

**Defining Serious Impairment of Body Function:
The Aftermath of *Kreiner* and the Need for Change**

Mark E. Warmbier

TABLE OF CONTENTS

INTRODUCTION	1
I. MICHIGAN’S NO-FAULT INSURANCE SCHEME	4
A. General Concepts of No-Fault Insurance.....	4
B. Adoption of No-Fault Insurance in Michigan.....	5
C. Michigan Case Law Pre- <i>Kreiner</i>	7
II. <i>KREINER V. FISCHER</i>	10
A. Overview of the Case.....	10
B. The Court’s Interpretation of Serious Impairment of Body Function.....	12
III. STATUTORY INTERPRETATION.....	14
A. Basic Tenets of Statutory Interpretation	14
B. The Court’s Flawed Approach in Defining Serious Impairment of Body Function.....	15
IV. IMPACT OF THE <i>KREINER</i> DECISION	17
A. Barriers to Recovery	17
B. Post- <i>Kreiner</i> Decisions	18
V. COMPARISON OF THE TORT THRESHOLDS IN OTHER JURISDICTIONS	20
VI. POTENTIAL SOLUTION.....	27
A. Proposed Amendment to Michigan’s No-Fault Statute	27
B. Application of the Proposed Amendment	30
CONCLUSION.....	33

INTRODUCTION

Imagine the devastation felt by an elderly grandmother who lost the ability to actively play with her loving grandchildren.¹ Picture the frustration of a young guitarist whose injured

¹ See *Farley v. Jeremiah*, No. 251160 (Mich. Ct. App. Feb. 15, 2005).

hand prevents him from playing in his band.² Based on the rationale of *Kreiner v. Fischer*,³ if such losses were incurred as a result of an automobile accident in Michigan, neither the grandmother nor the guitarist would be permitted to seek recovery for pain and suffering. Despite the significance of the losses, the Michigan courts would conclude that the ability of the grandmother and the guitarist to lead their normal life has not been generally affected.

In *Kreiner*, the Court analyzed the right to recover noneconomic damages resulting from an automobile accident under Michigan's no-fault insurance system.⁴ A no-fault insurance system seeks to allow quick recovery of damages for injuries incurred in an automobile accident, regardless of fault.⁵ In exchange for the benefits of such a system, the no-fault scheme places certain restrictions on the recovery of noneconomic damages. According to Michigan's no-fault statute, recovery for such damages is only permitted if the injury in question results in "death, serious impairment of body function, or permanent serious disfigurement."⁶ Since the adoption of the no-fault insurance scheme in 1973, Michigan courts have struggled to provide a clear definition of the tort threshold, particularly, the requirement of a serious impairment of body function.⁷ The Michigan Legislature defined 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."⁸ Despite the attempt at clarification, the application of the definition in practice has proved troublesome, leading to disagreements concerning the appropriate threshold level. An overly-restrictive tort threshold prevents full

² See *Kreiner v. Fischer*, 471 Mich. 109 (2004).

³ 471 Mich. 109 (2004).

⁴ *Kreiner*, 471 Mich. at 109. See *infra* notes 48-79 and accompanying text.

⁵ See ALAN I. WIDISS ET AL., NO-FAULT AUTOMOBILE INSURANCE IN ACTION: THE EXPERIENCES IN MASSACHUSETTS, FLORIDA, DELAWARE AND MICHIGAN 381 (1977).

⁶ MICH. COMP. LAWS § 500.3135(1) (2004).

⁷ See *infra* notes 31-47 and accompanying text.

⁸ MICH. COMP. LAWS § 500.3135(7) (2004).

compensation for legitimate injuries; whereas, an overly-lenient threshold thwarts the basic goals of the no-fault insurance system. Determining the proper balance is crucial to the survival of the system. The *Kreiner* Court evaluated the definition of serious impairment of body function and concluded that the injury in question must affect “the course or trajectory of the plaintiff’s normal life.”⁹ The decision effectively raised the tort threshold in Michigan to a level inconsistent with the language of the statute, the intent of the legislature, and the tort thresholds in other no-fault jurisdictions.

Part I of this comment will discuss the general concepts of no-fault insurance and the development of no-fault insurance in Michigan. Part II will focus on the specifics of the *Kreiner* decision. This section will detail the facts of the consolidated cases, the particulars of the injuries suffered by the individuals, and the Court’s interpretation of the serious impairment of body function threshold. Part III will discuss the basic requirements of statutory interpretation and analyze the Court’s flawed approach in defining serious impairment of body function. Part IV will focus on the impact of the *Kreiner* decision. This section will discuss the barriers put in place by the new definition and will analyze how subsequent cases have applied the new requirements to various fact patterns. Part V will provide a comparison of the Michigan tort threshold to other no-fault jurisdictions and emphasize the overly-restrictive approach of the Michigan system. Part VI will suggest a more appropriate definition for serious impairment of body function to better address the goals of the no-fault insurance scheme, the concerns of the judiciary in reducing litigation, and the interests of plaintiffs in full compensation for the injuries suffered.

⁹ *Kreiner*, 471 Mich. at 131.

I. MICHIGAN'S NO-FAULT INSURANCE SCHEME

A. General Concepts of No-Fault Insurance

Prior to 1973, Michigan residents relied exclusively on the traditional tort system to compensate injuries arising out of a motor vehicle accident.¹⁰ The fault-based tort system received considerable criticism. The frequency of automobile accidents resulted in a countless number of lawsuits requesting relatively minor relief which caused congestion in the courts and significant delays.¹¹ Additionally, the traditional fault-based tort system placed a heavy burden on the plaintiff to produce evidence; however, the chaos and quickness of an automobile accident often prevented the plaintiff from obtaining the required evidence, ascertaining how the events transpired, or tracking down the witnesses, who likely sped away after a quick glance at the accident scene.¹² The costs incurred in filing a tort claim, the fees charged by attorneys, and the risk of failing to recover damages from a financially-drained individual defendant, resulted in a sea of legitimate, yet uncompensated, injuries resulting from automobile accidents.¹³

The no-fault system of automobile insurance attempts to eliminate, or at least reduce, the problems associated with the traditional fault-based tort system. For instance, the no-fault system seeks to compensate injured parties for economic damages adequately, promptly, and without regard to fault; lower the nuisance value of small claims; eliminate the adversarial relationship between the insurer and insured; and reduce the amount of court congestion and litigation expenses.¹⁴ In exchange for such benefits, the no-fault system limits the ability of the injured party to recover noneconomic damages which resulted from the injuries received in the

¹⁰ See ROBERT E. LOGEMAN, MICHIGAN NO-FAULT AUTOMOBILE CASES: LAW AND PRACTICE 7-21 (3d ed. 2002).

¹¹ M.G. WOODROOF II ET AL., AUTOMOBILE INSURANCE AND NO-FAULT LAW 415 (1974).

¹² *Id.*

¹³ See *id.*

¹⁴ See WIDISS, *supra* note 5 (detailing the testimony of Commissioner Russel Van Hooser before the Michigan Legislature prior to the adoption of the no-fault plan).

automobile accident.¹⁵ The majority of the no-fault states limit such recovery based on a monetary threshold. For example, in Kentucky, recovery for noneconomic damages is barred unless the injured's medical expenses surpass \$1,000.¹⁶ Other states, including Michigan, have elected to use a verbal threshold. A verbal threshold creates a necessary standard that is based on a description of the extent of an injury, rather than economic damages caused by the injury. For example, New York requires that the plaintiff suffer a "serious injury" as defined by the statute.¹⁷ The specific limitations on noneconomic damage recovery, as will be discussed, vary significantly among the states operating under a no-fault scheme; however, the general objective is to limit such recovery where the injuries are deemed to be minor.¹⁸

B. Adoption of No-Fault Insurance in Michigan

In order to take advantage of the benefits described above, Michigan enacted the No-Fault Act in 1973.¹⁹ The act enables motorists, passengers, bicyclists and pedestrians to recover certain first party benefits from their own insurance carrier, regardless of fault.²⁰ The allowable first party benefits are broken down into three main categories. First, the insured is entitled to

¹⁵ See Jack L. Hoffman & Thomas A. Kuiper, *Injecting Fault Into No-Fault: Does SJ12D 50.11 Apply in a First-Party No-Fault Case?*, MICH. B. J. 928, 929 (1998). In the article, Hoffman and Kuiper emphasize that "[t]he No-Fault Act was a radical restructuring of the rights and liabilities of motorists" and recognize that the act was a compromise to achieve the best overall results. *Id.* As a result, the act "does not purport to compensate victims for all economic losses." *Id.*

¹⁶ KY. REV. STAT. ANN. § 304.39-060(2)(b) (Banks-Baldwin 2004).

