MEETING THE STATUTORY TORT THRESHOLD

By Michael L. Weiner

As any active plaintiff's attorney will attest, it is doubtful that any single issue presents as much importance to the outcome of the typical soft-tissue automobile accident case as the factual question of whether the plaintiff has met a statutory "tort threshold," namely that he has suffered a permanent injury or disfigurement, over $4,000 in medical treatment, or 60 days of disability. Even where liability is "cold" (i.e. the proverbial drunk driver rear-ender case), and the plaintiff has presented evidence that he has met not just one of the thresholds (and only one is needed) but all of them, the plaintiff can still walk away from the case with a *zero* recovery if the *jury* does not find that he has met at least one of these thresholds.

Because the outcome of a case is so critically dependent upon the jury's finding of a tort threshold, this article will cover all aspects of these thresholds, from their legislative history to practical proof problems. In analyzing these thresholds, it is important to keep in mind that their impact on a case, and their ability to bar a recovery, is *not* accidental. Indeed, these thresholds lay at the very heart of the Minnesota No-Fault Act, as explained by the court in *Coughlin v. LaBounty*:[1]

> One of the stated purposes of the No-Fault Act is to prevent litigation over automobile accident claims. Minn.Stat. Sec. 65B.42(4) (1982). As such, the No-Fault Act substitutes first party insurance as the remedy for the *majority* of personal injury claims. The tort thresholds represent a safety valve for the victim who is *so severely injured* that the no-fault insurance limits are so inadequate as to be unjust. Thresholds are established to reserve *only the more serious personal injury cases for third party litigation.*

Enacted in 1974, the Act was intended to permit *every* person injured in a motor vehicle accident, regardless of their fault or innocence, to recover *quickly and easily* from their own insurance company their "economic loss" benefits, generally their medical bills and wage loss. However, as a *quid pro quo* for what was *supposed to be* quick and automatic recovery of these basic economic loss benefits through now-mandated no-fault insurance (and the practitioner with a calendar full of no-fault arbitrations knows how "quick and easy" this recovery really is), the legislature sought to eliminate the "overcompensation" of victims and reduce the number of lawsuits arising out of motor vehicle accidents. To accomplish this end, the Legislature placed a new hurdle, the *tort threshold,* in the way of the injured motor vehicle accident victim with the idea of lessening the number of claims. Less seriously injured victims would automatically recover their medical bills and wage loss, but that was *all* they could recover. The Act took away their common law right to recover non-economic damages such as pain and suffering, emotional distress, loss of enjoyment of life, and loss of consortium. "Seriously" injured victims, on the other hand, retained all of their rights to these traditional common law damages.

The Legislature stated in 65B.42(2) the purpose of these thresholds, namely:

> to prevent the *overcompensation* of those automobile accident victims suffering minor injuries by *restricting the right to recover general damages* to cases of *serious injury*. (emphasis added)

The key question for the legislature, then, in drafting the No-Fault Act, was how to *separate* the two classes of victims, keeping in mind that an entire class (i.e. the less seriously injured) was to be denied entirely *any* recovery of non-economic benefits. The answer, of course, is found in the no-fault thresholds contained in Minn. Stat. section 65B.51. The consequences of the class the victim falls in is obviously critical when pursuing a tort action, because the typical plaintiff has had all of their medical bills and wage loss paid for by no-fault, and the *primary damages they seek* in their tort lawsuit are their non-economic damages, the very damages that are *dependent* upon meeting a tort threshold.

Consequently, when examining the no-fault thresholds found in section 65B.51, one must keep in mind that one of the very purposes of the Act is to deny an entire class of automobile accident victims certain damages while at the same time allowing the seriously injured victims their traditional tort damages.

I. Legislative History

An examination of the legislative history of the Act's tort thresholds reveals that the final thresholds were significantly liberalized from their initial requirements. While the intent was to deny recovery to those victims without "serious" injuries, the final version of the No Fault Act greatly liberalized the determination of a "serious" injury, and eased various burdens upon an injured plaintiff, key points when the interpretation of these thresholds is at issue.

