

*A Guide to New York  
State No-Fault Law*

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## **INTRODUCTION**

The New York Comprehensive Automobile Insurance Act, better known as the “no-fault” statute, was signed into law on February 13, 1973. The act went into effect on February 1, 1974. The purpose of the act is to compensate motor vehicle accident victims quickly for substantially all of their economic loss.

In essence, the no-fault statute provides for the payment of medical costs, a percentage of lost wages, compensation for substituted services and all other reasonable expenses incurred as the result of personal injuries sustained in a motor vehicle accident in New York up to a maximum of \$50,000 per person. This is known as basic economic loss and constitutes the no-fault aspect of the act. These benefits, known as “first party benefits,” will be paid to all individuals entitled to them regardless of fault. Important aspects of the fault system remain and a person who has suffered serious physical injury, as defined in the statute, or has incurred expenses above the \$50,000 limit of the basic economic loss provision, can institute a negligence action to recover additional monies. The statute, therefore, superimposes a no-fault system of accident compensation upon the already existing fault system.

The New York law does not affect claims concerning property damage. These injuries remain the subject of litigation in our courts. The No-Fault Act is only concerned with personal injuries and not property damage.

### **I. COVERAGE**

The first issue to be resolved in all motor vehicle accident cases is whether or not the no-fault statute is applicable. No-fault benefits are provided for economic loss arising out of the use or operation of a motor vehicle (Insurance Law §5103). A motor vehicle is defined in Insurance Law §5102 to include all vehicles driven upon a public highway except motorcycles. Motorcycles were presumably excluded because the frequency of personal injuries would make insurance costs prohibitive.

The statute covers injuries to the named insured, members of his household, any owner, operator or occupant of the insured’s vehicle, any pedestrian injured through the use or operation

of the insured's vehicle, or any other person entitled to "first party benefits." These people are referred to as "covered persons" (Insurance Law §5102). This definition means that persons occupying vehicles or pedestrians injured by uninsured vehicles are excluded from recovering under the act unless they are covered under their own or someone else's policy. An individual in this situation would still, however, retain his rights to make a claim against the Motor Vehicle Accident Indemnification Corporation or bring a negligence action against the uninsured motorist. It is important to remember, therefore, that occupants of vehicles or pedestrians are not entitled to "first party benefits" unless they are covered by that vehicle's policy, their own policy, or a family policy.

There are specific exclusions from the coverage of the no-fault statute. These are contained in Insurance Law §5103. An insurer may exclude from "first party benefits" a person who is injured:

- By his intentional act;
- While operating a motor vehicle in an intoxicated condition or while impaired by use of drugs;
- While committing an act which would constitute a felony, or seeking to avoid lawful apprehension or arrest by a law enforcement officer;
- While operating a motor vehicle in a race or speed test; or
- While operating or occupying a motor vehicle known to be stolen.

The exclusion is not an automatic one. The statute uses discretionary language. It provides that the insurer "may" exclude certain individuals from coverage. The decision to exclude must, however, be made at the time the insurance contract is negotiated and executed, since the contract must provide for the payment of "first party benefits" to all "covered persons" unless they are specifically excluded.

It is clear from the language used by the legislature in the exclusionary provision that only the operator of the vehicle in the above-enumerated situations is excluded from coverage. The result is to allow recovery for passengers riding with the excluded person whose injuries are caused by the latter's conduct.

Exclusion from the act only means that such a person is not entitled to "first party benefits." The excluded person is not precluded from bringing his own tort action.

It is therefore necessary to remember the distinction between “covered” and “non-covered” persons. The no-fault statute only concerns causes of action for personal injury brought by “covered persons.” It does not prevent actions by “non-covered persons.” The law prohibits a negligence cause of action by a “covered person” against another “covered person” for “basic economic loss” and for non-economic loss, i.e., pain and suffering, unless there is a “serious injury.” A “covered person” can bring a cause of action against a “non-covered person” but the “covered person’s” insurer has a lien against any recovery to the extent of “first party benefits” paid or payable by it to the “covered person.” If the claimant fails to bring the action within two years, the insurer is subrogated to the claim (see Insurance Law §5104).

## **II. FIRST PARTY BENEFITS**

“First party benefits” are monetary payments to reimburse a person for basic economic loss arising out of the use or operation of a motor vehicle minus certain deductions specified in the statute (Insurance Law §5102(b)). These deductions include 20 percent of lost earnings, any amounts recovered through social security disability benefits, Medicare benefits or workers’ compensation benefits, and any deductibles from the insurance policy. Section 5102(b) must be read in conjunction with Insurance Law §5102(a) which defines basic economic loss. Basic economic loss means up to \$50,000 per person for:

- All necessary expenses incurred for medical and related services, therapy, certain non-medical treatment by an accepted religious method, and other professional health services so long as their occurrence was ascertainable within one year of the injury;
- Loss of earnings and reasonable and necessary expenses incurred in obtaining services in lieu of those such persons would have performed for income, up to \$2,000 per month for up to three years;
- All other reasonable and necessary expenses incurred up to \$25 per day for not more than one year following the accident.

“Basic economic loss” shall also include an additional option to purchase an additional \$25,000 of coverage which the insured may specify will be applied to loss of earnings from work

and/or psychiatric, physical, or occupational therapy and rehabilitation after the initial \$50,000 of basic economic loss has been exhausted (§ 5102 (5)).

However, recoverable necessary medical and similar costs and any further health service charges which are incurred as the result of the injury, and which are in excess of basic economic loss, may not exceed the charges permissible under workers' compensation schedules. A death benefit of \$2,000 is to be paid to the estate of any covered person, other than an occupant of another motor vehicle or motorcycle. An employee who is entitled to receive monetary payments pursuant to statute or contract from his employer, or receives voluntary monetary benefits paid by the employer, by reason of the employee's inability to work because of personal injury arising out of the use or operation of a motor vehicle, is not entitled to receive "first party benefits" for loss of earnings from work, to the extent that monetary payments or benefits from the employer do not result in the employee suffering a reduction of income or reduction in the employee's level of future benefits arising from a subsequent illness or injury.

