issues surrounding the nature and extent of the claims, rather than continuing to hamstring an already overburdened judiciary with myriad "threshold" motions. Most importantly, these amendments would promote fair, swift, consistent, rational, just and easily comprehensible results, in keeping with the intent of the original law.

Described as "an act to amend the insurance law, in relation to the definition of serious injury and determining the sufficiency of the evidence related to the serious injury," the proposed legislation adds to the definition of "serious injury" contained in Ins. L. §5102(d) four new or additional categories or types of injuries: (1) "a partial or complete tear or impingement of a nerve, tendon, ligament, muscle or cartilage"; (2) "injury to any part of the spinal column that results in injury to an intervertebral disc"; (3) impingement of the spinal cord, spinal canal, nerve, tendon or muscle"; and (4) a surgical procedure to any injured part of the body."

In addition, sensitive, perhaps, to the definitional arguments set forth above, the proposed amendment adds the words "function or system" to the "permanent consequential limitation" category, and adds the words "organ or member" to the "significant limitation" category, thus rendering both categories similarly and consistently applicable to a "body organ, member, function or system." It also adds the word "permanent" to the final statutory category—the "90/180" category—so that it would apply to both permanent and non-permanent injuries that affect the plaintiff as described.

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In addition to the foregoing, the new bill adds a new section 5102-a, titled "Issues of Fact and Sufficiency of the Evidence," which effectively eliminates the "serious injury" threshold summary judgment motion. This new section reads as follows: "Issues of fact and sufficiency of the evidence. Whether an injury qualifies as a serious injury pursuant to subsection (d) of section five thousand one hundred two of this article shall be a question of fact. Where evidence is offered as to (a) whether an injury qualifies as a serious injury pursuant to subsection (d) of section five thousand one hundred two of this article, or (b) the causation of such an injury, the sufficiency of such evidence shall be determined by the trier of fact. Sufficiency and weight of evidence offered, including but not limited to that pertaining to qualitative and/or quantitative assessment of injury, shall be reserved for the trier of fact."

Reaction From the Bar

Not surprisingly, reaction to this proposed legislation from the bar has been swift and strong. For example, Buffalo Insurance defense counsel, Roy A. Mura, in his superb blog titled "Coverage Counsel" (http://nycoveragecounsel.blogspot.com), dated April 28, 2010, has raised the following questions and comments: "What's an impingement of a muscle, and why is it added twice? Will strains and spasms qualify? Contusions? Non-herniated but bulging discs? Will sutures qualify as a 'surgical procedure'?

"The imprecision and ambiguity of these proposed additional 'serious injury' categories should be embarrassing to the sponsors of this bill... Don't like the courts meddling with the personal injury plaintiff's lawyers livelihood? There's a legislative app for that. In addition to seeing to it that nearly every minor, soft-tissue injury that results from a car accident will be actionable, cut the damnable courts out of the picture by outlawing summary judgment on the 'serious injury' issue.... In no other area of the law is a defendant denied his or her right to make a dispositive motion. The very idea is patently ridiculous as antithetical to the rule of law and function of the judiciary. What about a defendant's constitutional right to not face trial of a frivolous or unmeritorious lawsuit? I suspect that §5102-a may be just a throwaway component inserted into these bills as a bargaining chip the sponsors may be willing to give up in order to obtain passage of the expanded definition of 'serious injury.' But without a prohibition of summary judgment, the hopelessly vague and imprecise four additional types of serious injuries will likely spawn more, not less, motion and appellate practice."

In the interest of fairness, Mr. Mura referred his readers to the also excellent New York Personal Injury Law Blog of attorney, Eric Turkewitz (http://www.newyorkpersonalinjurylawblog.com/2010/04/new-york-no-fault-law-to-finally-be-pdated.html) for "a thoughtful plaintiff's attorney's perspective on this bill." Therein, Mr. Turkewitz notes his approval of the proposed bill, which attempts to cure "the essential ambiguity in the (existing) law as it tries rightly to define medicine, especially given that medicine has moved forward over the last 30+ years." He also points out "the problems that Judge Victor discussed with the uneven administration of justice, with some judges tossing out cases while others would allow the exact same ones to go forward."

In Mr. Turkewitz's view, "the bill leaves this essential fact-finding function to the jury, where it belongs. Vagueness and ambiguity have no place in the law. It creates problems as courts get swamped with motions and appeals that they are ill-prepared to deal with if a legislature hasn't done a good job of establishing definitions. The bill would bring some fundamental fairness to New York's No-Fault Law, seeing to it that all people are treated the same. And that can only be a good thing if you happen to be the person that was injured."