¹⁷ N.Y. INSURANCE LAW § 28.5104(a) (McKinney 2004). The New York statute later defines "serious injury" to be: [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 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 § 28.5102(d) (McKinney 2004).

¹⁸ See *infra* notes 110-34; see also 1 Irvin E. Schermer, *Automobile Liability Insurance* 3d § 17.02 (1995).

"Although the wording of no-fault statutes varies by state, all states agree that death is not a minor injury and should permit a suit for noneconomic damages." *Id.*

¹⁹ See LOGEMAN, *supra* note 10.

²⁰ See *Heard v. State Farm Mut. Auto. Ins. Co.*, 414 Mich. 139, 145 (1982).

unlimited medical expenses arising from the injury.²¹ Such benefits continue for the duration of the insured's life, assuming that the medical expenses are connected to the treatment of the injury resulting from the accident.²² Second, the insured is entitled to receive work loss benefits.²³ If the insured person is unable to return to work due to the injuries suffered in the accident, the act generally permits recovery of 85% of the insured's wages, free of tax, up to a limited cap.²⁴ The work loss benefits, however, are only available for three years.²⁵ Third, the insured may recover costs for replacement services.²⁶ As a result of the accident, the insured may be unable to perform the normal activities of his or her daily life, such as lawn care or household chores. The act enables the insured person to recover a portion of the costs incurred in hiring out such activities to another party. The insured person may receive benefits in the amount of twenty dollars per day, seven days per week, for a maximum of three years.²⁷

In exchange for the guarantee of certain first party benefits, the act restricts the ability of the insured party to sue in tort. The insured party is only permitted to sue in tort under three circumstances. First, if the accident occurred as a result of an intentional act of another party, the insured party may commence a tort suit for damages.²⁸ Additionally, if the economic damages incurred due to work loss and replacement services exceed the limitations imposed by the statute, the insured person may bring a claim to recover the excess economic damages.²⁹ Finally, if the injuries suffered meet a specified threshold, the insured party may sue in tort to recover

²¹ MICH COMP. LAWS § 500.3107(1)(a) (2004).

²² *Id.*

²³ MICH COMP LAWS § 500.3107(1)(b) (2004).

²⁴ *Id.* The current maximum work loss payment is \$4,293 per month. The current rate is in effect through September 30, 2005. Each year, an adjustment is made to reflect the increase in the cost of living. *Id.*

²⁵ *Id.*

²⁶ MICH COMP. LAWS § 500.3107(1)(c) (2004).

²⁷ *Id.* As opposed to the wage loss provision, the replacement services allowance is not adjusted annually to reflect the increased cost of living.

²⁸ MICH COMP. LAWS § 500.3135(3)(a) (2004).

²⁹ MICH. COMP. LAWS § 500.3135(3)(c) (2004).

noneconomic damages, such as pain and suffering. In Michigan, “[a] person remains subject to tort liability for noneconomic 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.”³⁰ Despite attempts at clarification, the precise meaning of the tort threshold, specifically the requirement of serious impairment of body function, has remained uncertain since the adoption of the No-Fault Act.

C. Michigan Case Law Pre-*Kreiner*

The original text of the Michigan No-Fault Act did not define serious impairment of body function. An advisory opinion issued in 1973³¹ determined that the phrase was “sufficiently self-defined and provided a standard of review for deciding a question of fact.”³² During the ten years immediately following the enactment of the act, courts tended to allow juries to decide whether an injury met the requirements of the tort threshold.³³ In order to be submitted to a jury, the court simply analyzed whether a reasonable jury could find the existence of a serious impairment of body function. Personal injury claims were seldom barred from the courts as a result of the low standard.³⁴

In 1982, the Michigan Supreme Court effectively raised the tort threshold for recovery of noneconomic damages in *Cassidy v. McGovern*.³⁵ The Court held that the decision of whether

³⁰ MICH. COMP. LAWS § 500.3135(1) (2004) (emphasis added).

³¹ See Advisory Opinion re Constitutionality of 1972 PA 294, 389 Mich. 441 (1973). The advisory opinion was requested by Governor William G. Milliken and the Senate in order to determine the constitutionality of Michigan’s original no-fault insurance act. *Id.* at 460. The Michigan Supreme Court found the act to be constitutional and concluded that the phrases used in the act, such as “serious impairment of body function” and “permanent serious disfigurement” provided standards sufficient for legal interpretation. *Id.* at 477-81.

³² LOGEMAN, *supra* note 10 (citing Advisory Opinion re Constitutionality of 1972 PA 294, 389 Mich. 441 (1973)).

³³ *Id.*

³⁴ *Id.* at 7-21 – 7-22.

³⁵ 415 Mich. 483 (1982). The Michigan Supreme Court consolidated two cases to consider the proper application of the serious impairment of body function requirement of the no-fault statute. In the first case, Barbara Hermann was involved in a automobile accident and “suffered injuries to her back, neck, head, shoulders, arms, and legs, as well as abrasions, contusions, and headaches.” *Cassidy*, 415 Mich. at 488. The Court concluded that Ms. Hermann’s

an injury meets the standard of serious impairment of body function, assuming no material factual disputes exist, was a question of law for the court.³⁶ Additionally, the Court emphasized the requirement of an objectively manifested injury which affected the ability to live a normal life. The *Cassidy* decision reflected a significant turn in the Michigan courts' approach toward no-fault cases.³⁷ In a number of post-*Cassidy* decisions, the courts concluded that several injuries, such as fractured jaws, collar bones, or other broken bones, did not meet the serious impairment of body function threshold.³⁸

Four years later, the Michigan Supreme Court retreated from its holding in *Cassidy*. In *DiFranco v. Pickard*,³⁹ the Court held that if reasonable minds could differ as to whether or not a serious impairment of body function existed, the issue should be submitted to the jury.⁴⁰ Additionally, the *DiFranco* court discarded the “general ability to live a normal life” test of the *Cassidy* court as “an almost insurmountable obstacle to recovering noneconomic damages.”⁴¹ Instead, the Court developed a two-part test to determine whether a serious impairment of body

injuries did not rise to the level of a serious impairment of body function due to the minor nature of the injuries and the relatively speedy recovery period. In the second case, the Court held that Leo Cassidy met the serious impairment of body function threshold. The Court reasoned that “two broken bones, 18 days of hospitalization, seven months of wearing casts during which dizzy spells further affected his mobility, and at least a minor residual effect one and one-half years later are sufficiently serious to meet the threshold requirement of serious impairment of body function.” *Id.* at 505.

³⁶ *Id.* at 488.

³⁷ See LOGEMAN, *supra* note 10.

³⁸ *Id.*, at 7-22.

³⁹ 427 Mich. 32 (1986). In *DiFranco*, the Michigan Supreme Court considered five consolidated actions to determine the proper standard for recovery of noneconomic damages based on a serious impairment of body function. *DiFranco*, 427 Mich. at 38. The lower courts denied recovery in all cases as a result of the standard articulated in *Cassidy*. The *DiFranco* court feared that the *Cassidy* standard would limit recovery for noneconomic damages to only those plaintiffs with catastrophic injuries. As a result, the court introduced a more lenient standard. *Id.* Based on the new standard, the result in three of the consolidated cases remained unchanged. The issues of whether a serious impairment of body function existed for three cases had originally been submitted to juries which concluded that no such impairment existed. The *DiFranco* court affirmed each decision. *Id.* at 76-85. The two remaining cases resulted in a judgment notwithstanding the verdict and a summary judgment in favor of the defendants. The *DiFranco* court reversed the decisions and remanded for further proceedings in light of the newly articulated standard for serious impairment of body function. *Id.* at 85-92.