In summary, "first party benefits" amount to medical expenses, loss of 80 percent of earnings, up to \$2,000 a month for three years, and other expenses up to \$25 per day for one year, with all of this adding up to no more than \$50,000 per person. These payments are made regardless of fault. "First party benefits" do not include any payment for non-economic loss, better known as pain and suffering. A separate action for the injuries may be maintained where there is "serious injury" or where the party at fault is a "non-covered person."

### **III. PAYMENT OF BENEFITS**

The statute requires payment of "first party benefits" following proof of "basic economic loss." Payments shall be made as the loss is incurred (Insurance Law §5106). The benefits must be paid within thirty days after the claimant supplies proof of the fact and the amount of loss sustained. Although the insurer's duty to make first payment is dependent on supply of proof by the claimant, there is no time limitation within which the claimant must supply such evidence. Section 5106 encourages prompt payment by providing that all payments not made within thirty days of proof of claim shall bear interest at the rate of 2 percent per month. In addition, if payment is overdue and the claimant retains an attorney to collect his claim, the insurer is obligated to reimburse the claimant for his attorney's "reasonable fees."

If a dispute arises concerning the insurer's liability to pay "first party benefits," the claimant has the option of submitting the issues to binding arbitration or initiating a court action

in contract against the insurer to recover the unpaid amount. An award by an arbitrator may be vacated or modified by a master arbitrator in accordance with procedures promulgated or approved by the Superintendent of Insurance. The decision of the master arbitrator is binding except for the grounds of review set forth in CPLR Article 75. If the amount of the master arbitrator's award is \$5,000 or greater, exclusive of interest or attorneys' fees, the insurer or the claimant may institute a court action *de novo*.

#### **IV. SETTLEMENT BETWEEN INSURERS**

The New York no-fault statute allows an insurer to recover from the insurer of another covered party the amount of "first party benefits" it paid to, or on behalf of a person covered by them "if and to the extent that such other covered person would have been liable, but for the provisions of the (Act), to pay damages in an action of "Law" (Insurance Law §5105). This provision is applicable only when the accident involves two "covered persons." One of the vehicles must weight more than 6,500 pounds, or be a vehicle to hire. However, in the case of occupants of a bus other than the operators, owners, and employees of the owner, an insurer of an injured passenger to whom basic economic loss was provided pursuant to a motor vehicle policy of insurance does not have the right to recover first part benefits from the insurer of the bus. In other words, a passenger on a bus must first look to his or her own motor vehicle insurer for first part benefits. If there is no such applicable policy, then the passenger can apply to the insurer of the bus for such benefits.

In addition, an insurer liable for "first party benefits" to a "covered person" is also allowed to be subrogated to any cause of action the "covered person" may have against a "non-covered person" liable to him for personal injuries. The insurer can begin a subrogation action only if the covered person fails to bring such an action within two years from the payment of monies. If the "covered person" thereafter initiates such an action, the statute allows for the continuance of the insurer's action and prohibits the "covered person's" recovery for his "basic economic loss" (Insurance Law §5104). An insurer has a lien against any recovery to the extent of benefits paid or payable to a "covered person" where the latter institutes suit against a non-covered person.

## **V. GEOGRAPHICAL CONSIDERATIONS**

The New York No-Fault Act provides for the payment of “first party benefits” for injuries which arise out of the operation of a motor vehicle in New York. When a vehicle insured in New York is driven in another state, the rights of New York drivers are generally determined under local laws. Therefore, to protect New York residents in those situations, the act requires that the owners’ liability insurance policies provide “at least the minimum amount required for such vehicle by the laws of such other state or Canadian province.” (See §5103(e)).

It is important to note that this rule only applies when the New York insured is operating a motor vehicle out-of-state. The statute does not apply to an accident where the insured New York resident, while a pedestrian in another state, is severely injured when struck by two automobiles given that the insured automobile was not being “used or operated” in another state at the time of the insured’s accident. New York benefits apply in this situation.

The act also affects nonresident motorists driving in New York. Insurance Law §5107 provides in substance that every insurer transacting business in New York which sells motor vehicle liability insurance coverage in any state or Canadian province must include in such policies a provision for the payment of “first party benefits” for loss arising out of the use or operation of a motor vehicle in New York to satisfy the minimum requirements of the no-fault statute.

## **VI. THE “SERIOUS INJURY” THRESHOLD**

The right to bring a personal injury action for damages arising out of an automobile accident is curtailed but not eliminated by the statute. It is provided that in an action by one covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in New York, there is no right of recovery for either non-economic loss, except in the case of serious injury, or for basic economic loss (Insurance Law §5104). “Non-economic loss” means pain and suffering and similar non-monetary detriment (Insurance Law §5102).

Section 5104 of the Insurance Law does not declare that the common law damage suit is abolished. It does not even declare that such suit is unavailable unless plaintiff has injuries or damages within the threshold. It does provide, however, a damage limitation rather than a condition precedent to the right to sue. The damage limitation contained in §5104 thus



represents merely a legislative diminution of that which may be recovered through enforcement of an ancient right--the right to sue.

Section 5104 contains the threshold's mechanical formulation, providing, in essence, that the plaintiff cannot recover certain damage elements--i.e., those for pain and suffering--unless he has sustained "serious injury." The latter term is defined in §5102(d). The net effect is that these damages are now recoverable only by those plaintiffs who sustain injuries which result in:

- Death; or
- Dismemberment; or
- Fracture; or
- Significant disfigurement; or
- Loss of a fetus; or
- Permanent loss of use of a body organ, member, function or system; or
- Permanent consequential limitation of use of a body function or system; or
- Significant limitation of use of a body function or system; or
- Medically determined injury or impairment of a nonpermanent nature, which prevents the injured person from performing substantially all of the material, acts which constitute such person's usual or customary activities for not less than 90 days during the 180 days immediately following the occurrence or injury.

The determination of "serious injury" is only relevant to the issues of whether the claimant can sue in negligence for pain and suffering against a "covered person." It has no effect on claims against "non-covered persons," claims against anyone for economic loss beyond \$50,000, or claims against "covered persons" for "basic economic loss." In this latter situation, a "covered person" cannot bring a negligence action against another "covered person" to recover for "basic economic loss." The statute prohibits such an action. In effect, this means that a "covered person" cannot recover from another "covered person" the 20 percent deduction from any lost earnings that were included in the "basic economic loss" or the amount of any deductible written into his policy.