In response, Mr. Mura stated, as follows: "Eric and I appear to agree that the no-fault system is broken, but we differ on whether, and if so, how it can be fixed. No one can legitimately argue with the laudable goal of eliminating inconsistencies in appellate decisions and recognizing that a causally related surgical shoulder or knee is more deserving of admission to court than a broken pinky finger or toe. The proposed additional four categories of serious injuries, however, would make court a general admission event in New York, especially with a repeal of CPLR Rule 3212 only with respect to the 'serious injury' threshold issue."

To be sure, the debate will continue. The goal of fixing and/or improving the current No-Fault statute is, indeed, a laudable one, which should be accomplished after careful consideration of the issues and in contemplation of fairness to both—or all—sides including the courts. We will attempt to follow this issue carefully and to keep our readers advised of all developments as they occur.

1. The "loss of a fetus" category was added in 1984, in reaction to a decision by the court in *Raymond v. Bartsch*, 84 AD2d 60 (3d Dept. 1981), lv. denied, 56 NY2d 508 (1980). See Dachs, N. and Dachs, J., "Ranking the Auto Companies, and Loss of Fetus as a 'Serious Injury,'" NYLJ, March 10, 2009, p. 3, co. 1.

2. See *Oberly v. Bangs Ambulance Inc.*, 271 AD2d 135, 137 (3d Dept. 2000), affd. 96 NY2d 295 (2001) ("an important statutory distinction is drawn [by Ins. L. 5102(d)] between injuries affecting a 'body organ or member,' on the one hand, and a 'body function or system' on the other"); *Nasrallah v. Helio De Olivieri*, 1998 WL 152568, 5, n.2 (SDNY 1998) ("the [phrase] 'body organ or member' is meant to be distinctive from [the phrase] 'body function or system.'").

3. See also Stedman's Medical Dictionary (William H.L. Donette, ed., Fourth Unabridged Lawyers Ed. 1976) at 992 (similarly defining "organ"); 844 (similarly defining "member"); 560 (similarly defining "function"); 1395-96 (similarly defining "system").

4. The courts have held that to qualify as a "serious injury" under the "permanent loss of use of a body organ, member, function or system" category, the injury must result in a total loss of use. See *Oberly v. Bangs Ambulance Inc.*, 96 NY2d 295(2001); *Byong Yol Yi v. Canela*, 70 AD3d 584 (1st Dept. 2010); *Albury v. O'Reilly*, 70 AD3d 612 (2d Dept. 2010); *Tracy v. Tracy*, 69 AD3d 1218 (3d Dept. 2010); *Schreiber v. Krehbiel*, 64 AD3d 1244 (4th Dept. 2009).

5. See *Daviero v. Johnson*, 110 Misc.2d 381, 386 (Sup. Ct. Schenectady Co. 1981) aff'd 88 AD2d 732, (3d Dept. 1982) (citing Dorland's and ruling that the plaintiff's cervical injury involved a body function or system, not a body organ or member); see also *Khouzam v. Zaleski*, 1996 WL 79682 at 4 (S.D.N.Y. 1996) (dismissing plaintiff's permanent consequential limitation of use claim because plaintiff's disc herniation and bulging discs, resulting in a 75 percent decrease in cervical range of motion, did not involve a limitation of use of a body organ or member); *Nasrallah v. Helio De Olivieri*, supra (indicating that plaintiff's decrease in range of motion of her low back, resulting from a bulging disc, did not involve a body organ or member); *Coon v. Brown*, 192 AD2d at 909 (3d Dept. 1993) (neck and back injuries do not "fall within the category of limitation of use of an 'organ or member')."

6. See *Um v. Yang*, 63 AD3d 686 (2d Dept. 2009) (triable issues of fact as to whether injuries to the plaintiff's lumbar spine constituted a "permanent consequential limitation of use" or a "significant limitation of use"); *Bonilla v. Tortoriello*, 62 AD3d 637 (2d Dept. 2009) (same); see also, *Williams v. Clark*, 54 AD3d 942 (2d Dept. 2008); *Casey v. Mas Transportation Inc.*, 48 AD3d 610 (2d Dept. 2008); *Green v. Nara Car & Limo Inc.*, 42 AD3d 430 (2d Dept. 2007); *Lim v. Tiburzi*, 36 AD3d 671 (2d Dept. 2007).