A thorough analysis of both the legislative history of the Minnesota thresholds (as well as the rest of the Act), and a comparison of the Minnesota thresholds with approaches taken in other jurisdictions to accomplish the same goals, was made by Professor Michael Steenson shortly after the Act was enacted. In a 1976 law review article, *No-Fault in a Fault Context*, 2 Wm. Mitchell L. Rev. 109, 136-41, Professor Steenson examines the initial thresholds in the first bill that was introduced (as well as its source, the Uniform Motor Vehicle Accident Reparations Act), and the

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amendments which followed in both the Senate and the House. These amendments reduced the descriptive thresholds from the initial "*significant* permanent injury," "*serious* permanent disfigurement," and "more than *six months* of complete inability of the injured person to work in an occupation," to the present, less restrictive, thresholds. While the reduction in the disability period from six months to sixty days is obviously less restrictive, Professor Steenson also confirms that other changes (in particular, changing the amended language requiring the "permanent loss of a bodily function" to the present "permanent injury") were in fact intended to make the thresholds "less restrictive." Id. at 138 (quoting tape of Senate debate).

III. Burden of Proof

It is well established that the tort thresholds are *not* affirmative defenses but part of the plaintiff's substantive case, and that the *plaintiff*, therefore, has the burden of pleading and proving that they have met a threshold.[2] However, it is also clear from the "or" language of the Act that the plaintiff need only meet *one* of the thresholds in order to recover "non-economic detriment" damages. While there was originally some discussion in the conference committee about limiting recovery to the non-economic detriment *only* from the *threshold injury*, this would prove to be unworkable, and the final Act allowed non-economic damages for all losses once *any* threshold was met.[3]

IV. Limitations on Application of Tort Thresholds

It is important to remember that the Act itself *limits* the *application* of the thresholds in two separate and distinct ways, first, by limiting the type of damages dependent upon meeting a threshold and second, by defining the type of case in which the thresholds apply.

First, the Act only prohibits in section 65B.51, Subd. 3, the recovery of "non-economic detriment" if a threshold is not met. Non-economic detriment is defined in the Act as:

> all dignitary losses suffered by any person . . . including pain and suffering, loss of consortium, and inconvenience.[4]

Economic loss claims, on the other hand, are by definition simply *not* subject to these thresholds.

Equally important, meeting a threshold is only required for certain types of actions, defined in the Act as having the following four characteristics:[5]

1. A negligence cause of action,
2. Accruing as the result of an injury,
3. Arising out of the operation, ownership, maintenance, or use of a motor vehicle,
4. With respect to which the security required by the Act has been provided.

Consequently, various claims arising from a motor vehicle accident do *not* require meeting a threshold, including an uninsured motorist claim (which is a contract claim, not a negligence action), an intentional tort claim, a negligence or strict liability claim against a manufacturer that arose out of the negligent production of a motor vehicle, a dramshop claim that arises out of the illegal sale of liquor, and a claim for property damage.

Subdivisions 4 and 5 of section 65B.51 reinforce the point that not all actions are subject to the thresholds. Subdivision 5 simply repeats that the thresholds only apply to negligent acts or omissions committed in the "operation, ownership, maintenance, or use of a motor vehicle," and do not "impair or limit tort liability or limit liability or limit the damages recoverable" in all other actions.

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Subdivision 4 must be understood in conjunction with the Act's definition of "maintenance and use." Subdivision 4 reads:

> Nothing in this section shall impair or limit the liability of a person in the business of manufacturing, distributing, retailing, repairing, servicing or maintaining motor vehicles arising from a defect in a motor vehicle caused or not corrected by an act or omission in the manufacture, inspection, repair, servicing or maintenance of a vehicle in the course of the business (emphasis added).

Similarly, "maintenance or use," used in subdivision 1 of 65B to trigger the threshold application, is defined in 65B.43 subd.3, to exclude claims arising out of the repair or service of vehicles:

> Maintenance or use of motor vehicle . . . does not include (1) conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles unless the conduct occurs off the business premises . . .

V. Specific Thresholds

A. *Medical Expense Threshold*

To meet the medical expense threshold, 65B.51, subd.3(a) provides that the "sum of the following" must

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"exceed" $4,000.00. (As originally enacted, the Act contained a $2,000 medical expense threshold. This was increased to $4,000 by a 1978 amendment):

> (1) Reasonable medical expense benefits paid, payable or payable but for any applicable deductible, *plus*
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> (2) The value of free medical or surgical care or ordinary and necessary nursing services performed by a relative of the injured person or a member of the injured person's household, *plus*
>
> (3) The amount by which the value of reimbursable medical services or products exceeds the amount of benefit paid, payable, or payable but for applicable deductible for those services or products if the injured person was charged less than the average reasonable amount charged in this state for similar services or products, *minus*
>
> (4) The amount of medical expense benefits paid, payable, or payable but for an applicable deductible for *diagnostic X-rays* and for a procedure or treatment for *rehabilitation and not for remedial purposes or a course of rehabilitative occupational training* . . . (emphasis added).