⁴⁰ *Id.* at 58.

⁴¹ *Id.* at 66.

function existed.⁴² First, courts must inquire as to what body function was impaired as a result of the injuries suffered in the automobile accident. Second, courts must determine whether the impairment was serious. The Court concluded that such a test would effectively preserve the intent of the Michigan Legislature to set a significant, yet not extraordinarily high, threshold for the recovery of noneconomic damages.⁴³

In 1996, the Michigan Legislature amended the No-Fault Act in a manner that returned to the approach of the *Cassidy* court.⁴⁴ The amendments codified the notion that courts should determine whether a serious impairment of body function exists as a question of law, assuming that no material factual disputes exist.⁴⁵ Additionally, the amendments attempted to clarify the uncertainty surrounding the meaning of serious impairment of body function by defining the term for the first time. The amended statute defined the term as “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.”⁴⁶ Despite the new definition, the precise meaning of the serious impairment of body function requirement continued to be a point of contention. In 2004, more than thirty years after the initial adoption of the No-Fault Act, the Michigan Supreme Court faced another challenging test of interpreting the serious impairment of body function requirement in the case of *Kreiner v. Fischer*.⁴⁷

⁴² *Id.* at 67.

⁴³ *Id.* at 60, 67.

⁴⁴ See LOGEMAN, *supra* note 10.

⁴⁵ *Id.*; see also MICH. COMP. LAWS § 500.3135(2)(a) (2004).

⁴⁶ MICH. COMP. LAWS § 500.3135(7) (2004).

⁴⁷ 471 Mich. 109 (2004). The decision in *Kreiner* was a consolidated review of the lower court cases of *Straub v. Collette*, 254 Mich. App. 454 (2002) and *Kreiner v. Fischer*, 251 Mich. App. 513 (2002).

II. KREINER V. FISCHER

A. Overview of the Case

In *Kreiner*, the Michigan Supreme Court consolidated two lower court decisions in order to determine the proper interpretation of serious impairment of body function. The first of the consolidated cases involved Richard Kreiner, who suffered injuries to his lower back, right hip and right leg following an automobile accident on November 28, 1997.⁴⁸ After receiving cortisone injections, physical therapy, and medication, Kreiner's pain continued.⁴⁹ Six weeks after the initial accident, Kreiner was referred to a neurologist, who diagnosed him with "mild nerve irritation to the right fourth lumbar (L4) nerve root in Kreiner's back and degenerative disc disease with spondylolisthesis."⁵⁰ In August of 1999, nearly two years following the accident, Kreiner returned for medical treatment due to continuous pain in his lower back and right leg.⁵¹ Kreiner's physician prescribed additional muscle relaxants and instructed Kreiner "to continue the home exercises, to use a back support during daily activity, to avoid lifting objects over fifteen pounds, and to refrain from excessive bending or twisting."⁵²

Kreiner, a self-employed carpenter and construction worker, was forced to limit his work hours and tasks as a result of the injuries suffered.⁵³ For instance, Kreiner could only work a maximum of six hours per day.⁵⁴ Common construction activities, such as roofing projects, were too difficult to complete.⁵⁵ Additionally, Kreiner could not stand on a ladder for more than

⁴⁸ *Kreiner v. Fischer*, 471 Mich. 109, 124 (2004).

⁴⁹ *Kreiner*, 471 Mich. at 124.

⁵⁰ *Id.* at 124-25.

⁵¹ *Id.* at 125.

⁵² *Id.*

⁵³ *Id.* at 125-26.

⁵⁴ *Id.* at 126.

⁵⁵ *Kreiner*, 471 Mich. at 126.

twenty minutes at a time and could not walk for more than one-half mile without a rest.⁵⁶ The injuries also restricted the recreational activities Kreiner enjoyed prior to the accident.⁵⁷

The second of the consolidated cases involved Daniel Straub, who injured his non-dominant hand when his motorcycle collided with an automobile on September 19, 1999.⁵⁸ Straub's little finger was broken and tendons in his ring and middle finger were injured.⁵⁹ Following surgery to repair the tendons, Straub wore a cast on his hand for one month, took regular pain medication, and underwent physical therapy.⁶⁰

Due to his injuries, Straub was unable to return to full-time work as a cable lineman until December 14, 1999, nearly three months following the accident.⁶¹ During his recovery period, Straub "had difficulty doing household chores, such as washing dishes, doing yard work, and making property repairs."⁶² In addition, Straub was unable to operate his archery shop during the fall hunting season and could not play guitar in his band for four months.⁶³ Prior to the accident, Straub practiced the guitar several times a week and performed with his band nearly every weekend.⁶⁴

Despite the extent of the injuries suffered, the Michigan Supreme Court determined that both Kreiner and Straub failed to meet the tort threshold of "serious impairment of body function" and denied recovery for noneconomic damages.⁶⁵

⁵⁶ *Id.*

⁵⁷ *Id.* Due to his injuries, Kreiner was no longer able to hunt rabbits. The general pain suffered and the inability to walk for more than one-half mile made this formerly customary activity impossible.

⁵⁸ *Id.* at 122.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Kreiner*, 471 Mich. at 122. Straub initially returned to work in November, however, he was only able to work between twenty and twenty-five hours per week.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 123.

⁶⁵ *Id.* at 138-39.

B. The Court's Interpretation of Serious Impairment of Body Function

In rendering its final decision, the Court initially turned to the plain language of Michigan's no-fault statute and reiterated the definition of a serious impairment of body function. As defined by section 500.3135(7) of the Michigan Compiled Laws, a serious impairment of body function is "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."⁶⁶

Next, the Court zeroed in on the phrase "general ability to lead his or her normal life," in particular, the words "general" and "lead."⁶⁷ The Court stated that "[d]etermining 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."⁶⁸ The Court turned to various dictionary definitions to shed further light on the term "general" and settled on a meaning of "for the most part."⁶⁹ Therefore, an injured plaintiff in a no-fault automobile accident will not be deemed to have a serious impairment of body function if the plaintiff is able to lead his or her normal life, for the most part, following the accident.⁷⁰ In analyzing the proper meaning of the word "lead," the Court concluded that "to lead" means "to conduct or bring in a particular course."⁷¹ Based on this definition, the Court further reasoned that the impairment "must affect the *course* of a person's life."⁷² The Court stated that:

⁶⁶ MICH. COMP. LAWS § 500.3135(7) (2004).

⁶⁷ *Kreiner*, 471 Mich. at 130.

⁶⁸ *Id.* (emphasis added).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* (quoting *Random House Webster's Unabridged Dictionary* (2001)).

⁷² *Id.* at 131 (emphasis in original).

[a]lthough some aspects of a plaintiff's 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.⁷³

In an attempt to provide a framework for lower courts to follow in no-fault automobile negligence cases, the Court summarized the procedure to determine the existence of a serious impairment of body function in three steps. First, courts must conclude that there is no material factual dispute as to the nature and extent of the injuries suffered.⁷⁴ Second, the courts must analyze whether or not the injuries suffered affect an "important body function" and whether or not such injuries are "objectively manifested."⁷⁵ Assuming the above criteria are fulfilled, the final step for the courts is to determine whether the plaintiff's injuries affect the general ability to lead his or her normal life.⁷⁶ Such determination is made by "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."⁷⁷ The Court developed a non-exhaustive list of factors to consider when analyzing whether an injury affects the general ability to lead a normal life. The factors include "(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."⁷⁸ The totality of the circumstances must be analyzed, as opposed to the

⁷³ *Kreiner*, 471 Mich. at 131.

⁷⁴ *Id.* at 131-32.

⁷⁵ *Id.* at 132.

⁷⁶ *Id.*

⁷⁷ *Id.* at 132-33.

⁷⁸ *Id.* at 133. The Court noted that self-imposed restrictions should not be considered in determining the extent of residual impairment. Consideration should only be given to physician-imposed restrictions.

extent of each individual factor, in order to determine the effect on the plaintiff's general ability to lead his or her normal life.⁷⁹

The Court's analysis of the serious impairment of body function standard not only slammed the door in the face of countless future, legitimate claims, but was based on a flawed approach to statutory interpretation.