Though designed to limit tort actions, the definition of serious injury in the statute is not sufficiently specific enough to do so. The law does not define any of the enumerated injuries and therefore the application of the statute in each case will create questions as to whether the victim suffered dismemberment, whether the injuries constitute significant disfigurement, whether loss

of use of a body organ is permanent or temporary, and whether there is loss of use of a function or system.

The general definitions of serious injury in the Insurance Law have allowed plaintiffs' attorneys to circumvent the intent of the Legislature and flood our courts with suits arising out of automobile accidents. They were able to do this because, until 1982, the courts allowed juries to determine whether the plaintiff met the threshold requirement of serious injury. Invariably, juries usually found that plaintiffs did meet the threshold.

An important decision by the New York Court of Appeals has put an end to this practice. In Licari v. Elliott, 57 N.Y.S.2d 230, 455 N.Y.S.2d 570 (1982), the plaintiff was injured in an automobile accident on February 13, 1979. He was diagnosed at a hospital as having a concussion, acute cervical sprain, acute dorsal lumbar sprain, and a contusion of the chest and returned home later that day for bed rest.

After consulting with his family physician on February 15, 1979, plaintiff was admitted to the hospital for tests, which showed no damage, and he was released on February 17, 1979. On March 9, 1979, 24 days after the accident, plaintiff returned to his job as a taxi driver, resuming work 12 hours-per-day, six days-per-week, as he had prior to the accident. The only limitation with respect to work performance was that he was unable to help his wife with various household chores as much as before the accident and that he had occasional transitory headaches and dizzy spells, which aspirin relieved. After the close of evidence, defendant moved to dismiss the complaint on the ground that plaintiff had failed to establish that his injury met any of the threshold requirements of serious injury as defined by the Insurance Law. The court submitted the case to the jury on the theories that, in order to recover, he had to show that he had suffered an injury which prevented him from performing all his daily activities for not less than 90 days during the 180 days immediately following the accident or that as a result of the accident he sustained a significant limitation of use of a body function or system. The jury found that plaintiff had proven a serious injury under both definitions.

The Court of Appeals held that the issue is for the court, in the first instance, to determine the threshold question of whether the plaintiff, in a negligence action brought to recover damages for personal injuries sustained in a motor vehicle accident, has established a prima facie case of sustaining a "serious injury." If it can be said, as a matter of law, that the plaintiff suffered no serious injury within the meaning of the Insurance Law, then the plaintiff has no claim to assert

and there is nothing for the jury to decide. Therefore, unless the court feels that the plaintiff has established a prima facie case on the injury issue, the matter will not be submitted to a jury.

The court also provided guidance on the two definitions of serious injury that the plaintiff was suing under which involved significant limitation and the 90/180-day period of disability. The court stated that the word “significant” as used in the Insurance Law pertaining to “limitation of use of a body function or system” should be construed to mean more than a minor limitation of use; a minor, mild or slight limitation of use should be classified as insignificant within the meaning of the statute. Furthermore, the words “substantially all” as used in the statute should be construed to mean that the person had been curtailed from performing his usual activities to a great extent rather than some slight curtailment. As to the statutory 90/180 day period of disability requirement, it should be considered a necessary condition to the application of the statute, to be proved along with other statutory requirements in order to establish a prima facie case of serious injury.

The decision by the Court of Appeals in Licari provided the courts in New York with the framework for deciding the threshold question of serious injury in motor vehicle accident cases. However, each case must be examined on its own facts to determine whether or not it will meet the serious injury threshold of the statute. There have not been any problems in cases involving death, dismemberment, fracture or loss of a fetus because those terms are self-explanatory. The difficulty arises with the remaining definitions which are conducive to subjective criteria. The following is a summary of some of the leading cases dealing with these definitions.

### **SIGNIFICANT DISFIGUREMENT**

In Waldrom v. Wild, 468 N.Y.S.2d 244, the Appellate Division, Fourth Department ruled in a case involving facial scarring. The emergency room record revealed that the plaintiff suffered multiple small abrasions and lacerations on his face. A report submitted by defendant’s doctor notes injuries to the plaintiff’s face of an area of circular pigmentation, about 1/2 centimeter in diameter. The defendant’s doctor concluded that there was a laceration in this region. The trial court granted summary judgment to the defendant on the ground that the plaintiff did not sustain a serious injury. The Appellate Division reversed the decision of the lower court.

The Waldrom court noted that the statute did not define “significant disfigurement.” The court reviewed the cases defining the term “disfigurement” in the Workers’ Compensation law.

As used in the context of a claim for Workers' Compensation benefits, the term "disfigurement" is defined as "that which impairs or injures the beauty, symmetry or appearance of a person and which renders unsightly, misshapen, or imperfect or deforms in some manner." The court followed the definition of "significant" used in the Licari case. Based upon a review of the cases the court held that a "significant disfigurement" exists if a reasonable person viewing the plaintiff's body in its altered state would regard the condition as unattractive, objectionable, or the subject of pity or scorn. The court held that the plaintiff demonstrated by admissible evidence the existence of a factual issue requiring a trial on the issue of "significant disfigurement."

In Koppelman v. Lepler, 522 N.Y.S.2d 12, the Appellate Division, Second Department, ruled in a case where the infant plaintiff suffered a scar located near the left eye and measuring approximately 1/8 of an inch. The scar was barely visible upon close examination of the examining physician. There was also a scar on the infant's scalp that was obscured by the infant's hair. The trial court granted summary judgment to the defendant dismissing the complaint on the ground that the plaintiffs failed to meet the threshold requirements for serious injury. The Appellate Court agreed with the lower court. The court ruled under the circumstances that any "disfigurement" sustained by the infant plaintiff was not "significant" within the meaning of Insurance Law §5102(d) and that the plaintiffs failed to raise a triable issue of fact regarding the question of serious injury so as to warrant the submission of the case to a jury.

The case of Caruso v. Hall, 477 N.Y.S.2d 722, involved a plaintiff who sustained a 3-inch long scar on the top of his head. At the close of trial the defendant moved for dismissal of the plaintiff's action for personal injuries. The motion was denied and the case went to the jury. The jury concluded that the plaintiff suffered "significant disfigurement" and returned a verdict in the amount of \$15,000. The Appellate Division, Third Department, reversed the judgment and dismissed the case.