"Reasonable" in subd. 1, referencing "medical expense benefits," refers to both the treatment and the cost.

"Medical expense benefits" is defined in 65B.44, subd 2, as follows:

> [a]ll reasonable expenses for necessary medical, surgical, X-ray, optical, dental, chiropractic, and rehabilitative services, including prosthetic devices, prescription drugs, necessary ambulance and all other reasonable transportation expenses incurred in traveling to receive covered medical benefits, hospital, extended care, and nursing services. Hospital room and board benefits may be limited, except for intensive care facilities, to the regular daily semiprivate room rate customarily charged by the institution in which the recipient of benefits is confined. Such benefits shall also include necessary remedial treatment and services recognized and permitted under the laws of this state for an injured person who relies upon spiritual means through prayer alone for healing in accordance with that person's religious beliefs. Medical expense loss includes medical expenses accrued prior to the death of a person notwithstanding the fact that benefits are paid or payable to the decedent's survivors. Medical expense benefits for rehabilitative services shall be subject to the provisions of section 65B.45.

In order for a medical expense to be considered under the Act, it must be for *treatment* of the injury, as opposed to an expense related to the litigation. In *Krummi v. MSI Insurance Co.*,[6] the Court of Appeals held that a medical examination ordered by an attorney to aid in trial preparation is not necessary medical treatment, and thus not recoverable under no-fault insurance. As explained by the court, to rule otherwise would permit plaintiffs to meet the threshold merely by attending multiple examinations:

> If claimants are permitted to characterize examinations conducted for litigation purposes as "medical expenses" payable under the terms of the No-Fault Act, claimants will be afforded an opportunity to exceed the required threshold simply by seeking a sufficient number of examinations and additional opinions to meet the statutory threshold. The potential hazards of improperly permitting the use of such examinations to meet the medical expense threshold are aggravated where, as here, the referral is not by another treating physician who had concluded that a neurological consultation is necessary, but rather by plaintiff's counsel in preparation of a personal injury case. 363 N.W.2d at 857.

The court also recognized that there could be circumstances where active treatment might not be rendered, but the examination was still necessary for the ultimate treatment of the injury:

> We do note, however, that there may be situations where, although the doctor does not actively treat a patient, he may provide reimbursable necessary advice or passive treatment. For example, a patient may be seeking a second opinion from another doctor before approving major surgery. This may be a necessary medical examination, but it is not an examination conducted by a doctor for the purpose of treating the patient. While the doctor rendering the second opinion is only providing advice and consultation and is not directly providing treatment, his opinion is a

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> necessary part of the overall treatment of the patient. The second opinion would then be reimbursable because it is necessary to, and a part of, the treatment. 363 N.W.2d at 857.

There are also a number of other significant restrictions on which medical expenses can be used to meet the tort threshold. In *Coughlin v. LaBounty*,[7] the court held that *future* medical expenses may *not* be included for the purpose of meeting the threshold. Looking to the language of 65B.51, the court reasoned:

> The language itself, "paid, payable or payable but for an applicable deductible," indicates that the legislature intended to measure the seriousness by the reasonable medical expenses incurred in the past rather than the future. Minn. Stat. Sec. 65B.51, Subd. 3(a)(3). As Professor Steenson notes, "[The statute] precludes consideration of future medical expenses in computing the tort threshold." Steenson, Minnesota No-Fault Automobile Insurance 161 (1982). 354 N.W.2d at 52.

In another, often overlooked clause of 65B.51, the statute itself prohibits the inclusion of x-ray costs in meeting the tort threshold. In the recent case of *Rivard v. McGinnis*,[8] the jury determined that the plaintiff had not suffered a permanent injury, and the plaintiff was left with only his medical expenses to meet the threshold. His medical expenses totalled $4,245, but $595 was for x-rays. The pertinent language of 65B.51, subd. 3(a)(4) provides that the computation of the $4,000 in medical expenses does *not* include:

> [t]he amount of medical expense benefits paid . . . for diagnostic X-rays and for a procedure or treatment for rehabilitation and not for remedial purposes or a course of rehabilitative occupational training[.]

