

Kreiner v. Fischer: The Latest Step in the Emergence and Evolution of the Lifestyle Element in the Michigan No-Fault Act § 3135 Threshold Inquiry

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## I. Introduction

For many people involved in automobile accidents, their resultant damages constitute both economic and non-economic loss. Prior to 1973, the injured person's remedy for damages was generally a common law action in tort. Responding to perceived inadequacies inherent to the common law tort recovery system, Michigan adopted the no-fault automobile insurance act in 1973.

Since the adoption of the no-fault automobile insurance act of 1973, those who are injured in automobile accidents have been limited in their tort actions for non-economic loss against the tortfeasor. Section 3135(1) of the No-Fault Act provides that a person remains subject to tort liability for non-economic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. This evidences the notion that the No-Fault Act was a compromise encompassing the notion of a certain recovery for economic loss in return for reduced tort suit opportunities for non-economic loss.<sup>1</sup> Accordingly, no tort suit against a third party for non-economic damages is permitted unless the injured person "has suffered death, serious impairment of body function, or permanent serious disfigurement."<sup>2</sup> Initially, the Court left the determination of whether a person's injury was a "serious impairment of bodily function or permanent serious disfigurement" for the jury. However, in *Cassidy*, the Court retracted its earlier position, instructing lower courts to make the serious impairment of bodily function determination based on the following criteria:

To satisfy the "serious impairment" threshold, an "important" body function must be impaired, that the injury must be an "objectively manifested injury", and that the injury must have an effect "on the person's general ability to live a normal life."<sup>3</sup>

A key component of the *Cassidy* threshold definition was its lifestyle analysis that required a plaintiff's "general ability to lead a normal life" to be effected. Although subsequent decisions eroded most of the *Cassidy* holding in favor of a more inclusive interpretation of MCL § 3135, which eliminated the lifestyle analysis, the Michigan Legislature indicated its preference for *Cassidy* by codifying a near replica of its definition of "serious impairment of bodily function" in MCL § 3135 in 1995. MCL § 500.3135(7) defines "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.

In *Kreiner v. Fischer*, 471 Mich. 109 (2004), the Michigan Supreme Court addressed the issue of whether a plaintiff's injuries affect their general ability to lead their normal lives. Plaintiffs and their proponents argued that after 1995 it is only necessary to show that there has been an impairment of an important body function that, in some way, influences, touches or otherwise affects the plaintiff's lifestyle, regardless of degree.<sup>4</sup> If some effect has been demonstrated, the new legislative test is satisfied, regardless of the extent of the effect.<sup>5</sup> Defendants and their proponents, on the other hand, contended that a plaintiff must demonstrate

not simply that some aspect of his life has been affected, but that generally he is no longer able to lead his normal life.<sup>6</sup>

This comment examines the history of the No-Fault Act and non-economic loss recovery in Michigan, while specifically focusing on the adoption and evolution of a lifestyle element in the threshold inquiry.

## II. Origin and Development of the No-Fault Act

### A. Criticism of the Common Law System of Recovery that Preceded the No-Fault Act

Prior to 1973, actions seeking damages for injuries resulting from motor vehicle related accidents proceeded, for the most part, pursuant to common-law accident principles in Michigan's courts.<sup>7</sup> These common law accident principles were based on the liability insurance system in which an injured person would sue the party at fault in order to recover their damages.<sup>8</sup> The common law system came under criticism for four major reasons. First, the common law system excluded large numbers of injured parties from recovery because "the tort system required that the injured person be free of any contributory negligence and that the accident be caused by a person adjudged to be at fault."<sup>9</sup> Second, "minor injuries were [often] overcompensated and serious injuries were undercompensated ... because the minimum required statutory third party liability coverage was \$ 20,000."<sup>10</sup> Third, the necessity of litigation in order to recover damages caused long delays in the recoupment of benefits.<sup>11</sup> Finally, "the system appeared to discriminate against uneducated and poor plaintiffs because they tended to settle claims prematurely due to economic need or a lack of legal assistance."<sup>12</sup> Michigan's automobile insurance liability system "provided too little, too late, unfairly allocated, at wasteful costs, and by means that promoted dishonesty and disrespect for the law."<sup>13</sup>

### B. The Enactment of the No-Fault Act

Responding to public dissatisfaction, the Michigan Legislature explored tort reform with respect to automobile insurance. In June of 1971, Commissioner Russel VanHooser testified before a joint committee of the Michigan Legislature as to the inferiorities of the liability insurance system as discovered by a two-year Michigan Department of Transportation study.<sup>14</sup> The Commissioner suggested four priorities for any new legislation regarding automobile insurance reform. The priorities were:

1. Compensate injured persons adequately, promptly, and without regard to fault for medical expenses, wage loss and rehabilitation expenses;
2. Reduce or eliminate the nuisance value of small claims;
3. Reduce the duplication and overlapping of benefits within the auto-insurance system and other systems. If the duplication is not reduced or eliminated, it should at least be subject to greater control by the consumer so that the consumer will have a corresponding control over his costs;
4. Reduction or elimination of some of the other frictions and inefficiencies of the present system, such as the adversary relationship between insurer and injured party, court congestion, litigation expense, and overhead expense.<sup>15</sup>

One year and four months after the Commissioner's testimony, his recommendations were largely accepted and codified into law through the No-Fault Act, 1972 PA 294, which became effective on October 1, 1973.<sup>16</sup> The goal of the No-Fault Act was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses.<sup>17</sup> The Legislature believed this goal could be most effectively achieved through a system of compulsory insurance, whereby every Michigan motorist would be required to purchase no-fault insurance or be unable to operate a motor vehicle legally in this state.<sup>18</sup> With the enactment of the No-Fault Act, the Legislature abolished tort liability generally in motor vehicle accident cases and replaced it with a regime that established that a person injured in such an accident is entitled to certain economic compensation from his own insurance company regardless of fault.