The court noted that although the question of whether a plaintiff has suffered a serious injury is usually a question of fact for the jury, it is for the court, in the first instance, to determine whether the plaintiff has established a prima facie case of sustaining serious injury. The court noted that the scar on the top of the plaintiff's head was not readily discernable and did not affect the plaintiff's "natural appearance" since it was covered by a full head of hair. The fact that there was a temporary disfigurement as a result of the injury until the hair covered the scar did not warrant a finding of "serious injury." The court did note that some temporary

disfigurements will present jury questions as to whether they are significant but rejected such a finding in this case.

**PERMANENT LOSS, PERMANENT CONSEQUENTIAL  
LIMITATION OF USE, AND SIGNIFICANT LIMITATION OF USE**

A review of the case law in the “serious injury” area reveals that the courts are not consistent in classifying alleged injuries. One decision will classify an alleged injury as a claim for “permanent loss of use” and another court will place that same alleged injury in either the “significant limitation of use” or the “permanent consequential limitation of use” of a body organ, member, function, or system. The courts are more concerned with determining whether or not an individual has sustained a serious injury than they are in classifying the type of injury. All of the aforementioned classifications deal with soft tissue injuries and the following cases fall within these categories.

An important decision is that of the Court of Appeals in Scheer v. Koubek, 70 N.Y.2d 678, 518 N.Y.S.2d 788. The plaintiff instituted an action for injuries allegedly sustained in a rear-end collision. The plaintiff offered proof at trial that she suffered a permanent disability from the effect of the presence of scar tissue on cervical vertebrae following the accident. The plaintiff testified that for eight days following the accident she did not report for work but rested at home because of severe pain to the neck, shoulders, and back with accompanying headaches. She was treated by a chiropractor. The plaintiff testified that she had periodic episodes of extreme pain but continued to work. Physical examination revealed that the plaintiff had severe trauma to the vertebrae that resulted in an inflammation of the nerves of the cervical area. According to the plaintiff’s chiropractor, x-ray films taken about three months after the accident revealed a straightening of the cervical curve and increased dimensions of the cervical vertebrae along with subluxation and misalignment which created a wedging effect causing inflammation of the nerves and severe muscle spasms. The defendant’s doctor testified that his examination revealed nothing but subjective complaints. The jury found the presence of “serious injury.” The Appellate Division, Third Department affirmed the finding of the lower court. The Court of Appeals reversed and granted judgment to the defendant.

The Court of Appeals held that the plaintiff failed to make out her prima facie case of “serious injury” by “significant limitation of use of a body function or system.” The court rejected the holding of the majority of the Third Department that under the circumstances of this case, pain may form the basis of “serious injury.” The court stated that to agree with the holding

of the Third Department would undercut the policy behind the no-fault insurance scheme to reduce the number of automobile personal injury accident cases litigated in the courts and frustrate the Legislature's attempt to put an objective verbal definition on serious injury. The court held that the subjective quality of plaintiff's transitory pain does not fall within the objective verbal definition of serious injury as contemplated by the No-Fault Insurance Law.

The decision by the Court of Appeals in Scheer v. Koubek is important because it deals with the subjective complaints of pain. A case decided prior to the Court of Appeals decision in Scheer v. Koubek was Hourigan v. McGarry, 484 N.Y.S.2d 243. The Appellate Division, Third Department, also decided this case. In this case the defendant moved for summary judgment on the ground that there was no permanent injury suffered by the plaintiff and all that was remaining were aches or pains that could be alleviated by weight reduction and/or exercise. In opposition to the motion for summary judgment, the plaintiff submitted an affidavit from his physician, which showed that three years after the accident there was still significant limitation in certain aspects of motion in the lumbosacral spine and cervical spine due to pain. There was no objective evidence of injury and it was the opinion of the plaintiff's physician that the pain resulted from a permanent back and neck condition caused by the accident. The court found that pain can form the basis of a serious injury within the meaning of the No-Fault Law and that whether it does is ordinarily a triable issue of fact.

In Palmer v. Amaker, 529 N.Y.S.2d 536, the Appellate Division of the Second Department followed the holding of the Court of Appeals in Scheer v. Koubek. In this case the plaintiff had a mild limitation of motion of the neck on turning and trauma to his knee. When he was examined six months after the accident it was found that he had sustained lumbar and cervical sprains as well as a knee sprain and mild limitation of motion of the thoraco-lumbosacral spine. The plaintiff was treated by a chiropractor for traumatic myofascial pain and low back pain. The trial court denied defendant's motion for summary judgment. The Appellate Division reversed and dismissed the case. The court held that an allegation of occasional pain does not constitute a "significant limitation" within the meaning of the statute.

The plaintiff in Grotzer v. Levy, 518 N.Y.S.2d 629, won a judgment in the Supreme Court, Dutchess County for damages in the amount of \$175,000. The lower court ordered a new trial on damages unless the plaintiff stipulated to accept \$100,000 for her damages. The defendant took an appeal. The Appellate Division, Second Department reversed the trial court and dismissed the case.

The plaintiff in Grotzer offered evidence that showed she suffered some restriction in the motion of her neck or lower back as the result of the accident. The plaintiff returned to work within one month of the accident and was performing substantially all of her material acts at that time. The court held that the fact that the plaintiff had some restriction of motion of her neck or lower back did not constitute a significant limitation of use of a body organ or member. The court further held that her neck or back injuries did not constitute a permanent consequential limitation of use of a body organ or member. Although the plaintiff's expert testified at trial that the plaintiff has a permanent problem that will never go away, the court rejected this testimony. Such a conclusory allegation with nothing more is not sufficient according to the Appellate Court. The Court of Appeals refused to hear an appeal in this case.

The trial court in Mooney v. Ovitt, 474 N.Y.S.2d 618, dismissed the plaintiff's case at the close of the defendant's case at trial. The plaintiff appealed to the Appellate Division of the Third Department. The Appellate Division reversed the decision. This case was decided prior to the 1987 decision by the Court of Appeals in Scheer v. Koubek.