III. STATUTORY INTERPRETATION

A. Basic Tenets of Statutory Interpretation

When courts are faced with the task of interpreting a statute, the primary goal is to ensure that the intent of the legislature is carried out.⁸⁰ Over the years, courts have developed widely-accepted principles of statutory construction to best effectuate the desires of the legislature. The main principle is that courts must "construe a statute according to the plain and ordinary meaning of its words."⁸¹ The reasoning behind this principle is straightforward. The choice of words in drafting legislation is painstakingly deliberate and the legislature is assumed to have used the ordinary meaning of words in the drafting process. Therefore, in order to determine the legislative intent, simply look to the words of the statute. If the language of the statute is ambiguous, then, and only then, may the courts look to other factors to determine the proper interpretation of the statute.⁸²

In analyzing the plain meaning of the words in a statute, courts must consider "all provisions of the enactment in question."⁸³ Individual words should not be viewed in a vacuum.

⁷⁹ *Kreiner*, 471 Mich. at 133-34. Acknowledging that certain injuries are more significant to certain people, the Court recognized that an injury that prevents someone from throwing a baseball at ninety-five miles per hour has a different effect on a professional baseball player than it does on a father who occasionally plays catch with his son.

⁸⁰ *Lee v. Nat'l Union Fire Ins.*, 207 Mich. App. 323, 326 (1994).

⁸¹ *Transp. Ins. Co. v. Home Ins. Co.*, 134 Mich. App. 645, 651 (1984).

⁸² *See Transp. Ins. Co.*, 134 Mich. App. at 651 (citing *Arrigo's Fleet Service, Inc. v. Michigan*, 125 Mich. App. 790, 792 (1983)); *see also Hoffman & Kuiper*, *supra* note 15, at 929.

⁸³ *Mich. Life Ins. Co. v. Comm'r of Ins.*, 120 Mich. App. 552, 557-58 (1982).

Instead, each word should be considered in relation to the entire statute to avoid the possibility of pulling words out of context.

Each word, sentence, and provision should be read together to harmonize the meaning, giving effect to the act as a whole. . . . [T]he particular words are to be applied to the subject matter and the general scope of the provision and considered in light of the general purpose sought to be accomplished or the evil sought to be remedied by the statute.⁸⁴

The *Kreiner* Court strayed from the widely-accepted principles of statutory construction described above, resulting in an interpretation of serious impairment of body function that is unsupported by the general scope and purpose of the Michigan No-Fault Act.

B. The Court's Flawed Approach in Defining Serious Impairment of Body Function

In beginning its analysis in *Kreiner*, the Court touched on the basic concepts of statutory construction and noted the importance of the precise language of the statute.⁸⁵ However, the Court quickly took a wrong turn by placing an undue emphasis on a particular phrase within the statute. The Court turned to the statutory definition of serious impairment of body function and focused on the requirement that the injury affects the injured's "general ability to lead his or her normal life."⁸⁶ Although this may appear, at first glance, to properly analyze the plain meaning of the statute, the Court failed to consider the plain meaning of the statute *as a whole*, a key requirement of statutory interpretation.

The Court could have just as easily focused on the individual term "affect" in the definition of serious impairment of body function which would have led to a more relaxed tort threshold. The dictionary definition of "affect" is "to produce an effect upon" or "influence."⁸⁷

⁸⁴ *Mich. Life Ins. Co.*, 120 Mich. App. at 558.

⁸⁵ *Kreiner v. Fischer*, 471 Mich. 109, 129 (2004); *see also supra* notes 66-79 and accompanying text.

⁸⁶ *Kreiner*, 471 Mich. at 129-30.

⁸⁷ MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 21 (11th ed., 2003).

Based on this approach, nearly every injury would be deemed to “produce an effect” or “influence” the injured’s general ability to lead his or her normal life.

A sole focus on individual words within a statute, whether it be the words “general,” “lead,” or “affect,” leads to inaccurate results and does not conform to the requirements of statutory construction. Courts must look to the plain meaning of the statute *as a whole*. As discussed, individual words and phrases must be considered within the context of the entire statute in order to achieve a result most closely in line with the intent of the legislature.

The no-fault statute prevents recovery for noneconomic damages in tort unless the injury incurred results in “death, serious impairment of body function, or permanent serious disfigurement.”⁸⁸ The Michigan Legislature presumably intended the three terms to be distinct, yet consistent with the overall purpose of the no-fault statute. Each phrase listed in the threshold deliberately describes a different scenario and requires alternate levels of severity. For instance, any disfigurement suffered must be serious and permanent; whereas the impairment of body function must simply be serious, not permanent.

Despite the fact that permanency is not required by the statute, the *Kreiner* Court insisted on a change in the “course” or “trajectory” of the life of the injured party in order to meet the serious impairment of body function threshold.⁸⁹ Realistically, a non-permanent injury will never result in such a drastic shift. A non-permanent injury may substantially affect one’s life for a period of time; however, following recovery, the life continues as it did prior to the injury. The Court’s interpretation, requiring a change in the “course” or “trajectory” of one’s life, effectively inserted an additional requirement of permanency into a statute that had specifically omitted such language.

⁸⁸ MICH. COMP. LAWS § 500.3135(1) (2004).

⁸⁹ *Kreiner*, 471 Mich. at 131.

Although the *Kreiner* decision is less than one year old, the impact of the Court's flawed interpretation of the Michigan No-Fault statute has already affected plaintiffs throughout the state.⁹⁰

IV. IMPACT OF THE *KREINER* DECISION

A. Barriers to Recovery

The wording of the Court's decision in *Kreiner*, and the focus on the injured party's general ability to lead his or her normal life, severely limits the number of injury cases allowed to proceed in the court system. The requirement that the injuries suffered must affect the *course* or *trajectory* of a person's normal life places too great of a burden on the plaintiff and seriously "disrupt[s] the delicate balance that must exist if [the] Michigan no-fault system is going to be preserved."⁹¹ Legal experts have opined:

The decision has thrown the balance way out of whack. It will disqualify hundreds if not thousands of innocent accident victims who have sustained significant injury and who were never intended to be disqualified by the form of no-fault that Michigan adopted in 1973. The original Michigan threshold and the threshold that was amended in 1995 were designed to eliminate *clearly minor* injuries. The threshold was never intended to disqualify from noneconomic compensation, people like Mr. Kreiner, who lost 25 percent of his ability to work.⁹²

As can be seen in several post-*Kreiner* decisions, the fear that legitimate accident victims will be disqualified from noneconomic damage recovery has already been realized in the Michigan courts.

⁹⁰ Since *Kreiner*, the Michigan Court of Appeals, as will be discussed, has granted summary disposition in favor of the defendant in a majority of the cases involving a potential serious impairment of body function. See *Dixon v. Gibson*, No. 245943 (Mich. Ct. App. Aug. 17, 2004); *McKinnie v. Ravel*, No. 241842 (Mich. Ct. App. Oct. 5, 2004); *Hooks-Polk v. Blair*, No. 245562, 2005 WL 2391450 (Mich. Ct. App. Oct. 26, 2004); *Farley v. Jeremiah*, No. 251160 (Mich. Ct. App. Feb. 15, 2005); see also *infra* notes 93-109.

⁹¹ Karen M. Poole, '*Kreiner Fix Bill*' Lowers the Serious Impairment Threshold: Legislation Appropriate to Restore Balance, MICH. LAW. WKLY, Oct. 11, 2004.

⁹² *Id.* (quoting an interview of Lansing attorney George T. Sinas) (emphasis added).