The injured person's insurance company is responsible for all expenses incurred for medical care, recovery, and rehabilitation as long as the service, product, or accommodation is reasonably necessary and the charge is reasonable.<sup>19</sup> There is no monetary limit on such expenses, and thus, it is possible for this entitlement to last for the person's lifetime. An injured person is also entitled to recover from his own insurance company up to three years of earnings loss.<sup>20</sup> An injured person can also recover from his own insurance company up to twenty dollars a day for up to three years in "replacement" expenses.<sup>21</sup>

In exchange for the payment of these no-fault economic loss benefits from one's own insurance company, the Legislature limited an injured person's ability to sue a negligent operator or owner of a motor vehicle for bodily injuries. In particular, the Legislature significantly limited the injured person's ability to sue a third party for non-economic damages, e.g., pain and suffering. No tort suit against a third party for non-economic damages is permitted unless the injured person "has suffered death, serious impairment of body function, or permanent serious disfigurement."<sup>22</sup>

### C. Recovery of Non-Economic Losses Under the No-Fault Act

The No-Fault Act requires a plaintiff to satisfy the threshold of "death, serious impairment of body function, or permanent serious disfigurement" in order to maintain a tort action for non-economic loss.<sup>23</sup> If a plaintiff's injuries do not meet the threshold test, his action is barred, regardless of fault.<sup>24</sup> The notion of restricting tort actions by injured parties to those who satisfy a threshold indicates a major shift from the previous fault based insurance liability system, and raises serious questions about the threshold for the injured person, namely, what must my injury be so that I may recover my damages from the one who injured me?

Accordingly, satisfying the elements of the threshold test are crucial for an injured party seeking to recover non-economic loss from a negligent tortfeasor. While "death and permanent serious disfigurement" are not difficult standards to prove, the legal standard sufficient to prove "serious impairment of body function" has been the center of controversy in the judiciary for the past thirty years.<sup>25</sup> The Michigan Supreme Court's interpretation of the standard necessary to prove "serious impairment of a body function" can be divided into five phases. These phases are the pre-Cassidy era, the Cassidy era, the DiFranco era, the era following the 1995 amendment to § 3135 of the No-Fault Act, and the recent Kreiner era.

### III. Pre-Cassidy: No Lifestyle Consideration

In the decade following the passage of the No-Fault Act, the threshold of "serious impairment of body function" was decided, in a majority of cases, by the jury on an individual, case-by-case basis.<sup>26</sup> Following enactment of the No-Fault Act, Governor Milliken requested that the Michigan Supreme Court issue an advisory opinion regarding the act's constitutionality.<sup>27</sup> In response to the Governor's request, the Court issued its findings, titled *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich. 441 (1973), which held that the threshold provided standards sufficient for legal interpretation, and that the fact-finding related to those standards was within the province of the jury rather than a judge, except where interpretation approaches or breaches permissible limits, in which case, determination by the trial court is appropriate.<sup>28</sup>

In order to meet the threshold, the plaintiff needed to convince the jury that their injuries constituted a serious impairment of body function. However, the elements of the threshold were undefined in the statute, and thus, little guidance was available to the jury in regards to what type of injury satisfied the threshold. As a result, the pre-Cassidy standard proved to be vague and unwieldy, producing inconsistent results and alleviating little if any of the litigation that the No-Fault Act was intended to reduce.

### IV. Cassidy v. McGovern: The Lifestyle Element is Established

Approximately ten years after issuing its 1973 Advisory Opinion, the Michigan Supreme Court, articulated significant guidelines regarding summary judgment treatment of the tort threshold requirement of "serious impairment of body function" set forth in § 3135 of the Act.<sup>29</sup> Cassidy involved two consolidated cases where the plaintiffs were seeking recovery of non-economic damages that resulted from automobile accidents.<sup>30</sup> Prior to the Cassidy decision, cases of this type had been decided by juries, and were determined as issues of fact on a case-by-case basis. The Cassidy Court granted leave to appeal in order to address two important questions: whether the threshold should continue to be determined as a matter of fact, and what type of inquiry should be made in determining whether the threshold is satisfied.

In regards to the first question, the Court specifically repudiated its 1973 Advisory Opinion conclusion that the threshold should be decided by the trier of fact, and held that trial judges were to decide, as a matter of law, whether the plaintiff had suffered a serious impairment of body function when there was no factual dispute about the nature and extent of the plaintiff's injuries, or when there was a dispute, but it was not material to the determination whether the plaintiff had suffered a serious impairment of body function.<sup>31</sup> In retrenching on the issue of whether the threshold should be decided by a jury, the Court stated:

"Therefore, we conclude that the meaning of 'serious impairment of body function' is a matter to be determined by statutory construction. We hold that when there is no factual dispute regarding the nature and extent of a plaintiff's injuries, the question of serious impairment of body function shall be decided as a matter of law by the court. Likewise, if there is a factual dispute as to the nature

and extent of a plaintiff's injuries, but the dispute is not material to the determination whether plaintiff has suffered a serious impairment of body function, the court shall rule as a matter of law whether the threshold requirement of § 3135 has been met."<sup>32</sup>

The Court cited three reasons in support of its conclusion that the threshold was a proper subject of judicial interpretation. First, the Court stated that the threshold phrase was not a commonly used term such as "intoxication."<sup>33</sup> Second, the Court felt that statutory construction by trial courts would promote greater uniformity in application of the no-fault threshold.<sup>34</sup> Third, the Court noted that if a jury trial were necessary in all threshold cases, then one of the objectives of the No-Fault Act, to reduce automobile litigation, would be thwarted.<sup>35</sup> In regards to the third reason the Cassidy Court reiterated its general understanding that the No-Fault Act was a compromise encompassing the notion of a certain recovery for economic loss in return for reduced tort suit opportunities for non-economic loss.<sup>36</sup> The Court said:

