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Crash Course!

The new Michigan auto injury threshold created by *McCormick*

Presented by
 Robert A. Marzano Michael K. Sheehy
 Carrie Kennedy Donelle R. Buratto

Today's Presenters

 Michael K. Sheehy <small>Trucking/Transportation Leader</small>	 Donelle R. Buratto <small>Auto Liability Attorney</small>
 Carrie Kennedy <small>Auto Liability Attorney</small>	 Robert A. Marzano <small>Litigation Practice Leader</small>


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Michigan Supreme Court & History of Michigan's No-Fault Act

Presented by
Michael K. Sheehy

Michigan Supreme Court – Ruling For & Against *McCormick*

	Justice Cavanagh (D)	Justice Markman (R)	
	Chief Justice Kelly (D)	Justice Corrigan (R)	
	Justice Weaver (R)	Justice Young (R)	
	Justice Hathaway (D) (Elected 11/08)		

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Michigan Supreme Court – Changes on Aug. 26, 2010

- Justice Weaver (R) resigns
- Gov. Jennifer Granholm appoints COA Judge Alton Davis (D)



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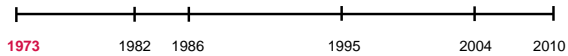
Michigan Supreme Court – Election November

	Justice Cavanagh (D)	2010 	Justice Markman (R)	
	Chief Justice Kelly (D)	Mary Beth Kelly (R)	Justice Corrigan (R)	
	Justice Davis (D) <i>(Incumbent)</i>		Justice Young (R) <i>(Incumbent)</i>	
	Justice Hathaway (D)	Denise Langford Morris (D)		

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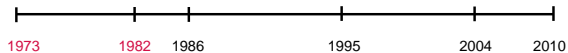
Timeline of No-Fault Act: 1973

- Michigan Legislature adopted and Governor signed No-Fault Act
- Third party action for noneconomic damages can be brought (MCL 500.3135 (1)) if:
 - Injured person suffered death
 - Serious impairment of body function
 - Permanent serious disfigurement



1973

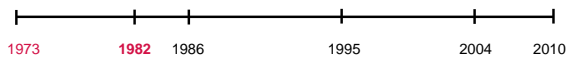
- Act didn't define "serious impairment of body function"
- 1973 to 1982: Trial and appellate courts in conflict what serious impairment entailed



1982

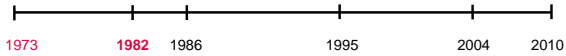
- Supreme Court defines "serious impairment of body function" in *Cassidy*:
 - Objectively manifested injuries that impair important body functions

Continued



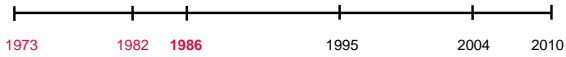
1982

- Effect of an injury on a person's general ability to lead a normal life
- Objective standard
- Question of law where there is no material disputed fact



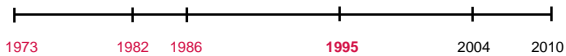
1986

- Supreme Court modifies threshold test in *DiFranco*
 - Impairment need not be of an important body function
 - Unnecessary to look at effect on person's general ability to lead a normal life
 - Can look at plaintiff's subjective complaints



1995

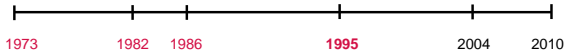
- Mich. Legislature defines "serious impairment of body function" using *Cassidy* (MCL 500.3135 (7)), but uses subjective test for third prong:
 - An objectively manifested impairment
 - Of an important body function
 - Affects the person's general ability to lead his or her life



1995

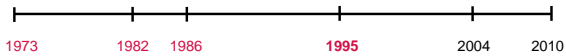
- Legislature provides whether threshold is met is a question of law for the court to decide (MCL 500.3135 (2)), if either:

Continued



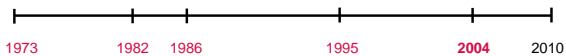
1995

- There is no factual dispute regarding nature and extent of injury
- There is a factual dispute concerning nature and extent of person's injury, but dispute is not material as to whether person has suffered a serious impairment



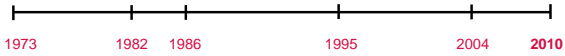
2004

- Supreme Court requires medical documentation for first prong and finds impairment must affect the course/trajectory of person's entire normal life (*Kreiner*)



2010

- Court overrules *Kreiner*, eliminates course/trajectory and entire life conditions and finds there is no temporal requirement (*McCormick*)



Michigan Supreme Court Rulings





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Kreiner v Fisher

Presented by
Donelle R. Buratto

Tort Liability for Noneconomic Damages (MCL 500.3135(1))

- Under Michigan No-Fault Act, individual remain subject to tort liability for noneconomic loss caused by their ownership, maintenance or use of a motor vehicle only if injured person has suffered:
 - Death
 - Serious impairment of body function
 - Permanent serious disfigurement

Continued

Serious Impairment of a Body Function

- Objective manifestation
- Important body function
 - Examples: Walking, memory, use of back



Continued

Serious Impairment of a Body Function

- Affects plaintiff's general ability to lead normal life
 - *Kreiner v Fischer*, 471 Mich. 109 (2004):
 - Impairment must affect "course or trajectory" of plaintiff's normal life
 - Examine difference between pre- and post-accident lifestyles and whether plaintiff's "general ability" to conduct course of life has been altered.