B. Post-*Kreiner* Decisions

Following the decision in *Kreiner*, Michigan courts have been quick to grant motions for summary disposition in favor of defendants in automobile no-fault cases, despite injuries that appear to seriously impair body functions. For example, in *Dixon v. Gibson*,⁹³ the plaintiff, Dixon, spent six days in the hospital on intravenous pain medication following an automobile accident. Dixon suffered fractures to four ribs, contusions, difficulty breathing, problems sleeping, unilateral sweating on the right side of his face, and was unable to return to full-time work for two months. Additionally, Dixon was no longer able to ride his bike, exercise, play golf or tennis, perform household chores, or assist his daughter with her volleyball practices.⁹⁴ Despite the significant injuries, the court affirmed the lower court's finding that Dixon could still generally lead his normal life and denied recovery of noneconomic damages.⁹⁵

Similarly, in *McKinnie v. Ravel*,⁹⁶ the plaintiff, McKinnie, suffered serious injuries as a result of an automobile accident. McKinnie was diagnosed with temporomandibular joint disorder (TMJ), an objectively manifested impairment of his jaw function which resulted in clicking, jerking, and pain on contact.⁹⁷ Additionally, McKinnie suffered from chronic headaches, severe tendonitis in her left wrist, and continued to experience "throbbing" and "stabbing" pain six months after the accident.⁹⁸ Based on the reasoning of *Kreiner*, the court affirmed the trial court's determination that McKinnie's injuries did not affect her general ability to lead her normal life.⁹⁹

⁹³ No. 245943 (Mich. Ct. App. Aug. 17, 2004).

⁹⁴ *Dixon v. Gibson*, No. 245943 (Mich. Ct. App. Aug. 17, 2004).

⁹⁵ *Id.*

⁹⁶ No. 241842 (Mich. Ct. App. Oct. 5, 2004).

⁹⁷ *McKinnie v. Ravel*, No. 241842 (Mich. Ct. App. Oct. 5, 2004)..

⁹⁸ *Id.*

⁹⁹ *Id.*

The Michigan Court of Appeals also affirmed summary disposition in favor of the defendant in *Hooks-Polk v. Blair*.¹⁰⁰ In this case, the plaintiff, Hooks-Polk, sustained injuries as a result of an automobile accident that resulted in nearly one month of missed work. Hooks-Polk could no longer travel in a car for longer than one hour, walk long distances, stand in one place for more than five minutes, climb stairs, or play with her grandchildren. Her injuries also forced her to take a semester off of school to focus on her recovery.¹⁰¹ The court reasoned that although Hooks-Polk could no longer play with her grandchildren, she was still able to “visit” with them.¹⁰² Although she could no longer climb stairs, nothing prevented her from using an elevator.¹⁰³ Although she could no longer prepare entire meals for holiday celebrations, “she [could] prepare at least some food for family potlucks.”¹⁰⁴ Based on such allegedly sufficient alternatives, the court held that Hooks-Polk’s injuries did not affect her general ability to lead her normal life.¹⁰⁵

In *Farley v. Jeremiah*,¹⁰⁶ the Michigan Court of Appeals affirmed yet another summary disposition in favor of the defendant due to a failure to meet the serious impairment of body function threshold. The list of injuries to the plaintiff, Farley, included: dizziness, short-term memory loss, disabling headaches, and the inability to sit in a car for long trips, play horseshoes, crochet, sew, do heavy housework, can produce and other food items, ride a bicycle, or actively play with her grandchildren.¹⁰⁷ Despite the laundry list of frustrating life changes, the court

¹⁰⁰ *Hooks-Polk v. Blair*, No. 245562, 2005 WL 2391450 (Mich. Ct. App. Oct. 26, 2004).

¹⁰¹ *Id.* at *2

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at *3.

¹⁰⁵ *Id.*

¹⁰⁶ No. 251160 (Mich. Ct. App. Feb. 15, 2005).

¹⁰⁷ *Farley v. Jeremiah*, No. 251160 (Mich. Ct. App. Feb. 15, 2005).

found that Farley's general ability to conduct the course of her life was not affected by her injuries.¹⁰⁸

The above examples represent only a small portion of recent decisions in the Michigan courts that denied recovery for noneconomic damages, based on the reasoning of the *Kreiner* decision.¹⁰⁹ A legitimate problem exists with the disqualification of legitimate noneconomic damage claims under the Court's current interpretation of the no-fault tort threshold. So what is the answer? A comparison of the tort threshold in other no-fault states will shed light on the topic, highlight the overly restrictive interpretation taken by the Michigan courts, and suggest alternative approaches to achieve a better balance of the goals of the no-fault system.

V. COMPARISON OF THE TORT THRESHOLDS IN OTHER JURISDICTIONS

A comparison of the tort thresholds of other states leads to significant questions as to the propriety of Michigan's strict requirements. Currently, twelve states and the District of Columbia, have adopted a version of no-fault automobile insurance.¹¹⁰ Although the specific

¹⁰⁸ *Id.*

¹⁰⁹ For a more in-depth analysis of post-*Kreiner* decisions in the Michigan courts, see Coalition Protecting Auto No-Fault, *Impact of the Kreiner Decision – Examples*, at <http://www.protect-no-fault.com/kc.htm> (last visited Mar. 25, 2005). A few post-*Kreiner* cases have found a serious impairment of body function to exist. In *Ream v. Burke Asphalt Paving*, No. 238824, 2005 WL 233541 (Mich. Ct. App. Feb. 1, 2005), the plaintiff drove heavy equipment and cut trees for the Ingham County Road Commission. The plaintiff was actively involved in hunting, fishing and softball. Such activities were deemed to be "important and meaningful components" of his life. Following an automobile accident, the plaintiff suffered multiple abrasions and contusions to his lower shin, ankle and wrist, an injury to his lower spine, and tearing of the head of his right bicep tendon. Due to the injuries, the plaintiff wore a walking cast, was unable to work for two months, and no longer participated in his recreational activities, such as hunting and softball. Additionally, the plaintiff lost roughly fifty percent of the strength in his right arm. The court found that the plaintiff's life following the injury was "sufficiently different such that his 'general ability' to conduct the course of his normal life has been affected," thus allowing him to recover noneconomic damages. *Id.* See also *Cook v. Hardy*, No. 250727, 2005 WL 433574 (Mich. Ct. App. Feb. 24, 2005) (finding that a plaintiff with two fractures in her upper and lower right leg met the serious impairment of body function threshold); *Luther v. Morris*, No. 244483, 2005 WL 94795 (Mich. Ct. App. Jan. 18, 2005) (finding that a plaintiff with a fractured-dislocated elbow, whose sister "had to do everything for [her]," met the tort threshold of serious impairment of body function).

¹¹⁰ State-by-State Insurance Laws and Quotes, at <http://www.autoinsuranceindepth.com/state-minimums.html> (last visited Mar. 17, 2005). States that have adopted a no-fault automobile insurance plan include Florida, Hawaii, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Pennsylvania and Utah.

provisions vary from state to state, the general goals of the plan remain the same: to reduce recovery of noneconomic damages in cases with minor injuries.

Of the jurisdictions that have enacted a no-fault system, seven have adopted a monetary threshold to limit the recovery for noneconomic damages.¹¹¹ Although the details differ, each monetary threshold attempts to limit the ability for a plaintiff to sue in tort for pain and suffering, unless the total medical expenses incurred reach a specified dollar amount. If, however, the medical expenses fall short of the stated monetary threshold, the plaintiff may still bring a suit if the injuries suffered reach a specified verbal threshold, such as a “permanent disfigurement.”

For example, the no-fault statute in Kentucky states:

[A] plaintiff may recover damages in tort for pain, suffering mental anguish and inconvenience because of bodily injury, sickness or disease arising out of the ownership, maintenance, operation or use of such motor vehicle only in the event that the benefits which are payable for such injury as ‘medical expense’ or which would be payable but for any exclusion or deductible authorized by this subtitle exceed one thousand dollars (\$1,000), or the injury or disease consists in whole or in part of permanent disfigurement, a fracture to a bone, a compound, comminuted, displaced or compressed fracture, loss of a body member, permanent injury within reasonable medical probability, permanent loss of bodily function or death.¹¹²

The amounts of the monetary thresholds vary among the states from \$1,000 to \$5,000.¹¹³

In Kansas, a plaintiff may recover noneconomic damages resulting from an automobile accident:

only in the event the injury requires medical treatment . . . having a reasonable value of \$2,000 or more, or the injury consists in whole or in part of permanent disfigurement, a fracture to a weightbearing bone, a compound, comminuted, displaced or compressed fracture, loss of a body member, permanent injury within reasonable medical probability, permanent loss of a bodily function or death.¹¹⁴

¹¹¹ *Id.*

¹¹² KY. REV. STAT. ANN. § 304.39-060(2)(b) (Banks-Baldwin 2004).