At least two reasons are evident concerning why the Legislature limited recovery for non-economic loss, both of which relate to the economic viability of the system. First, there was the problem of the overcompensation of minor injuries. Second, there were the problems incident to the excessive litigation of motor vehicle accident cases. Regarding the second problem, if non-economic losses were always to be a matter subject to adjudication under the act, the goal of reducing motor vehicle accident litigation would likely be illusory. The combination of the costs of continuing litigation and continuing overcompensation for minor injuries could easily threaten the economic viability, or at least desirability, of providing so many benefits without regard to fault. If every case is subject to the potential of litigation on the question of non-economic loss, for which recovery is still predicated on negligence, perhaps little has been gained by granting benefits for economic loss without regard to fault.<sup>37</sup>

In regards to the second question, it is initially important to note that the Court did not define the phrase "serious impairment of body function." Rather, in effort to effectuate the aforesaid goal of the No-Fault Act to reduce accident litigation, the Cassidy Court held, "that to satisfy the "serious impairment" threshold, an "important" body function must be impaired, that the injury must be an "objectively manifested injury", and that the injury must have an effect "on the person's general ability to live a normal life."<sup>38</sup>

In avoiding a specific definition, the Court stated that the threshold was "not susceptible of a single definition that will determine the outcome in all cases."<sup>39</sup> Accordingly, the Court held that "absent specifics from the legislature, its character will of necessity have to develop on a case-by-case basis . . . [a]s more cases are decided, it should become clear what types of injuries are of sufficient gravity to meet the threshold."<sup>40</sup> However, for the next four years, this judicially created formula became the central inquiry for a court to resolve when a plaintiff alleged that the tort threshold for a third-party tort suit had been met.

#### V. DiFranco v. Pickard: The Lifestyle Element is Overruled

Four years after *Cassidy* was decided, the threshold issue was revisited in *DiFranco v Pickard*, 427 Mich. 32 (1986).<sup>41</sup> The *DiFranco* court, clearly dissatisfied with the threshold that resulted from *Cassidy*, stated:

The serious impairment of body function threshold was designed to eliminate suits based on clearly minor injuries, and those injuries which did not seriously affect the ability of the body, in whole or in part, to function. Unlike other states, the Legislature did not enact a threshold which looks at how the injury affected the plaintiff's ability to work or perform his normal activities. Instead, the relevant inquiries are whether the injury impaired a body function, and if so, whether the impairment was serious.<sup>42</sup>

In an effort to bring the threshold into accord with this theme, the *DiFranco* Court overruled the pseudo-definition of "serious impairment" provided by the *Cassidy* Court and its progeny.<sup>43</sup> First, the Court found no textual authority for the notion that "serious impairment" was not to be decided as a matter of law and held that the question of whether a plaintiff has sustained a serious impairment of body function is a question of fact for the jury whenever a reasonable mind could differ as to the answer, even if there is no material factual dispute as to the nature and extent of a plaintiff's injuries.<sup>44</sup>

Second, the *DiFranco* Court rejected the *Cassidy* requirement that an "important" body function had to be impaired, concluding that there was no such requirement in the statutory language.<sup>45</sup>

Third, the *DiFranco* Court reversed *Cassidy*, holding that, an injury need not be "objectively manifested" as the phrase was previously construed by the Court of Appeals in *Williams v Payne*, 131 Mich. App. 403 (1984). The *Williams* decision required proof of "injuries subject to objective medical measurements." The *DiFranco* Court held that *Williams*' interpretation had proved to be "an almost insurmountable obstacle to recovery of non-economic damages in soft tissue injury cases."<sup>46</sup>

Finally, the *DiFranco* Court eliminated the lifestyle test established by *Cassidy*. The Court stated that "very simply, there is no such thing as a normal life," and thus, held that the no-fault threshold does not require proof that the injury interfered with the plaintiff's "general ability to live a normal life."<sup>47</sup>

In rejecting the *Cassidy* lifestyle standard, the Court stated that the standard "has proved to be an almost insurmountable obstacle to recovering non-economic damages. Apparently only plaintiffs who are bedridden, cannot care for themselves, or are unable to perform any type of work can satisfy this test. This was not the intent of the Legislature."<sup>48</sup>

In doing away with the "general ability to live a normal life" standard, the Court again observed that the relevant threshold inquiry is not the effect an injury has had on a plaintiff's lifestyle. Rather, the Court stated, "the relevant inquiries are whether the injury impaired a body function, and if so, whether that impairment was serious."<sup>49</sup>

This interpretation of the threshold led to the DiFranco Court's own two-part inquiry. The DiFranco Court held that the phrase "serious impairment of body function" involved two inquiries: (1) "What body function, if any, was impaired because of injuries sustained in a motor vehicle accident?" and (2) "Was the impairment serious?"<sup>50</sup>

The Court stated that "the focus of the inquiry is not on the injuries themselves, but how the injuries affected a particular body function. Generally medical testimony will be needed . . . The effect of the injury on the plaintiff's body functions is the paramount consideration, rather than the effect of the injury on the plaintiff's (or hypothetical persons) life."<sup>51</sup>

The DiFranco Court said that the jury should consider such factors as "the extent of the impairment, the particular body function impaired, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors."<sup>52</sup>

