



NEW AND NOTEWORTHY FOR Insurance Defense

New York Courts May Be Re-interpreting the “Serious Injury” Requirement of Insurance Law § 5102(d).

A recent decision from the New York Court of Appeals may mark a significant change in the way New York courts interpret the “serious injury” requirement of Insurance Law § 5102(d). This decision considers three cases from the First and Second Departments, all interpreting the statutory definition of “serious injury,” and reversing the trend toward granting summary judgment for defendant where plaintiff’s treating physician had not made “contemporaneous quantitative measurements” of the injury.

The courts have long been skeptical about serious injury claims under Insurance Law § 5101, the No-Fault law (officially the Comprehensive Motor Vehicle Insurance Reparations Act). Proof of “serious injury” under the statute is the threshold for determining whether a plaintiff can seek compensation for pain and suffering under the No-Fault Law. The problem is that the statute is vaguely worded, making it necessary for the courts to attempt to interpret what the Legislature had in mind, particularly the words in italics:

(d) “Serious injury” means a personal injury which results in death; dismemberment; **significant** disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent **consequential limitation** of use of a body organ or member; **significant limitation** of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing

substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

N.Y. Insurance Law § 5102(d). As a result of their skepticism as to what constitutes “serious injury,” particularly concerning injuries to soft tissue, trial courts had begun to develop a standard of proof on summary judgment that required contemporaneous, objective, quantifiable evidence of the severity of plaintiff’s injury. This made it more likely that a broken toe – easily visible on an x-ray – would constitute “serious injury” than would a torn meniscus in the knee.

In a 2002 case, Toure v. Avis Rent A Car Sys., the Court of Appeals held that a plaintiff’s subjective complaints alone were not sufficient to prove serious injury, but that objective proof was required. 98 N.Y.2d 345, 350 (2002). In 2010, the Second Department interpreted this to mean that plaintiff’s treating physician’s records must reflect quantitative measurements both contemporaneous to the date of the injury and recent to the litigation; they dismissed plaintiff’s claim of serious injury because his treating physician made only qualitative findings shortly after the accident, and did not make quantitative findings using specific, numeric range of motion measurements until several years later. Perl v. Meher, 74 A.D.3d 930 (2d Dept. 2010).

The Court of Appeals’ unanimous decision of November 22, 2011 reversed the Second Department’s dismissal in



Perl v. Meher, stating that Toure did not impose the requirement of “contemporaneous’ quantitative measurements, and we see no justification for it.” Perl v. Meher, -- N.E.2d ---, 2011 NY Slip Op. 08452 (2011).

[A] contemporaneous doctor’s report is important to proof of *causation*; an examination by a doctor years later cannot reliably connect the symptoms with the accident. But where causation is proved, it is not unreasonable to measure the *severity* of the injuries at a later time (citation omitted). Injuries can become significantly more or less severe as time passes.

The Court continued:

Potential plaintiffs should not be penalized for failing to seek out, immediately after being injured, a doctor who knows how to create the right kind of record for litigation. A case should not be lost because the doctor who cared for the patient initially was primarily, or only, concerned with treating the injuries. We therefore reject a rule that would make contemporaneous quantitative measurements a prerequisite to recovery.

The decision in Perl might be viewed as a signal from the Court of Appeals that it doesn’t agree with the trend toward granting summary judgment to defendants in “tort threshold” cases. Insurers would be well advised to monitor how the individual Appellate Division Judicial Departments interpret the scope of Perl, and whether the decision is relied upon to restrict summary judgment motions on the issue of “serious injury” under New York’s No Fault Law.

If you have any questions about the content of this legal update or have an insurance defense matter that you would like to consult with us about, please contact us at 800-447-9544. Find out more about KSLN at www.kslnlaw.com.