¹¹³ *Id.*; see also HAW. REV. STAT ANN. § 431:10C-306(b) (2003).

¹¹⁴ KAN. STAT. ANN. § 40-3117 (2003). A compound fracture is defined as a fracture in which the bone protrudes from the skin. A comminuted fracture is one in which the bone is broken, splintered or crushed into a number of pieces. See <http://www.medicinenet.com> (last visited Mar. 25, 2005).

Massachusetts requires a plaintiff to incur more than \$2,000 of necessary medical expenses in order to recover noneconomic damages. In the alternative, Massachusetts permits such recovery if the injury “(1) causes death, or (2) consists in whole or in part of loss of a body member, or (3) consists in whole or in part of permanent and serious disfigurement, or (4) results in such loss of sight or hearing . . . or (5) consists of a fracture.”¹¹⁵ Similarly, the North Dakota statute prevents recovery for noneconomic damages “unless the injury is a serious injury.”¹¹⁶ Serious injury is later defined to be “an accidental bodily injury which results in death, dismemberment, serious and permanent disfigurement or disability beyond sixty days, or medical expenses in excess of two thousand five hundred dollars.”¹¹⁷ Utah courts require that “the person sustained one or more of the following: (i) death; (ii) dismemberment; (iii) permanent disability or permanent impairment based upon objective findings; (iv) permanent disfigurement; or (v) medical expenses to a person in excess of \$3,000.”¹¹⁸ Minnesota raises the bar slightly, by requiring the medical expenses to exceed \$4,000. If such expenses fail to exceed the required amount, the injured person may still recover noneconomic damages if they establish that the injury resulted in “(1) permanent disfigurement; (2) permanent injury; (3) death; or (4) disability for 60 days or more.”¹¹⁹ For purposes of the statute, Minnesota defines “disability” as “the inability to engage

¹¹⁵ MASS. GEN. LAWS ch. 231, § 6D (2005). Massachusetts case law emphasizes the importance of noneconomic damage recovery. In *Victum v. Martin*, 326 N.E.2d 12 (Mass. 1975), the court noted that the “Legislature, in enacting the no-fault insurance statute, did not intend the imposition of severe restrictions upon cases in which recovery for pain and suffering would be allowed.” *Id.*

¹¹⁶ N.D. CENT. CODE § 26.1-41-08(1)(a) (2003).

¹¹⁷ N.D. CENT. CODE § 26.1-41-01(21) (2003). Furthermore, the statute defines disability as “the inability to engage in substantially all of the injured person’s usual and customary daily activities.” N.D. CENT. CODE § 26.1-41-01(6) (2003).

¹¹⁸ UTAH CODE ANN. § 31A-22-309(1)(a) (2004).

¹¹⁹ MINN. STAT. ANN. § 65B.51(3)(b) (2005).

in substantially all of the injured person's usual and customary daily activities.”¹²⁰ Hawaii permits tort liability if:

(1) [d]eath occurs to the person in such motor vehicle accident; (2) [i]njury occurs to the person which consists, in whole or in part, in a significant permanent loss of use of a part of function of the body; (3) [i]njury occurs to the person which consists of a permanent and serious disfigurement which results in subjection of the injured person to mental and emotional suffering; or (4) [i]njury occurs to the person in a motor vehicle accident and as a result of such injury that the personal injury protection benefits incurred by such person equal or exceed \$5,000.¹²¹

Due to the high costs associated with medical care, plaintiffs are much more likely to meet the monetary thresholds listed above than they would be able to satisfy the serious impairment of body function, as defined by the *Kreiner* decision. Each plaintiff in the consolidated *Kreiner* decision undoubtedly accumulated more than \$5,000 in medical benefits as a result of the surgery, doctor visits, therapy and medication required for the treatment of their injuries. Therefore, under any no-fault jurisdiction utilizing a monetary threshold, the *Kreiner* plaintiffs would have been permitted to sue for noneconomic damages.

The remaining jurisdictions have adopted a verbal threshold in restricting the ability to recover noneconomic damages for injuries resulting from automobile accidents. With the possible exception of Florida, each jurisdiction utilizes a lower tort threshold than that threshold required by the Michigan courts.

The New York statute governing automobile no-fault insurance states that recovery for noneconomic damages is prohibited “except in the case of a serious injury, or for basic economic loss.”¹²² “Serious injury” is later defined as:

¹²⁰ MINN. STAT. ANN. § 65B.51(3)(c) (2005).

¹²¹ HAW. REV. STAT ANN. § 431:10C-306(b) (2003).

¹²² N.Y. INSURANCE LAW § 28.5104(a) (McKinney 2005).

[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 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.*¹²³

Returning to the facts in the *Kreiner* decision, both plaintiffs received a medically determined injury which substantially prevented them from performing their usual and customary daily activities for at least ninety days. Therefore, under the New York statute, the Michigan plaintiffs would likely have been permitted to seek noneconomic damages.

Similarly, an accident victim in the District of Columbia has the option of choosing to receive personal injury benefits.¹²⁴ If the victim elects to take such benefits, he or she may only sue in tort if:

The injury directly results in substantial permanent scarring or disfigurement, substantial and medically demonstrable permanent impairment which has significantly affected the ability of the victim to perform his or her professional activities or usual and customary daily activities, *or a medically demonstrable impairment that prevents the victim from performing all or substantially all of the material acts and duties that constitute his or her usual and customary daily activities for more than 180 continuous days.*¹²⁵

New Jersey permits recovery of noneconomic damages, assuming that the plaintiff “has sustained a bodily injury which results in death; dismemberment; significant disfigurement or significant scarring; displaced fractures; loss of a fetus; or a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.”¹²⁶ Pennsylvania requires that the “the injuries fall within the definition of ‘serious injury’ as set forth in the policy or

¹²³ N.Y. INSURANCE LAW § 28.5102(d) (McKinney 2005) (emphasis added).

¹²⁴ D.C. CODE ANN. § 31-2405(b) (2004).

¹²⁵ D.C. CODE ANN. § 31-2405(b) (2004) (emphasis added).

¹²⁶ N.J. STAT. ANN. §39:6A-8 (West 2003).

unless one of several other exceptions noted in the policy applies.”¹²⁷ “Serious injury” is later defined in the statute as “[a] personal injury resulting in death, serious impairment of body function or permanent serious disfigurement.”¹²⁸ Although the wording of the Pennsylvania statute utilizes the vocabulary of the Michigan statute, the recent case law demonstrates that the Pennsylvania courts do not interpret the threshold as strictly as the Michigan courts.¹²⁹ Additionally, the Pennsylvania courts consider the question of whether or not a serious injury exists to be a question of fact for the jury.¹³⁰ Therefore, the Pennsylvania statute is clearly more favorable to the plaintiff than the Michigan statute.

The Florida statute requires the injured party to establish that the injury consists of “(a) [s]ignificant and permanent loss of an important bodily function; (b) [p]ermanent injury within a reasonable degree of medical probability, other than scarring or disfigurement; (c) [s]ignificant and permanent scarring or disfigurement; or (d) [d]eath.”¹³¹ The requirement for permanence in each scenario suggests a higher threshold than the serious impairment of body function required by the Michigan courts. However, the Florida courts have determined that the question of whether or not an injury is permanent is a question for the jury, thereby allowing the court cases to proceed.¹³²

¹²⁷ PA. CONS. STAT. ANN. § 75.1705(a)(1)(A) (West 2004).

¹²⁸ PA. CONS. STAT. ANN. § 75.1702 (West 2004).

¹²⁹ See *Hellings v. Bowman*, 744 A.2d 274 (Pa. Super. 1999). A motorist suffered back and neck injuries as a result of an automobile accident. He missed six weeks of work and continued to experience headaches, numbness in his knee and pain in his hip. Following the accident, the motorist could no longer hunt, ride horses or ski. The court simply asked what body function was impaired and whether or not it was serious. The courts did not require a change in the course of trajectory of the motorist’s normal life. The court held that reasonable minds could differ as to the severity of the motorist’s injuries and submitted the case to the jury for a decision.

¹³⁰ *Washington v. Baxter*, 719 A.2d 733, 740 (Pa. 1998); see also *Hellings*, 744 A.2d at 275.