#### VI. 1995 Amendment to § 3135: The Lifestyle Element is Codified

The DiFranco decision produced dissatisfaction in the Legislature to the extent that in 1995 it enacted 1995 PA 222 (HB 4341) which reformed the tort threshold provisions of § 3135 of the No-Fault Act. The aim of the Legislature in enacting the 1995 bill was "to modify tort liability arising out of certain accidents."<sup>53</sup> As passed and signed by the Governor, the amendment made two significant changes to the threshold contained in § 3135. First, the amendment required courts to decide the "serious impairment of body function" issue if "there is no factual dispute concerning the nature and extent of the person's injuries," or if there is a factual dispute, but it is not material to the determination whether the person has suffered a serious impairment of body function.<sup>54</sup> Second, the amendment enacts the first ever legislative definition of the threshold requirement of "serious impairment of body function."<sup>55</sup> The amendment defines 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."<sup>56</sup>

In analyzing the 1995 amendment's impact on the lifestyle element of the threshold, the Kreiner Court made the following observation:

While Cassidy, required an evaluation of the effect of an injury on the person's general ability to live "a normal life," the DiFranco Court concluded that it was impossible to objectively determine what "a normal life" is, asserting: "there is no such thing as 'a normal life.'" Apparently cognizant of this comment, and attempting to reconcile the incongruity that DiFranco had pointed out, the Legislature, in the 1995 act, requires that the impairment affect "the person's general ability to lead his or her normal life." It is then clear that, harkening to the DiFranco Court's guidance that there is no objectively "normal life," the Legislature modified the entirely objective Cassidy standard to a partially objective and partially subjective inquiry. Thus, what is "normal" is to be determined subjectively on the basis of the plaintiff's own life and not the life of some objective third party. However, once that is fixed as the base, it is to be

objectively determined whether the impairment in fact affects the plaintiff's "general ability to lead" that life.<sup>57</sup>

Thus, the concept of "lifestyle effect" under the new no-fault legislation is different than a similarly sounding requirement in *Cassidy v McGovern*. Whereas in *Cassidy*, an objective test was applied to determine whether the lifestyle test was met, under 1995 PA 222, the focus of inquiry is on the effect of an injury on the injured plaintiff's life, not the effect of a similar injury on an "average" or a "typical" person. This is a critical distinction highlighted by the DiFranco Court. Thus, the amendment created a hybrid threshold that is a blend of *Cassidy* and DiFranco. However, as the Kreiner Court made clear, the balance is weighted quite heavily toward *Cassidy*.

## VII. Kreiner v. Fischer

### A. Introduction

In the years following the 1995 amendment, there was disagreement among the courts in interpreting the new statutory definition of "serious impairment of body function" when determining whether an injury satisfied the threshold. The disagreement revolved primarily around the lifestyle element contained in § 3135(7) of the No-Fault Act. On one side of the argument, Plaintiffs and their proponents argued that after 1995 it is only necessary to show that there has been an impairment of an important body function that, in some way, influences, touches or otherwise affects the plaintiff's lifestyle, regardless of degree.<sup>58</sup> If some effect has been demonstrated, the new legislative test is satisfied, regardless of the extent of the effect.<sup>59</sup> On the other side, Defendants and their proponents, contended that a plaintiff must demonstrate not simply that some aspect of his life has been affected, but that generally he is no longer able to lead his normal life.<sup>60</sup>

In *Kreiner*, the Supreme Court issued a consolidated opinion interpreting the lifestyle element of the No-Fault Act threshold.<sup>61</sup> The issue in these consolidated cases was whether plaintiffs have suffered a "serious impairment of body function and specifically, whether plaintiffs' impairments affect their general ability to lead their normal lives."<sup>62</sup> In the two consolidated cases, the trial courts ruled that neither plaintiff had sustained an impairment that affected his general ability to lead his normal life. In both cases, the Court of Appeals reversed. In its majority opinion, the Michigan Supreme Court reversed the Court of Appeals and found that neither *Kreiner* nor *Straub* had sustained an impairment that affected his general ability to lead his normal life and, therefore, both defendants were entitled to summary disposition as a matter of law.

### B. Re-emergence of *Cassidy v McGovern*

In *Kreiner*, the Court made it clear that the threshold should be interpreted in light of *Cassidy*. In commenting on the intent of 1995 PA 222 and the statutory definition of serious impairment of body function set forth in section 7 of that Act, the Court, in footnote 8, stated:

As should be evident, and as previous panels of the Court of Appeals have noted, the most uncomplicated reading of the 1995 amendment is that the Legislature clearly rejected DiFranco in favor of Cassidy.<sup>63</sup>

Based upon this comment it would appear that the majority opinion expresses the conclusion that the 1995 statutory definition of serious impairment embodies the Cassidy threshold and presumably resurrects appellate cases decided during that 48 month period.<sup>64</sup> Assuming this to be true, it would then appear logical that the most restrictive interpretation of the 1995 threshold would be the threshold established by the Supreme Court in Cassidy and the Court of Appeals cases decided thereafter.<sup>65</sup>

### C. Interpretation of the Lifestyle element

After expressing the notion that 1995 PA 222 is essentially a return to the threshold of Cassidy, the Court, in section IV of its opinion, made a series of comments characterizing the essence of the threshold phrase which requires that an impairment affect the person's "general ability to lead his or her normal life."<sup>66</sup> With regard to the lifestyle element of the statutory definition, the Court stated:

In order to be able to maintain an action for non-economic tort damages under the No-Fault Act, the "objectively manifested impairment of an important body function" that the plaintiff has suffered must affect his "general ability" to lead his normal life. Determining whether the impairment affects a plaintiff's "general ability" to lead his normal life requires considering whether the plaintiff is "generally able" to lead his normal life. If he is generally able to do so, then his general ability to lead his normal life has not been affected by the impairment.<sup>67</sup>

