

# No Fault Serious Injury Update 2008

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# Introduction

- No Recovery absent a “serious injury”
- No Fault Law Intended to Limit Litigation
- What is a “serious injury”
- Pommells v Perez – (4 NY3d 566 [2005])
- Practice Tips

# The Nine Serious Injuries [Slide 1]

- Death
- Dismemberment
- Loss of Fetus

# When Does It Apply?

- Non Economic Loss & Basic Economic Loss
- Pedestrians, no motorcycles, ATV v MVA
- Arising out of use or operation of a motor vehicle in the State of New York [5104]
  - Loading /Unloading
  - May apply out of State . . . . [*Wosner v Elrac, Inc.*, 48 AD3d 274 [1<sup>st</sup> Dept' 2008]
- SUM – Regulation 35-D; *Raffellini* [9 NY3d 196]

# Damages or Liability

- Mixed Question
  - No liability w/o serious injury
  - Serious injury = medical / damages
- CAUTION
  - Stipulations to liability
  - Motions for partial summary judgment
  - Bifurcation
  - Default Judgment

# Default & Interest

- Prejudgment interest from judgment on negligence [*VonNostrand v Froehlich*, 44 AD3d 54 [2d Dep't 2007]).
- Default Judgment – must prove “serious injury” at inquest
  - *Abbas v Cole*, 44 AD3d 31 [2d Dep't 2007]
  - *Amato v Fast Repair, Inc.*, 42 AD3d 477 [2d Dep't 2007]

# Nine Serious Injuries [Slide 2]

- Fracture
- Significant Disfigurement
- Permanent loss of use of a body organ, member function or system

# Nine Serious Injuries [Slide 3]

- Permanent consequential limitation of use of a body organ or member
- Significant limitation of use of a body function or system
- 90/180

# 90/180

- **90/180 --**
  - **Medically determined injury** or impairment of a
  - **non permanent** nature
  - that **prevented** plaintiff from performing
  - **substantially all of the material acts** that constituted (his, her)
  - **usual and customary daily activities**
  - for not less than **90 days** during the **180 days** immediately following the accident.

# Easy Determinations

- Death
- Dismemberment
- Loss of Fetus
- Fracture [not limited]
  - Teeth
  - Cartilage - Nose
  - Examples:
    - Non displaced nasal fx
    - Deviated Septum
    - Chipped tooth
    - Fractured teeth w/dental care.

# Significant Disfigurement

- “alters plaintiff’s natural appearance”
  - RP would regard P as unattractive, objectionable, or as the object of pity or scorn.
- Describe length, width, texture or density
- Must be readily observable
- Surgical scars --- if surgery caused by MVA
- Significant as matter of law: 1” facial

# Permanent Loss of Use

- *Oberly v. Bangs*,
  - TOTAL LOSS OF USE
- Objective evidence:
  - permanency
  - loss of use
- Examples: Frozen limbs, paralysis.
- Why plead only one?

# Most Difficult Determinations

- Type of cases
  - soft tissue, neck and back
  - ROM limitations
  - closed head; neuropsychological; PTSD; TMJ
- Exceptions
  - Permanent consequential limitation of use
  - Significant limitation of use
  - 90/180

# Permanent Consequential Significant Limitation of Use & 90/180

- Defendant shifts burden
  - IME opinion with no objective findings
- P - competent medical evidence
  - Objective medical findings -diagnostic tests
  - More than minor - not subjective complaints
  - Qualitative / Quantitative Limitations
  - Explain away problems: before, after & gaps

# Toure v Avis Rent A Car

- “Whether a limitation of use or function is significant or consequential (i.e. important . . . ) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based upon the normal function, purpose and use of the body part” (98 NY2d 345 [2002])
- Limitation “has an objective basis and compares the plaintiff’s limitations to the normal”

# Permanent Consequential Limitation of Use of a Body Organ or Member

- Permanent limitation of use [based upon recent examination];
- Involve use of body organ or member
  - Expert / is neck or back a body organ or member?
- More than mild, minor or slight
- Qualitative or Quantitative Description of limitation -- Compare to “Normal”

# Meeting the Standard - Permanent Consequential Limitation

- Not serious
  - mild, minor, slight
  - no objective measure
  - no causal link by expert even with films
  - Chiropractor Affirmation
  - no expert on permanency
  - no test description
- Serious -- Issue of Fact
  - Objective quantification in admissible form
    - ROM -- % loss
    - Permanent
    - Diagnostic tests
    - Explanation
  - Causal connection
  - Recent Exam

# Permanent Consequential - Elements

1. Limitation of use is permanent [based upon recent examination];
2. The limitation must be of the use of a body organ or member;
3. The limitation must be more than mild, minor or slight;
4. The limitation must be objectively verified by medical evidence in either qualitative or quantitative terms.

