



Motor Vehicle - No-Fault, Motor Vehicle Negligence Practice Groups

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SUPREME COURT LESSENS 'SERIOUS IMPAIRMENT OF A BODY FUNCTION' BURDEN REQUIRED IN AUTO NEGLIGENCE CASES

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Plaintiffs injured in auto accidents will now have an easier time meeting the threshold requirement to recover non-economic damages under the Michigan No-Fault Act.

In a much anticipated ruling, the Michigan Supreme Court released on Sunday its decision in *McCormick v Carrier*, --- Mich --- (July 31, 2010). The court relaxed the definition of "serious impairment of bodily function" as previously established in *Kreiner v Fisher*, 471 Mich 109 (2004), and in-so-doing, created the potential for a significant increase in claims filed by plaintiffs' attorneys in auto liability cases.

Under the relaxed definition, a plaintiff will meet the new serious impairment threshold, if they can show the following: "(1) an objectively manifested impairment (observable or perceivable from actual symptoms or conditions) (2) of an important body function (a body function of value, significance, or consequence to the injured person) that (3) affects the person's general ability to lead his or her normal life (influences some of the plaintiff's capacity to live in his or her normal manner of living)."

The plaintiff in *McCormick* suffered a fractured left leg after his ankle was run over by a truck. The fracture required an initial surgery to install metal hardware to stabilize bone fragments, as well as a second surgery 10 months later to remove the hardware. The plaintiff, a medium truck loader, was restricted from weight-bearing activities for one month after surgery, underwent months of physical therapy, and did not return to work full-time until approximately 19 months after the accident, although he was initially cleared to return after approximately one year.

The plaintiff testified his normal life before the incident consisted mostly of working 60 hours per week as a truck loader. He also characterized himself as a "weekend golfer," and stated that he enjoyed fishing from his boat. After the incident, the plaintiff testified that he continued to experience ankle pain and his life is "painful, but normal," although "limited." Although the record is unclear as to the duration, the plaintiff's enjoyment of fishing and golfing appear to have been interrupted after the injury. The trial court found this

insufficient to meet the serious impairment threshold as provided in MCL 500.3135, a decision affirmed by the Michigan Court of Appeals.

The Michigan Supreme Court reversed, concluding that the plaintiff demonstrated that he suffered a serious impairment of a body function as a matter of law. In so doing, the court articulated a new test, one which the 4-3 majority concluded is consistent with the statutory language of MCL 500.3135.

MCL 500.3135(7) defines a “serious impairment of body function” as “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.” According to the court, this statutory language sets forth three requirements to establish a “serious impairment of body function:” (1) an objectively manifested impairment (2) of an important body function that (3) affects the person’s general ability to lead his or her normal life.”

Kreiner attempted to clarify § 3135(7) by holding that the injury must affect “the trajectory of the plaintiff’s normal life.” Under the majority decision in *Kreiner*, if a plaintiff was able to eventually resume most or all of his pre-injury activities, then the trajectory of his or her life had not been sufficiently altered. In turn, the plaintiff would fail to meet the “serious impairment” threshold.

The Supreme Court in *McCormick* rejected the *Kreiner* majority’s interpretation of the three prongs of § 3135(7), finding that its interpretation is “inconsistent with the clear language of the statute,” particularly with respect to the portion of the statute discussing the effect of the injury on the person’s general ability to lead his or her normal life.

With respect to the first prong – whether the injured person has suffered an objectively manifested impairment” – the Supreme Court in *McCormick* concluded that “an ‘objectively manifested impairment’ is commonly understood as one observable or perceivable from actual symptoms or conditions.” The court cautioned that the focus should be on whether the impairment is objectively manifested, not whether the injury or its symptoms are objectively manifested, and that medical documentation is not required in every case. This leaves unanswered whether a “perceived” impairment without medical documentation might even satisfy the threshold.

The Supreme Court held that its previous interpretation in *Kreiner* regarding what constitutes an “important body function” – the second prong of the statute – was consistent with its plain language. The Supreme Court in *McCormick*, therefore, limited its analysis to briefly reiterating that any body function of value, significance or consequence to the injured person is sufficient under the statute.

The bulk of the Supreme Court’s *McCormick* opinion focused on clarifying when a plaintiff’s impairment “affects the person’s general ability to lead his or her normal life.” After parsing the ordinary definition of each word used in the statute, the court concluded that to “affect the person’s ability to lead his or her normal life” is “to have an influence on some of the person’s capacity to live in his or her normal way of living.” The court cautioned that the statute only requires a person’s general ability to lead his or her normal life be affected, not destroyed.

The court noted that the statute does not create an express temporal requirement as to how long an impairment must last in order to affect the person’s general ability to lead his or her normal life.

Finally, the court rejected *Kreiner*’s list of objective factors to compare the plaintiff’s pre- and post-incident lifestyles as “extra-textual” and “incorrect.”

In applying the new test to the current case, the court concluded that the plaintiff satisfied the threshold as a matter of law. The broken ankle was an objectively manifested impairment, and the fact that he was unable to walk or perform other functions of consequence to his ability to work demonstrated the importance of the impaired body function. Further, the broken ankle did influence “some of his capacity to live in his normal, pre-incident manner of living” because he was unable to work for at least one year, was restricted from weight-bearing activities, and was forced to undergo months of physical therapy.

Justice Stephen Markman authored a lengthy dissent which Justices Robert Young and Maura Corrigan joined. The more conservative members of the Supreme Court opined that the majority’s decision will “resurrect a legal environment” plagued by “concerns over excessive litigation, the over-compensation of minor injuries and the availability of affordable insurance.”

It is likely that trial courts will see an influx of new cases filed as a result of the Supreme Court’s ruling in *McCormick*. Seemingly minor injuries that would not have satisfied *Kreiner*’s high threshold might quite possibly be sufficient under the Supreme Court’s new legislative test under *McCormick*. For example, a simple fracture resulting in temporary restriction against physical activity may be sufficient to meet the threshold in the context of an athlete plaintiff, because the impairment would have some influence on the plaintiff’s normal way of living.

Furthermore, *McCormick* will make it exceedingly more difficult for defendants to prevail on a motion for summary disposition. While the question of whether a plaintiff has suffered a serious impairment of body function remains a question of law for the court absent a factual dispute regarding the nature and extent of the injury, courts will be much more reluctant to grant summary disposition to defendants where the threshold is so low. Rather, courts may be more inclined to find the threshold met, even in questionable cases and allow cases to proceed to trial for a determination as to proper compensation, if any.

Interestingly, the Supreme Court did not discuss whether its ruling in *McCormick* should be given prospective or retroactive application. When a decision is given prospective application, it is only applied to cases filed after the effective date of the decision. However, absent any discussion of prospective application in *McCormick*, the Supreme Court will likely defer to the general rule that appellate decisions are to be applied retroactively.

Plunkett Cooney will continue to monitor the case law that follows this important development. Several other cases were held in abeyance pending the outcome of *McCormick*. As the courts apply the new standard to those and other cases, we will learn more about the new legislative test as it is applied to different injuries. We remain committed to keeping you updated on this evolving area of the law.

If you have any questions regarding this Rapid Report, contact the author Hilary A. Ballentine, an appellate attorney in the firm’s Detroit office, or William J. Lynch, Chair of Plunkett Cooney’s Automobile Liability & No-Fault Practice Group.