The Court then examined several dictionary definitions in order to flesh out the statutory language. Drawing from those definitions, the Court stated:

Accordingly, determining whether a plaintiff is "generally able" to lead his normal life requires considering whether the plaintiff is, "for the most part" able to lead his normal life. [To] "lead" one's normal life contemplates more than a minor interruption in life. To "lead" means, among other things, "to conduct or bring in a particular course." Given this meaning, the objectively manifested impairment of an important body function must affect the course of a person's life. Accordingly, the effect of the impairment on the course of a plaintiff's entire normal life must be considered. Although some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's "general ability" to lead his normal life has not been affected and he does not meet the "serious impairment of body function" threshold.<sup>68</sup>

The Court concluded that in analyzing whether an impairment affects a person's "general" i.e., overall, ability to lead his normal life, the primary focus should be identifying how his life has been affected, by how much, and for how long.<sup>69</sup> In conducting this inquiry, specific

activities should be examined with an understanding that not all activities have the same significance in a person's overall life.<sup>70</sup> Additionally, minor changes in how a person performs a specific activity may not change the fact that the person may still "generally" be able to perform that activity.<sup>71</sup>

#### D. The Kreiner Threshold Inquiry

The Court went on to discuss the process trial courts should follow in considering motions for summary disposition on the threshold issue, which the Court referred to as a "multi-step process" intended to provide a framework for the lower courts in determining the threshold in light of the new threshold interpretation. The Court laid out the process as follows:

First, a court must determine that there is no factual dispute concerning the nature and extent of the person's injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function. If a court so concludes, it may continue to the next step. But, if a court determines there are factual disputes concerning the nature and extent of a plaintiff's injuries that are material to determining whether the plaintiff has suffered a serious impairment of body function, the court may not decide the issue as a matter of law. Second, if a court can decide the issue as a matter of law, it must next determine if an 'important body function' of the plaintiff has been impaired. . . . If a court finds that an important body function has in fact been impaired, it must then determine if the impairment is objectively manifested. . . . If a court finds that an important body function has been impaired, and that the impairment is objectively manifested, it then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life. In determining whether the course of plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of plaintiff's overall life. . . .

The following nonexhaustive list of objective factors may be of assistance in evaluating whether the plaintiff's 'general ability' to conduct the course of his normal life has been affected: (a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery. This list of factors is not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves. For example, that the duration of the impairment is short does not necessarily preclude a finding of a 'serious impairment of body function.' On the other hand, that the duration of the impairment is long does not necessarily mandate a finding of a 'serious impairment of body function.' Instead, in order to determine whether one has suffered a 'serious impairment of body function,' the totality of the circumstances must be considered, and the ultimate question that must be answered is whether the impairment 'affects the person's general ability to conduct the course of his or her normal life.'<sup>72</sup>

In articulating this "multi-step process," the Court made a very important observation in footnote 19 that serious impairment determinations must be determined on a case-by-case basis and therefore these cases are not easily subject to bright light tests that will decide the issue.<sup>73</sup> In this regard, the Court stated, "We agree with the dissent that the 'serious impairment of body function' inquiry must 'proceed on a case-by-case basis because the statute requires inherently fact-specific and circumstantial determinations.'"<sup>74</sup>

#### E. Application of the Threshold Inquiry to Plaintiffs Kreiner and Straub

The Court first applied its newly established analysis to the facts of Kreiner. The Court noted that there was no factual dispute to the determination of whether Kreiner suffered a serious impairment of body function. Having found that Kreiner suffered a serious impairment of body function, the Court next examined whether the impairment was objectively manifested. The Court stated:

Kreiner's medically documented injuries to his lower back, right hip, and right leg constitute an impairment of an important body function that was objectively manifested.<sup>75</sup>

Continuing to the final step of the threshold inquiry, the lifestyle test, the Court stated:

We find that Kreiner's impairment did not affect his overall or broad ability to conduct the course of his normal life. In fact, his life after the accident was not significantly different than it was before the accident. He continued working as a self-employed carpenter and construction worker and was still able to perform all the work that he did before, with the possible exception of roofing work. His injuries did not cause him to miss one day of work. Looking at Kreiner's life as a whole, before and after the accident, and the nature and extent of his injuries, we conclude that his impairment did not affect his overall ability to conduct the course of his normal life. While he cannot work to full capacity, he is generally able to lead his normal life.<sup>76</sup>

Having found that Kreiner did not satisfy the threshold, the Court next turned to the facts of Straub. Similarly to Kreiner, the Court held that Straub satisfied the first to elements of the threshold, stating:

Straub's injuries to his non-dominant hand . . . constituted an impairment of an important body function that was objectively manifested.<sup>77</sup>

Also similarly to Kreiner, the Court held that Straub failed to satisfy the lifestyle element of the threshold, stating:

While an injury need not be permanent, it must be of sufficient duration to affect the course of a plaintiff's life. Straub's treatment consisted of having his wounds sutured, wearing a cast, and taking antibiotics and pain medication. Four days

after the accident, outpatient surgery was performed on the fingers and palm. The treatment was not significant or long-term. Within two months, the fracture and surgical wounds had healed. There were two sessions of physical therapy. At that point, Straub discontinued all medical treatment. Plaintiff estimated he was ninety-nine percent back to normal by mid-January 2000. Given that Straub's injury was not extensive, recuperation was short, unremarkable, and virtually complete, and the effect of the injury on body function was not pervasive, we conclude that Straub's general ability to live his normal life was not affected. There is no medical evidence that Straub has any residual impairment or that the course of Straub's life has been affected. The Temporary limitations Straub experienced do not satisfy the statutory prerequisites.<sup>78</sup>

## F. Specific Considerations in the Threshold Inquiry

Although the Kreiner Court did not establish a bright line test for determining what comprises a person's "general ability to lead his normal life", there are several considerations that the Court emphasized in finding that neither of the plaintiffs in Kreiner met the threshold. The considerations are the pervasiveness of the impairment, the permanency and duration of the impairment, the extent of work loss, and verifiable restrictions that result from the impairment.