# Significant Limitation of Use of a Body Function or System

- Not Serious -
  - Degree & duration of limitation not stated
- Serious
  - All MD's agree on duration & description
- Issue of Fact:
  - MD describes ROM in degree and duration based on recent tests
- Not Serious - Examples
  - PTSD w/o objective basis for diagnosis
  - Time gaps
    - treatment / affidavit
  - MRI confirmed herniation with no medical opinion describing limitation
- 2-10% loss ROM

# Significant Limitation - Elements

1. Limitation of a body function or system;
2. More than mild, minor or slight; and,
3. Objectively verified by medical evidence in qualitative or quantitative terms as compared to normal.

# 90/180

- Elements
  - Medically determined non-permanent injury
    - Need MD / Chiropractor testimony
    - Quantifies limitation- duration & severity
    - Objectivity required [*Alcombrack v Swartz*, 49 Ad3d 1170 [4<sup>th</sup> Dep't 2008]]
  - Prevents substantially all activities of daily living
    - 90 / 180 days following accident
- Easy case: out of work per doctor's order for three months.

# 90/180

- Timing of the IME
  - Second Department -- might need exam within 90/180 time period
  - Fourth Department -- Can address issue by doctor's reliance on review of certified medical records
- *Alcombrack v Swartz*
  - More on this later . . . maybe

# Pommells

- Purpose of No Fault law -- limit litigation
  - Failure to grant dismissal “even where evidence justifies dismissal, burdens court dockets and impedes resolution of legitimate claims.”
- Road Map -- Must Explain
  - Gaps in treatment
  - Pre-existing degenerative conditions
  - Subsequent Injuries
  - Herniated Disc is NOT enough
- Aggravation itself must qualify

# Pommells v. Perez - Facts

## ■ Facts:

- 3/15/98 – MVA
- Claims – herniated lumbar discs
- Treatment
  - Neuro few days post accident
  - 6 months PT & Off Work
- 8/2000 Kidney removal
- 2002 – plaintiff returns for treatment

# Pommells v. Perez - Evidence

- Defendant's Evidence: Favorable Neurologist and Radiologist Affidavits finding no causally related disability;
- Plaintiff's Evidence:
  - Un-sworn medical reports
  - Doctor affidavit based upon examination 4 years post accident
    - herniated lumbar disc and clinical radiculopathy related to "history stated" (included MVA & Kidney)

# Pommels v. Perez - Holding

- Dismissed
- Herniated disc w/o objective evidence of physical limitation does not qualify
- Plaintiff must provide reasonable explanation for gap in treatment

# Brown v Dunlop

- Explanation of 2.5 year Gap in Treatment
  - Affirmation of P's physician: herniated and bulging discs; numeric deficiencies in spinal extension and flexion +
  - Reasonable explanation - After therapy any future treatment would only be palliative
- Hold: Issue of fact as to permanent consequential and significant limitation

# Carrasco v Mendez

- Pre-Existing Conditions must be explained
- Submissions:
  - Defendant: Plaintiff's medical notes of pre-existing, and IME report -- MRI findings as degenerative;
  - Plaintiff: Affidavit of Ortho based upon one examination one year post accident and one examination while motion pending failed to address pre-existing degenerative issues [did not see MRI];

# Carrasco v Mendez [Slide 2]

- Must Address Pre-existing Conditions
- Dismissed:
  - P failed to rebut D's showing that injuries were caused by pre-existing degenerative conditions;
  - P failed to specifically address evidence of pre-existing degenerative change

## Carrasco – [Slide 3]

- “with **persuasive evidence** that plaintiff’s alleged pain and injuries were related to a pre-existing condition, plaintiff had the burden to come forward with evidence addressing defendant’s claimed lack of causation” (4 NY3d 566, 580)

# *Persuasive Evidence . . .*

## *Ashquabe v McConnell*

- Defendant's Burden – injuries pre-existing
  - D's Doctor – Cervical strain,
    - MRI's revealed degenerative disease/spondylosis at C5-6, C6-7 associated with mild disc bulges, and Thoracic degenerative disc disease at T4-5 and T5-6;
    - Failed to address herniation at C6-7 on MRI report;
    - Failed to address significance of absence of prior complaints despite plaintiff's denial of pre-existing conditions.
  - D failed – “physician's analysis was conclusory”
  - What would be “persuasive evidence” of pre-existing condition?
  - 46 AD3d 1419 [4<sup>th</sup> Dep't 2007]