The plaintiff was involved in a rear-end collision. The Appellate Division found that the evidence sufficiently demonstrated the existence of a neck injury that allowed the performance of certain ordinary functions only with pain. The plaintiff's neurosurgeon testified that the plaintiff sustained a cervical lumbar sprain in the accident. The accident occasioned nerve root irritation in the cervical spine, pain in the shoulder area and radiation of pain and numbness into the right hand. The doctor opined that from a standpoint of pain and limitation of motion the injury to the plaintiff's neck was permanent. The defendants argued that the occasional, intermittent nature of the pain does not constitute a "serious injury." The Appellate Court disagreed. The fact that such pain is not constant does not diminish its severity. The plaintiff sufficiently demonstrated the existence of a neck injury that allows the performance of certain ordinary functions "only with pain." The Appellate Court found that this was sufficient to establish a prima facie case of "serious injury." The plaintiff was entitled to go before the jury on the issue of "serious injury."

The plaintiff in Daviero v. Johnson, 451 N.Y.S.2d 858, claimed that as a result of a motor vehicle accident he was out of work for 54 days and continued to have occasional headaches. The trial court dismissed the complaint and the Appellate Division affirmed this decision. The court held that such a claim does not meet the requirement of a "significant limitation of a use of a body function or system." The plaintiff relied largely on the fact that he was absent from work for 54 days and continued to have headaches. The court noted that the mere fact of absence from

work, without medical proof indicating a significant limitation of a use of a body function or system is manifest and contrary to the intent of the Legislature.



## **90/180-DAY PROVISION**

The leading case in this area continues to be the Licari case. There are two other decisions that are noteworthy.

In Gleissner v. LoPresti, 521 N.Y.S.2d 735, the plaintiff established evidence that she was greatly curtailed from performing her usual and customary daily activities for more than 90 days during the 180 days following the accident. Particularly, she could not maintain her daily routine because she was not able to do housework, which prior to the accident she accomplished without help, could not continue her part-time job until some five months after the accident, could not attend church, and could not engage in family activities. This unrefuted testimony was supported by medical evidence that the injury she sustained in the automobile accident was because of her disability. The orthopedist who treated her for two years following the accident testified as to her injuries and course of treatment, identified and quantified the limitation of movement in her cervical and lumbar spine, described the objective testing which confirmed his diagnosis, and stated his opinion that she had a permanent problem in bending, lifting and carrying, which caused intermittent pain. The Appellate Court found that the evidence was sufficient to send the case to the jury for a decision on serious injury. Moreover, the verdict is not against the weight of the evidence. The court reduced the \$200,000 verdict as clearly excessive and awarded the plaintiff damages in the sum of \$50,000.

An interesting decision is the case of Poblet v. Parisi, 496 N.Y.S.2d 936. The Supreme Court, Queens County, decided this case. The plaintiff sought to recover for injuries sustained in a motor vehicle accident. The alleged injury sustained by the plaintiff was that, due to a condition diagnosed by her psychiatrist as a post-traumatic neurosis syndrome following a car crash, she developed a fear of driving to such an extent that her ability to drive while performing field work as a social worker was sharply curtailed. The court held that an alleged psychiatric and/or psychological disorder cannot qualify as a “serious injury” unless the plaintiff can demonstrate that this injury prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment. The court found that the plaintiff in this case could perform all of her other functions with the exception of driving. Therefore, the court found that the plaintiff did not meet the requirement of serious injury as contained in the insurance law.

## **VII. CONCLUSION**

Causes of action that are not specifically restricted remain unaffected by the no-fault statute. Since the statute does not limit the rights of “non-covered persons,” they are allowed to sue “non-covered” or “covered” persons for property damage, all economic losses and all non-economic losses, including pain and suffering, regardless of whether there is a serious injury. “Covered persons,” however, are only permitted causes of action against other “covered persons” for recovery of property damage, death benefits, economic losses either not included in “basic economic loss” or in excess of the \$50,000 limitation and non-economic loss if there is a serious injury. As against “non-covered persons,” the No-Fault Act does not preclude suit but does prevent any double recovery at the expense of the insurer, by granting a lien for the “first party benefits” paid or payable to “covered persons.” The law further protects the insurer by limiting a “covered person’s” right to compromise an action against a “non-covered person” except where he has the written consent of the insurer, court approval, or where the amount of the settlement exceeds \$50,000 (Insurance Law §5104).

## APPENDIX OF THRESHOLD DECISIONS

### SIGNIFICANT DISFIGUREMENT

Moxley v. Givens, 679 N.Y.S.2d 472 (3d Dept. 1998). Plaintiff claimed that he sustained a significant disfigurement to his lower lip. He testified that his lower lip was numb in the area of the injury that made it difficult for him to eat certain foods, prevented him from fully smiling, and caused him to drool. However, plaintiff's own physician testified that there was no muscular damage to the lip. The court found no significant disfigurement.

Cushing v. Seemann, 668 N.Y.S.2d 791 (4<sup>th</sup> Dept. 1998), Defendant made motion for summary judgment based upon claim that motorist did not sustain a significant disfigurement constituting serious injury. The evidence submitted by the plaintiff through her physician was that the plaintiff had a permanent and visible 7-inch scar on her head as a result of the scalp laceration. The court applied the standard that significant disfigurement is to be determined as to whether a reasonable person would view the condition as unattractive, objectionable, or subject to pity or scorn. The court found that there were triable issues of fact as to whether or not the 7-inch scalp scar constituted a serious injury within the meaning of the No-Fault Law. The court denied the defendant's summary judgment motion.

Loiseau v. Maxwell, 682 N.Y.S.2d 74 (2d Dept. 1998). The court granted summary judgment to the defendant based on lack of serious injury. The Appellate Court upheld this ruling. The plaintiff sustained a scar 5 centimeters in length and 1 centimeter in width on the lower part of his leg. The court held that this did not constitute a significant disfigurement under Article 51 of the Insurance Law.