### 1. Pervasiveness of the Impairment

In discussing how pervasive an impairment must be on the plaintiff's general ability to lead his normal life, the Court stated:

[T]he court must engage in an objective analysis regarding whether any difference between plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's 'general ability' to conduct the course of his life. Merely 'any effect' on the plaintiff's life is insufficient because a de minimus effect would not, as objectively viewed, affect the plaintiff's 'general ability' to lead his life.

However, in footnote 16, the Court qualified its previous statement by adding:

Contrary to the dissent, we do not require that 'every aspect of a person's life must be affected in order to satisfy the tort threshold.' . . . Rather, in a quite distinct proposition, we merely require that the whole life be considered in determining what satisfies this threshold, i.e., whether an impairment 'affects the person's general ability to lead his or her normal life.'

The Court refrained from enumerating "spheres of living," such as sleeping, eating, exercising, working, family interactions, etc. that constitute a normal life. Moreover, the Court gave no methodology how to prioritize those particular life activities that should be taken into consideration for purposes of determining whether a plaintiff's general ability to lead his normal life has been affected.<sup>79</sup>

Rather, the Court seems to say that although a person's entire life should be considered, the gravamen of the inquiry is to determine what aspects of a plaintiff's normal life are significant and important to that plaintiff and then engage in an objective analysis whether there has been something other than a de minimus impact in those areas of living.<sup>80</sup> This analysis truly seems to be at the heart of the new threshold inquiry. However, there is nothing in the majority opinion that mandates what specific activities to look at, how many of those activities have to be affected and the precise extent to which they must be affected.<sup>81</sup>

## 2. Permanency and Duration of Impairment

The Kreiner Court upheld the long established Michigan threshold law that an injury need not be permanent to be serious. In this regard, the Court stated, "While an injury need not be permanent, it must be of sufficient duration to affect the course of a plaintiff's life."<sup>82</sup> With regard to duration, the Court stated:

[The fact] that the duration of an impairment is short does not necessarily preclude a finding of a 'serious impairment of body function.' On the other hand, that the duration of the impairment is long does not necessarily mandate a finding of a 'serious impairment of body function.'<sup>83</sup>

## 3. Extent of Work Disability

Although the Court concluded that neither Kreiner nor Straub's work restrictions were significant enough to satisfy the threshold, they did not specify the extent to which a person's ability to work must be affected. Rather, the Kreiner Court left that determination for the lower courts to make by asking whether the injured is "generally able" to work. The Court did make it clear that a plaintiff need not be totally unable to work. In this regard, the Court stated:

Contrary to the dissent's contention, we are not concluding that Kreiner would have to show that he is unable to work at all in order to show that he has suffered a 'serious impairment of body function.' Instead, we are simply concluding that, although plaintiff has suffered an impairment that does have an effect on this ability to work, it is not a 'serious impairment of body function,' as defined by the Legislature, because plaintiff is 'generally able' to work and the course of his normal life is otherwise unaffected. We disagree with the dissent's suggestion that any effect on one's ability to work is sufficient to establish a 'serious impairment of body function.'<sup>84</sup>

In emphasizing the minimal impact on Kreiner's ability to work, the Court specifically noted:

He continued working as a self-employed carpenter and construction worker and was still able to perform all the work that he did before, with the possible exception of roofing work. His injuries did not cause him to miss one day of work. Kreiner states that he . . . was forced to limit his workday to six hours

because he can no longer work eight-hour days. Kreiner does not contend, however, that these limitations prevent him from performing his job.<sup>85</sup>

The majority viewed Straub's work impairment in a similar way when the Court stated:

The temporary limitations Straub experienced to not satisfy the statutory prerequisites. Considered against the backdrop of his preimpairment life and the limited nature and extent of his injuries, we conclude that Straub's postimpairment life is not so different that his 'general ability' to lead his normal life has been affected.<sup>86</sup>

#### 4. Verifiable Restrictions

After setting forth its "nonexhaustive list of objective factors," the Court emphasized the importance of doctor imposed restrictions in satisfying the "extent of any residual impairment" factor. In this regard, the Court stated:

Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish this point.<sup>87</sup>

This language would suggest that physician restrictions and expert opinions regarding the extent of residual impairment now have an increased importance in threshold issues.<sup>88</sup>

#### VIII. Post-Kreiner: The Difficult Judicial Inquiry

Several unreported cases have gone to the Michigan Court of Appeals on the lifestyle issue since the Kreiner decision. The results of these cases has been inconclusive to say the least. In each case, the Court applied the Kreiner threshold inquiry in determining whether the plaintiff was "generally able to lead his or her normal life." Likewise, in each case the Court examined and contrasted the facts surrounding the Kreiner plaintiffs with facts currently before them. The results of these analyses has been inconsistent, as can be expected when a person, albeit a judge, is required to determine whether an injured person's pre-accident and post-accident life are sufficiently different from one another as to satisfy the lifestyle element. Essentially, the judges required to subjectively decide what is important to the injured person and then objectively determine whether those important things have been impacted enough to alter the course of the plaintiff's entire life. Clearly, one person's opinion and viewpoint of whether the "course or trajectory" of a person's life has been affected will be different from that of another.