# *Persuasive Evidence*

- Burden shifted by D IME doctor: D = SJ
  - CT scan and MRI studies did not indicate any acute injury, and the bulging discs at L3-S1 were due to “congenital abnormalities.” (*Barnes v Estes* 46 AD3d 1441 [4<sup>th</sup> Dep’t 2007])
  - Numerous records and reports of plaintiff’s treating physicians indicating that plaintiff’s alleged injuries were related to two workplace accidents [one before and one after] (*Anania v Verdgeline*, 45 AD3d 1473 [4<sup>th</sup> Dep’t 2007]).
  - Plaintiff complained of prior neck pain – 3 months, positive x-ray findings, not explained by P (*McCarthy v Bellamy*, 39 Ad3d 1166 [4<sup>th</sup> Dep’t 2007])
- *Ashquabe* was decided the same day as *Barnes*?

# Gaps In Treatment

- What is a reasonable excuse
  - No insurance or \$\$\$ to pay
  - No need for treatment
- Shifting the burden to explain the gap
- Examples:
  - 15 Month unexplained gap in treatment = SJ for D
  - Gap in treatment + Plaintiff's doctor's first examination 3.5 years post accident = SJ for D

# Pre-existing Conditions

- Shifting the Burden to Plaintiff “Persuasive Evidence”
  - Defendant’s medical expert’s opinion that plaintiff’s bulging discs were degenerative in nature did NOT shift burden of proof to plaintiff. The report did not contain evidence that plaintiff’s pain might not be chronic and unrelated to the accident (*Ashquabe v McConnell*, 46 AD3d 1419 [4th Dep’t 2007])
- “Addressing Defendant’s Claimed Lack of Causation”
  - Comparison of pre and post accident ROMS “significantly decreased” (*Kneepell v Casem*, 50 AD3d 1508 [4<sup>th</sup> Dep’t 2008]).

# Re-injuries

- Defendants met their initial burden
  - Physiatrist IME - plaintiff's disability was temporary,
  - Orthopedic IME – any residual disability caused by accident #2.
- Plaintiff created issue of fact through objective evidence stating that accident one caused her injuries, not accident #2
  - including X ray reports, an MRI report, and an expert's designation of numeric percentages of plaintiff's loss of range of motion. *Parmer v Opportunities Unlimited*, 48 AD3d 1242 [4<sup>th</sup> Dep't 2008]
- D wins SJ proving that injuries caused by pre-existing and supervening medical problems *Anania* (45 AD3d 1473 [4<sup>th</sup> Dep't 2007] )
- Plaintiff's deposition testimony “complaints after first accident stayed the same after second accident” = D = SJ on #2

# Practice Tips

- I. Identify Categories
- II. Discovery & Investigation
- III. Experts
- IV. Deposition Issues
- V. Motions for Summary Judgment
- VI. Trial

# Identifying Potential Categories

## A. Really Easy Categories

Death, Disfigurement, Loss of Fetus

## B. Easy Categories

1. Fracture
2. Significant Disfigurement
3. Permanent Loss of Use

## C. The Gray Area

1. Permanent Consequential Limitation of Use of a body organ or member
2. Significant Limitation of Use of a body function or system
3. 90/180

# Identifying Potential Categories

**Review Available Materials to Determine:**

1. Pleadings
2. Limited medical
3. Interview

# Discovery & Investigation

- A. Records [Medical, Insurance, Employment]
  - Prior / Subsequent Injuries
  - Lost time from work
  - Description of Limitations – What is Normal?
- B. Diagnostic Studies
- C. Prepare Medical Chronology
- D. Speaking Authorizations

# Experts

- A. Make sure doctors understand the Threshold
- B. Early Narrative Report from MD
- C. Choose the Right Expert [understanding of threshold]
- D. Properly Disclose to Include Opinion on Threshold;
- E. Defense – Schedule IME early

# Deposition Issues

- A. Make Sure P is prepared
- B. 90/180 – Substantially All / time
- C. Range of Motion Testing – Due to Pain?
- D. Confirm providers
- E. Explore other injuries / causes of limitation
- F. Make document / authorization demands and follow up

# Motion for Summary Judgment

- A. Evaluate Likelihood of Success
- B. Timeliness – CPLR 3212 – 120 days or Order
- C. Papers
  - Records in Admissible Form
    - Can't rely upon unsworn MRI reports . . .
  - Affirmations from MDs and Attorneys only
  - Attorney Affidavit – category by category
  - Separate Memorandum of Law

# Trends --- Future

- Reasonable Excuse swallows Gap in Treatment
- Burden Shifting
  - 90/180 – need IME within 90/180 time period or at least competent medical evidence that there would have been no qualifying limitation during period
  - Unsworn documents --- digitization of medical profession . . .
- Body Organ, Member, Function, System
- What is objective? Normal?

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