Pietrocola v. Battibulli, 656 N.Y.S.2d 559 (3d Dept. 1997). Plaintiff sustained a 2 ½ centimeter laceration just above the hairline which was not readily discernable. The court held that this did not constitute a significant disfigurement. The court also dealt with the issue of permanent loss and significant limitation of use. Defendant in a summary judgment motion submitted an affidavit from an orthopedist that stated that based upon a physical examination of the plaintiff, there were no objective findings nor indications of injury whatsoever. There was no evidence of muscle spasms and the range of motion in the legs of the plaintiff was normal. The plaintiff was able to perform range of motion tests for his lower back without complaint of pain. The orthopedist also stated that he was unable to establish a relationship between the accident and plaintiff's complaint of lower back pain. In opposition, plaintiff submitted an affidavit of a chiropractor. However, this affidavit was insufficient as it was based on plaintiff's subjective complaints as opposed to any objective findings. The court therefore held that the plaintiff did not meet the serious injury threshold of the Insurance Law.

Zulawski v. Zulawski, 566 N.Y.S.2d 141 (4<sup>th</sup> Dept. 1991). Plaintiff sustained a laceration of his forehead, which required 20 stitches and left a 2 to 2 ½-inch scar on his forehead. The scar was still visible six and one half years after the accident. The court held that this was a significant disfigurement.

Hutchinson v. Beth Cab Corp., 612 N.Y.S.2d 10 (1<sup>st</sup> Dept. 1994). Plaintiff sustained a laceration over her right eyebrow. Plaintiff's surgeon described the laceration as a permanent "cosmetically significant scar." However, plaintiff's own treating physician described it as a laceration, and defendant's physicians described it as a 2-inch healed laceration within an area of depression and a laceration that healed with a good result. The court viewed photographs of the laceration. Based upon the cumulative evidence, the court found that the plaintiff failed to make out a prima facie case of serious injury.

Matula v. Clement, 517 N.Y.S.2d 100 (3d Dept. 1987). Plaintiff required shoulder surgery following a motor vehicle accident. The surgery was necessary to relieve pain. As a result of the surgery, the plaintiff was left with a 6-inch scar. This scar was a significant disfigurement under the statute.

### **FRACTURE**

Kennedy v. Anthony, 600 N.Y.S.2d 980 (3d Dept. 1993). Plaintiff sustained a fractured tooth as a result of the motor vehicle accident. The fractured tooth required dental repair and continuing treatment. The court found that there was nothing in the no-fault statute that indicated that a fractured tooth was not within the meaning of "fracture" so as to constitute a serious injury. This decision established that if there is a fractured tooth, there will be a finding of a fracture within the meaning of the No-Fault Law.

Epstein v. Butera, 547 N.Y.S.2d 374 (2d Dept. 1989). In this case, the plaintiff did not sustain a fractured tooth but rather a chipped tooth. The Court held that a chipped tooth was not a fracture under the No-Fault Law. A fractured tooth is a fracture, and a chipped tooth is not a fracture within the meaning of the Insurance Law.

### **PERMANENT LOSS OF USE OF ORGAN, etc.**

Booker v. Miller, 685 N.Y.S.2d 837 (3d Dept. 1999). In order to establish "permanent loss" it is not necessary to prove a total loss of the effected function or system, but it is still necessary to submit proof that it operates in some limited way or operates only with pain. Some degree of permanency and causation must be established. The court continued that to establish a "permanent consequential limitation," it was encumbered upon the plaintiff to demonstrate more than a "mild, minor, or slight limitation of use." The hospital records in this case demonstrated a diagnosis of cervical strain. X-rays and all other tests were negative for injuries. Plaintiff thereafter complained of back, neck, chest, and arm pain. Plaintiff's own physician stated that the plaintiff could work without restrictions and would improve under a home exercise program. Defendant's physician diagnosed the plaintiff to have sustained a cervical spine sprain with left ulnar nerve symptoms and irritation. The defendant's physician did document certain objective findings such as a minor limitation of motion in rotation, a positive Tinel's sign present over the ulnar nerve at the left elbow, and decreased sensation in the ulnar nerve distribution on the left side. However, the physician was emphatic in stating that any resulting limitations were either mild, slight, or insignificant. The Court found that the plaintiff did not sustain a serious injury.

Paolini v. Sienkiewicz, 691 N.Y.S.2d 836 (4<sup>th</sup> Dept. 1999). Plaintiff's treating chiropractor found that plaintiff sustained a permanent impairment of 6 percent of the overall range of motion in her spine. This minor degree of impairment does not qualify as a significant or consequential limitation of use.

Kosto v. Bonelli, 681 N.Y.S.2d 293 (2d Dept. 1998). The trial court granted summary judgment to the defendants based on lack of serious injury. Plaintiff claimed to have sustained a lumbosacral sprain and other soft tissue injuries. An MRI of the plaintiff performed in September of 1994 indicated preexisting levels of disc herniation and desiccation that were not due to the present accident. The affidavit of the plaintiff's chiropractor was found woefully insufficient in that it failed to indicate that the opinion was based upon a recent medical examination rather than an earlier examination conducted over two years prior thereto. It further noted that there was a loss of the lumbar range of motion but failed to specify the extent or degree of such limitation of motion.

Countermine v. Galka, 593 N.Y.S.2d 113 (3d Dept. 1993). Testimony showed that plaintiff suffered a torn rotator cuff in his right shoulder leaving the plaintiff with residual permanent adhesive capsulitis. This limited plaintiff's ability to move his right arm without pain. The court found that there was serious injury in this case based on objective tests and conclusions. The court stressed that the finding of a serious injury was based on objective evidence and not unsubstantiated subjective complaints of pain.

### **BACK PAIN**

Dubois v. Simpson, 582 N.Y.S.2d 561 (3d Dept. 1992). Plaintiff's vehicle was struck on the passenger side by defendant's vehicle as she was backing her car out of a driveway. Complaining of pain in the right side of her neck and shoulder, plaintiff was examined at a local emergency room. X-rays revealed no trauma. She was diagnosed with a muscle injury, given medication and a cervical collar, and discharged. Thereafter, she made several follow-up visits to a doctor, but sought no further medical treatment when, apparently on the recommendation of her attorney, she consulted a neurologist. The neurological examination was normal. Although the range of motion to the cervical spine was full, plaintiff's apparent complaint of discomfort on her right side led the neurologist to conclude that the plaintiff had a cervical strain and two months of physiotherapy was prescribed.