It can be argued that the Kreiner inquiry will become more clear as it is applied to more factual circumstances, however, even cases with facts strikingly similar to those in Kreiner have already been held to satisfy the lifestyle element.<sup>89</sup> The real problem lies in the Kreiner Court's failure to better state the degree to which an injured person's life must be affected. Apart from stating that "a minor interruption in life" is not sufficient, the Kreiner Court simply stated that "the ultimate question that must be answered is whether the impairment 'affects the person's general ability to conduct the course of his or her normal life.'" As a result of this ambiguity, it is

certain that inconsistency will continue as Plaintiffs argue that their injuries have affected their general ability to conduct the course of their lives and Defendants argue just the opposite.

## IX. Conclusion

The No-Fault Act was adopted in order to provide those injured automobile accidents with the assurance that their resultant medical and economic loss will be covered with minimal litigation. In exchange for this assurance, those injured are required to abandon their tort claims against the tortfeasor that injured them unless their injuries consist of death, permanent disfigurement or serious impairment of bodily function. In order to effectuate the No-Fault compromise, courts and the legislature have repeatedly modified the threshold to non-economic loss recovery. Incorporated within these modifications to the threshold was the adoption, repeal, codification and interpretation of a lifestyle element. The Michigan Supreme Court most recently addressed the lifestyle element in *Kreiner*. In *Kreiner*, the Court directed the lower courts to engage in a multi-part analysis in order to determine whether the plaintiff has suffered a “serious impairment of body function.” The final and most crucial step of this analysis, the lifestyle element, requires the Court to objectively examine the plaintiff’s pre-injury and post-injury lifestyle, looking at whether the plaintiff’s general ability to conduct the course of his life has been affected.

In this regard, the *Kreiner* Court provided a rough framework for the analysis, but little more in the way of guidance for the lower courts. The Court did not establish a bright line test for determining the threshold, nor did they provide a list of injuries that satisfy the threshold. Thus, the specifics of each injury will be crucial in determining whether a plaintiff will satisfy the threshold. The Court must believe that injury is significant and of a sufficient degree. In this regard, the Court will consider the pervasiveness of the impairment, the permanency and duration of the impairment, the extent of work loss, and verifiable restrictions that result from the impairment. The end determination will clearly be facts and circumstances driven, making it crucial that a plaintiff is able to convincingly demonstrate that his injury affected his general ability to lead his normal life.

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<sup>1</sup> *Cassidy v McGovern*, 415 Mich. 483, 500 (1982).

<sup>2</sup> MCL 500.3135(1).

<sup>3</sup> *Cassidy*, supra.

<sup>4</sup> *Kreiner v. Fischer*, 471 Mich. 109 (2004).

<sup>5</sup> George T. Sinas & Robert M. Ransom, The 1995 no-fault tort threshold: A statutory hybrid, 76 Mich. Bar J 76 (1997).

<sup>6</sup> *Kreiner*, supra.

<sup>7</sup> *Kreiner*, supra.

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<sup>8</sup> Claudia Maria Darmofal, The dismantling of Michigan's No-Fault Auto Insurance Law by House Bill 4156: The Permanent Scaling Back of Auto Insurance Coverage in Michigan For the Promise of a Temporary Rate Reduction, 71 U. Det. Mercy L. Rev. 597 (1994).

<sup>9</sup> Robert H. Joost, Automobile Insurance and No-Fault Law (2d. ed. 1992), note 4, 1-1.

<sup>10</sup> *Id.* at 1-1 to 1-2.

<sup>11</sup> *Id.* at 1-2.

<sup>12</sup> *Id.*

<sup>13</sup> R. Keeton & J. O'Connell, Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance (1965) reprinted in William H. Horton, A Performance Review of Michigan No-Fault, 60 Mich. Bus. L.J. 744, 745 (1981).

<sup>14</sup> Thomas C. Jones, No-Fault Automobile Insurance In Michigan: A Preliminary Study reprinted in No-Fault Automobile Insurance in Action: The Experiences in Massachusetts, Florida, Delaware and Michigan, p. 379-81 (1977).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Shavers v Attorney General*, 402 Mich. 554 (1978).

<sup>18</sup> *Id.*

<sup>19</sup> Mich. Comp. Laws Ann. § 500.3107(1)(a) (1973).

<sup>20</sup> Mich. Comp. Laws Ann. § 500.3107(1)(b) (1973).

<sup>21</sup> Mich. Comp. Laws Ann. § 500.3107(1)(c) (1973).

<sup>22</sup> Mich. Comp. Laws Ann. § 500.3135(1) (1973).

<sup>23</sup> Darmofal, *supra*.

<sup>24</sup> Mich. Comp. Laws Ann. § 55.3135 (West 1983).

<sup>25</sup> *Id.*

<sup>26</sup> *Advisory Opinion re Constitutionality of 1972 PA 294*, 208 N.W. 2d 469, 480 (Mich. 1973). The Court held, "such phrases [as serious impairment of body function and permanent serious disfigurement] are capable of legal interpretation . . . such findings result from denominated fact questions and thus are within the exclusive province of the trier of fact."

<sup>27</sup> *Kreiner*, *supra*.

<sup>28</sup> *Id.*

<sup>29</sup> George T. Sinas, MTLA Redbook (2003 ed., 2<sup>nd</sup> supp.).

<sup>30</sup> Plaintiff, Leo Cassidy, suffered a complete break of two bones in his lower right leg. He was hospitalized for 18 days, wore four casts for seven months, suffered from dizzy spells forcing him to use a walker instead of crutches

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during recuperation, and complained of leg pain one and a half years after the accident. Cassidy's own physician testified that the fractures had completely healed, that there was no significant residual damage and that Cassidy had returned to normal following the accident. A defense physician was not able to find any reason for continuing pain. Plaintiff, Barbara Hermann, received injuries much less severe than Mr. Cassidy in both intensity and duration. She sustained a bump on her head which cleared up in one month, bruises on both knees which cleared up in two months but caused no pain or problem, and neck and back pains requiring nine doctor visits in the immediate one month period following the accident. Hermann was off work for one month and had no problems with any of her injuries after two months from the accident date. Sinas, *supra*.