Continued

Serious Impairment of a Body Function

- Non-exhaustive list of factors to consider if plaintiff's general life has been affected:
 - Nature and extent of impairment
 - Type and length of treatment required
 - Duration of impairment
 - Extent of any residual impairment
 - Prognosis of eventual recovery
- "Totality of circumstances" approach



Statistics (As of Sept. 2010)

- Total serious impairment cases since *Kreiner* – 268
 - Defendant prevailed – 207
 - Plaintiff prevailed – 61
- Total serious disfigurement cases since *Kreiner* – 19
 - Defendant prevailed – 15
 - Plaintiff prevailed – 4





McCormick v Carrier

The new Auto No-Fault Threshold

Presented by
Carrie Kennedy

MCL 500.3135

- Threshold requirement remains unchanged
 - person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of motor vehicle only if injured person has suffered death, serious impairment of body function or permanent serious disfigurement

Continued

MCL 500.3135 (7)

- Serious impairment of body function definition unchanged
- An objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life.

First Step: MCL 500.3135(2)(a)

- Questions of law for court, if court finds either of the following:
 - No factual dispute concerning nature and extent of person's injuries.
 - Factual dispute concerning nature and extent of person's injuries, but dispute is not material to determination as to whether person has suffered a serious impairment of body function or permanent serious disfigurement.

Proper Inquiry

- Whether impairment is objectively manifested, not injury or its symptoms
- Important Distinction
 - Injury is damage of or to a person
 - Impaired means being weakened, diminished or damaged or functioning poorly or inadequately.
- When considering impairment, focus is not on injuries themselves, but how injuries affected a particular body function.

Important Body Function

- Again, dictionary definition applies:
 - Marked by or having great value, significance, or consequence
 - “Whether a body function has great value, significance, or consequence will vary depending on person.”
 - Subjective inquiry that must be decided on a case by case basis
 - Depends on relationship of that function to person’s life

Considerations in Normal Life Prong of Test

- Plain language of statute only requires that some of person’s ability to live in his or her normal manner of living has been affected, not that some of person’s normal manner of living has itself been affected.
- NO QUANTITATIVE MINIMUM AS TO PERCENTAGE OF PERSON’S NORMAL MANNER OF LIVING THAT MUST BE AFFECTED.

Continued

New Threshold

- AN OBJECTIVELY MANIFESTED IMPAIRMENT (observable or perceivable from actual symptoms or conditions)
- IMPORTANT BODY FUNCTION (a body function of value, significance, or consequence of injured person)
- AFFECTS PERSON'S GENERAL ABILITY TO LEAD HIS OR HER NORMAL LIFE (influences some of plaintiff's capacity to live in his or her normal manner of living)

New Threshold Details

- Fact and circumstance specific and must be conducted on case by case basis
- Legislature recognized that what is important to one is not important to all.
- Brief impairment may be devastating whereas near permanent impairment may have little effect.

Continued

New Threshold Details

- No bright line rule or imposition of non-exhaustive list of factors particularly where there is no basis in statute for such factors
- Same ability to take care of his personal needs as before the incident.
- No allegation that impairment affected his relationship with his significant other or other qualitative aspects of his life

How McCormick met Requirements

- Broken Ankle. Actual symptoms or conditions that someone else would perceive as impairing body functions (i.e., walking, crouching, climbing, and lifting weight) satisfies first prong.
- Important Body Functions were important to plaintiff because his testimony establishes that being unable to walk and perform other functions hindered his ability to work.

Continued



How McCormick met Requirements

- Impairment affected his general ability to lead his normal life because it *influenced some of his capacity to live in his normal, pre-incident manner of living*:
 - Before incident, plaintiff's normal manner of living consisted primarily of working for 60 hours a week, and secondarily, his hobbies of fishing and golfing.

Continued



How McCormick met Requirements


- After incident, at least some of plaintiff's capacity to live in this manner was affected.
 - Month after incident, plaintiff could not bear weight on his left ankle
 - Underwent two surgeries over a period of 10 months
 - Multiple months of physical therapy


Continued



How McCormick met Requirements

- Capacity to work was affected
 - Never returned to his original job, but suffered no change in pay.
 - Unable to perform functions necessary for his job for at least 14 months
 - He did not fully return to work for 19 months



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What do we do Next?

Presented by
Robert A. Marzano

Retroactivity?

- How does *McCormick* apply to pending claims and cases?

Create Genuine Issue of Material Fact

- Identify plaintiff's claimed injuries and impairments he/she is claiming; try to get plaintiff to commit to exactly what is at issue in the case
- Obtain and review plaintiff's medical and PIP records to check for inconsistencies

Continued

Create Genuine Issue of Material Fact

- Get necessary independent medical exams to determine if there is a genuine issue of material fact
- Obtain surveillance on plaintiff ASAP to determine true degree of impairment

Prepare to Defend Key Issues at Trial

- Learn as much about pre-accident plaintiff as possible since serious impairment of body function is subjective:
 - Medical records
 - PIP records
 - Employment records

Continued

Prepare to Defend Key Issues at Trial

- Prior claims/lawsuits
- Social Security applications/approvals
- Evidence of hobbies/activities

Prepare to Defend Key Issues at Trial

- Learn about post-accident plaintiff
- Focus on limiting amount of damages plaintiff can claim:
 - Type of impairment
 - Degree of impairment
 - Length of impairment

Continued

Other Defenses to Remember

- Is defendant at fault for the accident?
- Proximate cause?
- Alcohol/drug impairment
- Comparative negligence
- Notices of non-party fault

Thank You!

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