Plaintiff claims that her injuries constituted a permanent loss of use or a permanent consequential limitation. She also claims to have been prevented from performing substantially all of her usual and customary activities for 90 of the 180 days immediately following the accident.

Defendant filed a summary judgment motion that disputed the plaintiff's injury claims. The court granted defendant's summary judgment motion. Addressing first plaintiff's claim that she was unable to perform her normal and usual activities, the court rejected her statement that she was unable to attend to her usual household duties of cooking, cleaning, dusting, vacuuming, and the like during the three to four months that she was home after the accident. The plaintiff

was also unable to attend various social functions. The court stated that the affidavit of the plaintiff was conclusory in nature and rejected the affidavit.

The court further found that the plaintiff's claim of loss of range of motion in her neck and cervical area did not meet the serious injury threshold. The court found it to be a mild decrease in range of motion and this does not equal a permanent consequential limitation of use of this body function. The court further rejected the subjective complaints of pain in the plaintiff's neck and shoulder area.

Robillard v. Robbins, 563 N.Y.S.2d 940 (3d Dept. 1990). Plaintiff's expert testified that the plaintiff suffered from chronic cervical strain so as to constitute a significant limitation. Jury returned a verdict in favor of the plaintiff. This was affirmed on appeal. In particular, the court found that an expert is not precluded from giving an opinion as to whether or not a particular injury may meet one of the categories of serious injury as defined in the Insurance Law.

It should be noted that this decision was a three to two decision. The dissent found it internally inconsistent to permit an expert to perform the function of a jury. The dissent would have reversed the decision. This is a Third Department decision and would therefore have little impact on the majority of your cases which are in the First and Second Departments.

Belmonte v. Collins, 690 N.Y.S.2d 596 (2d Dept. 1999). The trial court granted summary judgment to the defendants. The Appellate Court reversed this. The Appellate Court found that there was serious injury established within the meaning of the No-Fault Insurance Law. Plaintiff offered evidence that an MRI of her spine taken approximately one month after the accident revealed the existence of a small central L4-5 disc herniation. Plaintiff's treating physician provided objective evidence of the degree of the limitation of use of the plaintiff's back and right leg.

Ottavio v. Moore, 529 N.Y.S.2d 876 (2d Dept. 1988). Immediately after the accident the plaintiff did not sustain any manifest physical injuries and was not taken to the hospital. She saw her family physician the next day, was given some painkillers and bed-rest was recommended. Thereafter, the plaintiff continued treatment for neck and lower back pain with a chiropractic orthopedist. X-rays showed the plaintiff had sustained subluxations or misalignments of the spine. The chiropractic orthopedist was of the opinion that this condition would be permanent and would cause occasional pain to the plaintiff. The court found that the plaintiff provided ample medical evidence to make out a prima facie case of serious injury. The court stated that pain can form the basis of a serious injury. Whether it does is a question of fact for the jury. The court also noted that in past cases it is held that the permanency of an injury could refer to persistent pain or operation of the organ, member or system in some limited way, or only with pain. In this case, the plaintiff could only undertake certain neck movements with pain. The expert for the defendant did not refute this testimony. The court stressed that the plaintiff's x-rays showed misalignments both in the cervical spine and in the lower back. I believe that the significance of the x-rays was the determining factor in this decision.

Maisonaves v. Freedman, 680 N.Y.S.2d 619 (2d Dept. 1998). Plaintiff was involved in a rear-end collision. Testimony at trial showed that the plaintiff suffered from four bulging discs

in the cervical spine and two bulging discs in the lumbosacral spine. These bulges impinged upon the thecal sac. The jury found that these injuries constituted a significant limitation of use of a body function or system and that the plaintiff was unable to perform as usual in customary activities during the 90/180-day period. It should be noted that the jury returned the verdict of \$426,000 for pain and suffering. This was reduced by the Appellate Court to \$100,000 for past pain and suffering and \$75,000 for future pain and suffering.

### **LIMITATION OF USE**

O'Reilly v. Nelson, 689 N.Y.S.2d 221 (2d Dept. 1999). The trial court set aside a jury verdict for the plaintiffs and dismissed the complaint for failure to prove serious injury. Testimony showed that the plaintiff sustained incipient carpal tunnel syndrome. This was insufficient to satisfy the threshold criteria that she sustained a permanent consequential limitation of a body organ or member. The Appellate Court further stated that there was insufficient testimony to show that the plaintiff was disabled during the 90/180-day period.

Bandoian v. Bernstein, 679 N.Y.S.2d 123 (1<sup>st</sup> Dept. 1998). The Trial court granted summary judgment motion based on lack of serious injury. The Appellate Court affirmed this. Plaintiffs' physician's affirmation stating summarily that all three plaintiffs suffered from a permanent disability of the cervical spine was insufficient to raise a triable issue of fact. There was no other medical evidence produced by plaintiffs sufficient to sustain their action. Medical proof of "serious injury" offered respecting one of the plaintiffs was inadequate for its failure to specify the degree of limitation or restriction caused by the injury and was based upon an MRI examination before more than a year and a half earlier by a physician other than the affiant. As to the two remaining plaintiffs, the 10 percent restriction of extension and/or rotation they claimed to have suffered is not, under the circumstances of this case, of sufficient magnitude to qualify as a significant or important limitation of use.

Zeyger v. Litman, 674 N.Y.S.2d 380 (2d Dept. 1998). The Appellate Court held that V. Zeyger met his burden of demonstrating the existence of factual injuries in opposing summary judgment motion of defendants. The affidavit of his treating chiropractor, based upon a recent examination, presented objective evidence of the extent or degree of limitation with respect to the use of his cervical lumbar spines and that the injuries are permanent. However, the affidavit submitted by I. Zeyger failed to show that she sustained a permanent consequential limitation of use or a significant limitation of use. Objective evidence of the extent or degree of the physical limitation in her cervical spine was based on a chiropractor specialist examination performed approximately five years earlier, and the chiropractor failed to quantify these limitations at a more recent examination. Furthermore, evidence that she suffered from mild diffuse cerebral dysfunction and complained of headaches is a showing of no more than a minor, mild, or slight limitation of use and this is insignificant within the meaning of the Insurance Law.