<sup>31</sup> *Cassidy*, *supra*.

<sup>32</sup> *Id.*

<sup>33</sup> Sinas, *supra*.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Kreiner*, *supra*, *citing* 415 Mich. 483.

<sup>37</sup> *Cassidy* at 500.

<sup>38</sup> *Cassidy* at 505.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> In *DiFranco*, the Plaintiff sustained soft tissue neck and lower back injuries. He had muscle spasms, active range of motion limitations and loss of normal spinal lordosis. His injuries required some physical therapy and at home treatment. Plaintiff was off work for approximately 2 months and was able to return without restrictions. He continued to experience pain and range of motion limitations. His doctor indicated his condition was chronic. The trial court denied motions for summary judgment filed by both plaintiff and defendant and permitted the case to go to the jury who found the plaintiff had not suffered a serious impairment of body function. The Supreme Court held that, in light of the fact that reasonable minds could differ on a question, the question was properly submitted to the jury for determination of the threshold and their finding was not against the great weight of the evidence. Sinas, *supra*.

<sup>42</sup> *DiFranco v Pickard*, 427 Mich. 32 (1986).

<sup>43</sup> Even though the Court recognized that modifying the Cassidy decision would result in more third party cases going to trial, the Court noted that permitting more tort cases to proceed to trial will not "cripple the no-fault system." The Court stated that "we note that limiting tort liability for non-economic losses is not an essential feature of No-Fault Acts. Several no-fault states place no limitations on the ability to sue for these damages." The Court also added, "moreover, No-Fault Acts were designed primarily to reduce the number of cases seeking damages for economic loss, e.g., wage loss, survivor's loss, and medical expenses."

The Court also acknowledged that jurors are quite capable of understanding the phrase "serious impairment of body function." The Court observed that no evidence exists that supports the notion that the Legislature's original intent was to take the threshold issues away from juries. The Court commented "Moreover, trial and appellate courts have proven to be no more consistent than juries would have been in determining whether a particular plaintiff suffered a serious impairment of body function. . . . Properly instructed jurors are capable of weighing evidence and using their collective experiences to determine whether a particular plaintiff has suffered an impairment of body function and whether that impairment was serious. Their verdict represents the collective judgment of six people, as opposed to

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the views of one trial judge, and perhaps a panel of appellate judges reviewing, a cold record. Without further guidance from the Legislature, we believe that juries are better suited to resolving threshold questions where reasonable minds can differ on the answer." Sinas, *supra*.

<sup>44</sup> *DiFranco* at 38. The *DiFranco* Court stated, "our holding marks a return to the rules articulated in Advisory Opinion re: Constitutionality of 1972 PA 294, 389 Mich. 441 (1973) and the Court of Appeals decisions which are consistent with that opinion."

<sup>45</sup> *Id.* at 39.

<sup>46</sup> *Id.* at 40, 73.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 39, 66.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 39, 67.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* The Court Gave the Following two-part jury instructions:

- 1) The plaintiff must prove that the claimed injuries impaired one or more body functions and that the impairment of body function was serious; and
- 2) In determining whether the impairment of body function was serious, the jury should consider such factors as the extent of the impairment, the particular body function impaired, the length of time the impairment lasted, the treatment required to correct the impairment and any other relevant factors. The court specifically observed that "an impairment need not be permanent to be serious."

<sup>53</sup> *Id.*

<sup>54</sup> Mich. Comp. Laws Ann. § 500.3135(2) (1995). The Bill States in relevant part:

(2) For a cause of action for damages pursuant to subsection (1) filed on or after 120 days after the effective date of this subsection, all of the following apply:

(a) The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

(i) There is no factual dispute concerning the nature and extent of the personal injuries.

(ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement.

However, for a closed head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed head injuries testifies under oath that there may be a serious neurological injury.

(b) Damages shall be assessed on the basis of comparative fault, except that damages shall not be assessed in favor of a party who is more than 50% at fault.

(c) Damages shall not be assessed in favor of a party who was operating his or her own vehicle at the time the injury occurred and did not have in effect for that motor vehicle the security required by section 3101 at the time the injury occurred.

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<sup>55</sup> Sinas, *supra*.

<sup>56</sup> Mich. Comp. Laws Ann. § 500.3135(7) (1995). The Bill states in relevant part, “As used in this section, "serious impairment of body function" means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life.”

<sup>57</sup> *Kreiner*, *supra*, footnote 7.

<sup>58</sup> *Kreiner*, *supra*.

<sup>59</sup> Sinas & Ransom, *supra*.

<sup>60</sup> *Kreiner*, *supra*.

<sup>61</sup> Sinas, *supra*.

<sup>62</sup> *Kreiner*, *supra*.

<sup>63</sup> Sinas, *supra*.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Kreiner*, *supra*.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Sinas, *supra*.

<sup>74</sup> *Kreiner*, *supra*.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Sinas, *supra*.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

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<sup>82</sup> *Kreiner*, supra.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*, footnote 23.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*, footnote 17.

<sup>88</sup> *Sinas*, supra.

<sup>89</sup> See, *Ream v. Burke Asphalt Paving*, 2005 Mich. App. LEXIS 216. In *Ream*, the plaintiff was unable to work for two months and was unable to hunt as he was prior to the accident. Contrast that with *Kreiner* where plaintiff *Straub* also missed two months of work on account of his accident and plaintiff *Kreiner* was unable to hunt as he had prior to the accident.