¹³¹ FLA. STAT. ANN. § 627.737(2) (West 2004).

¹³² *Colvin v. Williams*, 564 So.2d 1249, 1250 (Fla. Dist. Ct. App. 1990). In *Colvin*, the plaintiff Colvin sued for damages under Florida’s no-fault statute and attempted to prove the existence of a permanent injury. *Id.* The trial court heard testimony from Colvin, as well as medical witnesses, that the injury she suffered was indeed a permanent injury. *Id.* However, other testimony brought to light the existence of other doctors’ opinions which questioned the level of permanency of the injury. *Id.* The trial court submitted the issue to the jury, who decided

Compared to the tort threshold in all other no-fault jurisdictions, Michigan arguably has the most restrictive approach to noneconomic recovery. Such realization should alert the Michigan Legislature to the need for a reexamination of the issue.

In addition to the specific threshold language in other no-fault states, recent developments in such states illustrate a trend toward breaking down the barriers to recovery of noneconomic damages in automobile no-fault cases.

The Minnesota Legislature recently voted *against* a bill that would have raised the tort threshold for claims of noneconomic damages. Minnesota currently requires that a monetary threshold of \$4,000 be met before suing in tort for noneconomic damages. Advocates of the proposed bill believed that the current monetary threshold was insufficient and preferred a verbal threshold that would require a “serious permanent impairment of a bodily function or death.”¹³³ The legislature disagreed and chose not to adopt additional limitations. Similarly, the New Jersey Legislature recently introduced a bill to “lower the state’s threshold for lawsuits to allow claimants who are permanently injured to sue for noneconomic damages such as pain and suffering even in cases where the injury did not have a significant or serious impact on the quality of that person’s life.”¹³⁴ Although a decision on the New Jersey bill has not yet been made, the existence of the bill illustrates a desire of many to lower the restrictions to noneconomic recovery in automobile no-fault cases.

against Colvin. *Id.* On appeal, Colvin argued that the trial court should have granted her motion for a directed verdict on the permanency issue; however, the court concluded that “the question of permanent injury was properly one for the jury.” *Id.*

¹³³ Insurance Information Institute, No Fault Auto Insurance, at <http://iii-dev.iii.org/media/hottopics/insurance/nofault/> (March 2005).

¹³⁴ *Id.*

VI. POTENTIAL SOLUTION

A. Proposed Amendment to Michigan's No-Fault Statute

Determining the proper tort threshold required for the recovery of noneconomic damages in no-fault automobile insurance cases is not an easy task. As evidenced by the variances among the thresholds in each no-fault jurisdiction, no right answer exists. The legislature must attempt to balance the interests of all parties involved against the purposes of adopting a no-fault insurance scheme. The no-fault insurance scheme seeks to provide “an equitable and prompt method of redressing injuries in a way that [makes] mandatory insurance coverage affordable to all motorists.”¹³⁵ Minor injuries should be compensated quickly. In exchange for the ease of collection, those with minor injuries are barred from recovering noneconomic damages in tort. The no-fault scheme permits quick recovery and reduces the backlog of cases in the court system. The ideal threshold is one in which minor injuries are compensated via the insurance company, yet a plaintiff with more severe injuries is allowed full compensation via the ability to sue in tort for noneconomic damages. If the threshold is set too low, the goals of the no-fault insurance system are thwarted. The savings involved in creating a tort threshold is entirely lost if nearly all cases are permitted to enter the court system. Conversely, if the threshold is set too high, plaintiffs with legitimate claims are not fully compensated for the injuries suffered.

The tort threshold in Michigan, as evidenced by the statute itself and its interpretation in *Kreiner*, is arguably the most stringent threshold among the no-fault jurisdictions and should be amended to better balance the interests involved and more effectively achieve the goals of the no-fault scheme.

¹³⁵ Hoffman & Kuiper, *supra* note 15; *see also supra* note 10-18 and accompanying text for a discussion on the policies behind the no-fault system.

On September 28, 2004, Senate Bill 1429 was introduced in direct response to the decision in *Kreiner*.¹³⁶ The curative bill “intended to correct any misinterpretation of existing law and legislative intent in the Michigan Supreme Court decision of *Kreiner v. Fischer*.”¹³⁷ The bill seeks to amend the definition of serious impairment of body function to read: “an objectively manifested impairment of an important body function that affected the person’s normal life in a manner, and for a time, that was not clearly minor.”¹³⁸

If adopted, the bill would remove the current language of “an objectively manifested impairment of an important body function that affects the general ability to lead his or her normal life,”¹³⁹ which the *Kreiner* Court interpreted to require a change in the “course” or “trajectory” of the injured’s life. Such relaxation of the tort threshold attempts to return the proper balance to the no-fault scheme in Michigan.

One major drawback of the bill is the ambiguity of the term “not clearly minor.” Although the drafters of the bill intended to avoid overly complex vocabulary, the current language of the bill will no doubt lead to differences in opinion as to what constitutes an amount of time that is “not clearly minor.”¹⁴⁰

In order to address the ambiguity of the proposed phrase “not clearly minor,” the Michigan Legislature should look to the verbal thresholds of other no-fault jurisdictions and incorporate the specific language used to achieve similar results. As discussed earlier, New York provides a lower tort threshold for the recovery of noneconomic damages resulting from an

¹³⁶ S. Res. 1429 (Mich. 2004). The bill was introduced by Senators Cropsey, Bishop, Schauer, Emerson, Bernero, and Brater. *Id.* Although there was no action taken concerning the bill in 2004, it is expected to be reintroduced in 2005. Insurance Information Institute, *No Fault Auto Insurance* (Mar. 2005), available at <http://iiiidev.iii.org/media/hottopics/insurance/nofault/>.

¹³⁷ S. Res. 1429 (Mich. 2004).

¹³⁸ *Id.* The bill seeks to apply the amended standard to any case filed on or after July 22, 2004.

¹³⁹ MICH COMP. LAWS § 500.3105 (7) (2004).

¹⁴⁰ See Poole, *supra* note 91.

automobile accident.¹⁴¹ An analysis of the New York statute will provide suggestions for improvement of Senate Bill 1429. The Michigan Legislature should look to the New York statute for an improved word choice in injury description, as well as a clarification of the timeframe of the injury.

One of the alternate definitions of “serious injury” utilized by the New York no-fault statute includes:

[A] a medically determined injury or impairment of a non-permanent nature which prevents the injured 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.¹⁴²

As opposed to Senate Bill 1429, this definition provides further details required for the injury itself, as well as the particular time frame for the courts to consider when analyzing the nature of the injury. The Michigan Legislature should draw on the experience of New York and adopt a more specific injury description as well as a precise time frame to illustrate what constitutes “not clearly minor,” instead of leaving such determination to the subjective control of the courts.

In order to prevent potential *Kreiner* misinterpretations in the future, the Michigan Legislature should not adopt the New York statute as written. For example, the phrase “performing substantially *all* of the material acts,”¹⁴³ could lead to similar misinterpretations as seen in *Kreiner*. Therefore, the drafters of Senate Bill 1429 should consider amending the language of the bill to include the definition of “serious impairment of body function” as follows:

¹⁴¹ See *supra* notes 122-23.

¹⁴² N.Y. INSURANCE LAW § 28.5102(d) (McKinney 2005).

¹⁴³ *Id.* (emphasis added).

A medically determined, objectively manifested injury or impairment of an important body function, whether of a permanent or non-permanent nature, which prevents the injured from substantially performing many of the 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.¹⁴⁴

The above definition would 1) achieve a better balance of the interests involved in no-fault cases, 2) allow the intent of the legislature to be carried out, 3) align Michigan with the tort thresholds of other no-fault jurisdictions, and 4) further the goals of the no-fault insurance system.