Duarte v. Ester, 668 N.Y.S.2d 631 (2d Dept. 1998). The trial court found that the plaintiff did not meet the physical injury threshold and granted summary judgment to the defendants. The Appellate Court reversed this. The Appellate Court found that the affidavits of the plaintiff's two physicians, who examined him three and one half years after the accident,

found a 10 percent limitation in full flexion of the knee that could result in surgery. This established a prima facie case of serious injury.

Paternoster v. Drehmer, 688 N.Y.S.2d 788 (3d Dept. 1999). Plaintiff complained of general muscular skeleton pain after a motor vehicle accident and was taken to the hospital. Approximately two weeks later, he was treated by his family physician and diagnosed with meralgia paresthetica. Plaintiff was referred to physicians who treated him with a series of nerve blocks. At trial a neurologist testified on behalf of the plaintiff and opined that based on his examination, the plaintiff suffered from meralgia paresthetica, which is essentially a pinched nerve at the crest of the hip. The neurologist detected hypersensitivity over the area of the lateral thigh based on a pinprick test, which the physician stated had both objective and subjective components. The plaintiff's condition was purely sensory and did not affect strength, but could be very painful and restrict plaintiff's activities. The court found that the plaintiff sustained an injury that resulted in a significant limitation and was not a mere recitation of plaintiff's subjective complaints. The plaintiff's complaints of pain had an objective basis.

### **NECK PAIN**

Verderosa v. Simonelli, 689 N.Y.S.2d 45 (1<sup>st</sup> Dept. 1999). The affirmation of plaintiff's treating physician, based upon a recent personal examination of the plaintiff, asserts that more than two years after the accident plaintiff continues to suffer significant limitation of use of the neck and right knee. Appended reports of the MRI, SSEP, ultrasound, and other tests performed by other physicians further support such limitations as consistent with the findings of such tests of straightening of the normal lordotic curve, radicular dysfunction at the left C8 level, and inflammation and damage of the cervical and lumbar posterior paravertebral tissues and of the left trapezius muscles. The Appellate Court found that this evidence supported significant limitation of use.

Kern v. Ash, 676 N.Y.S.2d 296 (3d Dept. 1998). The day of the accident the plaintiff was evaluated at a local health facility and complained of "slight neck stiffness." The examining physician recorded his impression as "neck strain" and found that the plaintiff had a full range of motion of the neck. No medication was prescribed or further treatment ordered. Approximately one week after the accident the plaintiff consulted an orthopedist complaining of neck pain. The orthopedist found a good range of motion in the cervical spine and x-rays were completely within normal limits. Plaintiff underwent physical therapy and was found to have a minimal decrease in the range of motion of the left side of the neck and a minimal to moderate decrease of cervical spine extension. An MRI of the cervical spine was unremarkable. The Appellate Court found that the plaintiff did not meet the physical injury threshold, reversed the order of the lower court which denied the summary judgment motion of the defendant, and dismissed the complaint. The court stated that there was a deficiency found in the plaintiff's own medical records, which contained no evidence confirming nor suggesting any significant curtailment of plaintiff's ability to engage in his normal activities. The only evidence that the plaintiff submitted was a letter from his orthopedist that stated that the plaintiff advised him that he was totally disabled from July 25, 1992 through March 13, 1993. This was clearly insufficient as it was not objective medical evidence.



### **90/180 Day Rule**

Glielmi v. Banner, 678 N.Y.S.2d 138 (2d Dept. 1998). The plaintiff's self-serving affidavit concerning his inability to perform his daily activities after the accident, without more, is insufficient to establish that he had sustained a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for a period of not less than 90 days during the 180-day period immediately following the accident.

Abrahamson v. Premier Car Rental, 691 N.Y.S.2d 83 (2d Dept. 1999). The trial court denied defendants' motion for summary judgment based on lack of serious injury. The Appellate Court reversed the order. The evidence demonstrated that the injured plaintiff returned to work full-time within 73 days of the accident. Prior to his return, his orthopedist determined that he no longer suffered from rib-cage tenderness and had a full-range of shoulder motion. The report of the defendants' expert indicated that there was no evidence of any long-term disability. The defendants therefore sustained their burden of demonstrating that the plaintiff was not prevented from performing "substantially all" of his daily activities during the 90/180-day period. It should be noted that the plaintiff's own affidavit and his pre-trial testimony at an examination before trial indicated that he "occasionally suffers from back pain and that he was unable to have sexual relations with his wife or to care for his children for three months after the accident." However, he failed to submit any credible medical or other evidence to support these subjective claims.

### **ABSENCE FROM WORK**

Delaney v. Lewis, (3d Dept. 1998). Plaintiff was involved in a rear-end collision. She complained of debilitating headaches and damage to the cervical and thoracic areas of her spine. The court found that the plaintiff submitted evidence showing her subjective complaints. There was no objective medical testimony to support these subjective complaints. As far as the 90/180-day period is concerned, the court ruled that the plaintiff's claim that she had to reduce her work hours during that 90/180-day period was self-imposed. The plaintiff had been advised that her condition would improve if she pushed herself rather than restricted her activities. As such, the court would not allow the fact that she decided not to work full-time to be a qualifying element under the serious injury threshold definition of Article 51.

Sigona v. New York City Transit Authority et al., 680 N.Y.S.2d 228. The plaintiff testified to the effect that he was out of work for at least six months while under active medical care. The Appellate Court held that this does not, in the absence of a physician's affidavit substantiating that his alleged impairment was attributable to a "medically determined injury" sufficient to raise a triable issue as to whether the plaintiff was prevented from performing substantially all the material acts which constitute his usual and customary activities for the 90/180-day period.

Relin v. Brotherton, 633 N.Y.S.2d 883. The Appellate Court held that the record in the trial court failed to establish that plaintiff's injuries prevented her from performing her normal and customary activities immediately following the accident. The plaintiff missed three weeks

of work and then returned part-time for the next three weeks before returning full-time. While this missed work time is reported in her medical record, there is little indication of any pain other than tenderness and tightness. The physician's notes disclosed that the plaintiff always had full range of motion, although with discomfort at the initial examination. The medical record is devoid of evidence confirming or suggesting any significant curtailment of plaintiff's ability to engage in her normal activities following her return to work full-time.