B. Application of the Proposed Amendment

The proposed definitional amendment would likely have changed several aspects of the *Kreiner* case, as well as the post-*Kreiner* decisions discussed earlier.¹⁴⁵ Richard Kreiner suffered significant injuries to his lower back, right hip and right leg following an automobile accident.¹⁴⁶ Over the next two years, Kreiner continued to receive medical care for his injuries and continued to endure the effects of the injury on his daily life.¹⁴⁷ Kreiner, who worked as a carpenter and construction worker, was instructed “to avoid lifting objects over fifteen pounds, and to refrain from excessive bending and twisting.”¹⁴⁸ Kreiner was unable to perform roofing projects, unable to maintain his previous work hours, unable to walk for more than one-half mile without rest,

¹⁴⁴ Alternatively, the Michigan Legislature may consider a bolder approach by switching gears and adopting a monetary threshold for the definition of serious impairment of body function. As discussed, seven of the other no-fault jurisdictions currently utilize such a definition. See *State-by-State Insurance Laws and Quotes*, at <http://www.autoinsuranceindepth.com/state-minimums.html> (last visited Mar. 17, 2005); see also *supra* notes 111-21 and accompanying text. Either as a substitution for or an addition to the proposed amendment above, the Michigan Legislature may provide that plaintiffs, who incur medical expenses in excess of \$5,000, are entitled to recover noneconomic damages in tort. This approach would more closely align Michigan with a majority of no-fault jurisdictions, while maintaining a more conservative approach by utilizing the highest dollar figure among the monetary threshold states. However, based on the history of the no-fault system in Michigan and the development of the governing case law, the Legislature is much more likely to adopt an amended version of the current verbal threshold than it is to take such a drastic turn to the monetary threshold approach. See *supra* notes 19-47.

¹⁴⁵ See *Kreiner v. Fischer*, 471 Mich. 109 (2004); see also *supra* notes 48-65, 93-108 and accompanying text.

¹⁴⁶ *Kreiner*, 471 Mich. at 124 (2004); see *supra* notes 48-57 and accompanying text.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

and unable to enjoy his recreational interests.¹⁴⁹ Based on the language of the proposed definitional amendment to the no-fault statute, courts would likely conclude that Kreiner suffered a serious impairment of body function. Kreiner suffered a medically determined, objectively manifested impairment of an important body function which prevented him from substantially performing many of the acts which constituted his customary activities for more than ninety days following the accident.

Recall the case of *Dixon v. Gibson*,¹⁵⁰ where plaintiff Dixon was involved in an automobile accident, but was denied recovery of noneconomic damages despite his inability to perform household chores, ride his bike, exercise, play golf or tennis, or assist his daughter with her volleyball practices.¹⁵¹ The proposed amendment listed above would likely permit the claim to proceed because Dixon's medically determined, objectively manifested, non-permanent injury of an important body function prevented him from substantially performing many of the acts which constitute his usual and customary daily activities for more than ninety days.

Following *Kreiner*, the Michigan Court of Appeals also affirmed summary disposition in the case of *Hooks-Polk v. Blair*.¹⁵² Plaintiff Hooks-Polk's injuries prevented her from attending a semester of school, playing with her grandchildren, climbing stairs, traveling in a car for longer than one hour, walking long distances, or standing in one place for more than five minutes.¹⁵³ Despite the number of limitations, the court held that Hooks-Polk's injuries did not affect her general ability to lead her normal life.¹⁵⁴ Under the proposed amendment, Hooks-Polk would likely convince a court that her injuries prevented her from substantially performing many of her

¹⁴⁹ *Id.*

¹⁵⁰ No. 245943 (Mich. Ct. App. Aug. 17, 2004). *See supra* notes 93-95 and accompanying text.

¹⁵¹ *Dixon v. Gibson*, No. 245943 (Mich. Ct. App. Aug. 17, 2004).

¹⁵² No. 245562, 2005 WL 2391450 (Mich. Ct. App. Oct. 26, 2004). *See supra* notes 100-05 and accompanying text.

¹⁵³ *Hooks-Polk v. Blair*, No. 245562, 2005 WL 2391450, at *2 (Mich. Ct. App. Oct. 26, 2004).

¹⁵⁴ *Id.*

usual and customary daily activities for the requisite time period, thereby avoiding summary disposition.

The plaintiff in *Farley v. Jeremiah*,¹⁵⁵ was also denied noneconomic damage recovery following an automobile accident after the court concluded that her inability to play with her grandchildren, do heavy housework, can food items, sit in a car for long trips, play horseshoes, crochet, sew or ride a bicycle, did not affect her general ability to live her normal life.¹⁵⁶ Based on the number of usual and customary daily activities that Farley was prevented from substantially performing, the proposed amendment would likely permit recovery.

Although the proposed amendment is significantly more plaintiff-friendly than the current statutory language and case law interpretation, the amendment will not provide an open door to all plaintiffs. For example, the application of the proposed definition to Daniel Straub, the plaintiff from the second consolidated case in *Kreiner*, is less certain. Although Straub suffered a broken finger, injuries to his hand that required surgery, and restrictions to his daily activities during his recovery period, the facts state that he returned to full-time work just short of three months following the accident.¹⁵⁷ Based on the specific dates included in the opinion, the majority of Straub's injuries only lasted for eighty-six days.¹⁵⁸ This amount of time does not meet the ninety day requirement of the proposed amendment. Unless Straub is able to expound

¹⁵⁵ No. 251160 (Mich. Ct. App. Feb. 15, 2005); *see supra* notes 106-08 and accompanying text.

¹⁵⁶ *Farley v. Jeremiah*, No. 251160 (Mich. Ct. App. Feb. 15, 2005).

¹⁵⁷ *Kreiner*, 471 Mich. at 122.

¹⁵⁸ *Id.* The court noted that Straub was unable to operate his archery shop during the entire fall hunting season and was unable to play the guitar in his band for four months. However, the majority of his limitations, such as the difficulty experienced in doing household chores, washing dishes, maintaining the yard, and making property repairs, only lasted from September 19, 1999 to December 14, 1999. *Id.*

on the nature and duration of the limitations that resulted from his injury, he would be barred from noneconomic damage recovery, even under the more lenient proposed standard.¹⁵⁹

Additionally, the plaintiff in *McKinnie v. Ravel*¹⁶⁰ will likely remain barred from noneconomic recovery in tort, even under the more lenient standard proposed. McKinnie was diagnosed with temporomandibular joint disorder (TMJ) as a result of an automobile accident and suffered clicking, jerking, and pain on contact.¹⁶¹ McKinnie also incurred chronic headaches, severe tendonitis in her left wrist, and continued pain for six months after the accident.¹⁶² The court concluded that McKinnie's injuries did not affect her general ability to lead her normal life.¹⁶³ Unless McKinnie could offer additional proof that her injuries prevented her from substantially performing many of the acts which constituted her usual and customary daily activities for ninety days following the injury, she will still be unable to recover noneconomic damages.

As illustrated by its application, the proposed amendment to the Michigan statute provides a more appropriate balance between the need to reduce noneconomic damage recovery for relatively minor injuries and to provide full recovery for seriously injured plaintiffs.

CONCLUSION

Determining proper compensation for injuries is always an arduous task. What amount of money will fully compensate an injured person for the economic and noneconomic damages

¹⁵⁹ If a \$5,000 monetary threshold is added to the language of the amended statute, Straub would be certain to recover. *See supra* note 144. Although a thorough computation of damages is absent from the court's analysis, Straub underwent surgery to repair the tendons in his fingers, wore a cast on his hand, and received physical therapy as a result of the accident, surely racking up a significant medical bill. *Id.* Each of the post-*Kreiner* decisions discussed in this section would likely meet a monetary threshold as a result of the medical expenses incurred following each automobile accident.

¹⁶⁰ *McKinnie v. Ravel*, No. 241842 (Mich. Ct. App. Oct. 5, 2004); *see supra* notes 96-99 and accompanying text.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

experienced as a result of a particular incident? In the context of the no-fault insurance system, the question of proper compensation becomes even more difficult. The no-fault system intentionally places limitations on full compensation in the form of tort thresholds for noneconomic damages resulting from certain minor injuries. Such limitations are required in order to permit swift recovery for basic expenses, such as medical expenses and wage loss, in all automobile accidents, regardless of fault. The limitations put in place by the legislature, however, were only intended to apply to minor injuries. The *Kreiner* decision increased the level of the tort threshold far beyond what the legislature intended and remedial action should be taken to return the tort threshold to the proper level. The definition of serious impairment of body function proposed in this comment would provide a better balance of all interests involved.