Quoting Professor Steenson's 1981 law review article, Steenson, *A Primer on Minnesota No-Fault Automobile Insurance*,[9] the court explained:

> [t]he reason for deducting diagnostic x-rays from the medical expense computation is, apparently, to remove any incentive to reach for the tort threshold by resort to easily inflated expenses. The same reason seems to apply to the exclusion for non-occupational or non-remedial rehabilitation expenses. *Rivard.* 454 N.W.2d at 454.

The court rejected the plaintiff's argument that these x-rays were really remedial, and not simply diagnostic.

> Even if there was testimony specifically describing the x-rays in this case as "remedial," we would have to disagree with such a label. "Remedial" may be defined as "[s]upplying a remedy" or cure. American Heritage Dictionary 1045 (2d college ed. 1982). The x-rays here did not provide any relief or remedy to Rivard for his condition. While there may be times when certain types of x-rays are remedial, such as for treatment of cancer, this is not one of these instances. *Id.* at 455.

Finally, the court determined that while the legislative purpose in excluding diagnostic x-ray may have been to prevent plaintiffs from using them to try to reach a threshold, the intent of the plaintiff and/or his doctor wasn't important when the statutory language was "clear and unambiguous."

> As further support for its decision, the trial court in this case emphasized it was "firmly convinced that [the x-rays] were ordered for remedial purposes and not in any attempt to reach for the tort threshold." Reliance on legislative intent is not permitted when the language of a statute is clear and unambiguous. Minn. Stat. Sec. 645.16 (1988); *Beck v. City of St. Paul*, 304 Minn. 438, 445, 231 N.W.2d 919, 923 (1975). The fact the x-rays in this case were not ordered in an attempt to reach the tort threshold is therefore unimportant. *Id.*

Consequently, the law is clear — diagnostic *x-rays* are *excluded* from the calculation of the medical expense threshold. There are apparently no reported appellate decisions defining the scope of the term "x-ray." While it might be arguable that a test such as an *MRI* (which uses a magnetic field to form its image as compared with a CAT scan which uses traditional x-rays assisted by computer imaging) might *not* be excluded by this statutory language, the practitioner would be well advised to calculate threshold amounts excluding *all* forms of diagnostic imaging.

It is also important to keep in mind that subd. 4 also excludes expenses for treatment for rehabilitation which is not remedial or for occupational purposes. That means expenses for rehabilitation that is designed to enable a person to better adjust to her physical limitation, but does not fall into the category of physical or medical therapy, or occupational retraining, is subtracted.

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B. Permanent Disfigurement or Permanent Injury

The Act itself does not define the terms "injury" or "disfigurement," and to date, no reported Minnesota decision has provided any interpretation or definition that adds anything to the ordinary meaning of the terms. While the Minnesota Jury Instruction Guide defines each term, see 4 Minnesota Practice Civ., JIG 600 (3d ed. 1986), it cites *no Minnesota authority* for these definitions. Nevertheless, these definitions have become widely accepted by the bench and bar, and counsel can generally assume the jury will be instructed by the definitions in JIG 600:

Disfigurement

A disfigurement is that which impairs or injures the appearance of a person.

Permanent Injury

A permanent injury is one from which it is reasonably certain a person will not fully recover. Such injury may improve or worsen, but must be reasonably certain to continue to some degree throughout the person's life."

While the original no-fault bill as first introduced required a *specific degree of severity* for both a permanent injury and a permanent disfigurement (requiring a "significant" permanent injury and a "serious" permanent disfigurement), both of the initial qualifying terms were ultimately omitted from the final Act. Because one of the primary purposes of the Act was to separate out so-called minor injuries and "restric[t] the right to recover general damages to cases of *serious injury*," 65B.42(2) (emphasis added), the question that naturally arises is whether the omission of these qualifying terms was meant to *lessen* the severity of the injury required.

In other words, would *any* permanent injury or disfigurement, no matter how minor, meet the threshold? The legislative history shows that the word "significant" was deleted to avoid use of a vague term difficult of legal application, Steenson, 2 Wm Mitchell L. Rev. at 138. However, the legislative history is otherwise not terribly helpful, and Steenson concludes that it "presents no conclusive answers." Id at 147.

The most logical way to view the omission of the qualifying terms of "serious" and "significant" is that the Legislature concluded that any *permanent* harm that befalls a person is, by the *very fact of its permanency*, serious enough to justify the allowance of non-economic damages.

The bottom line for the practitioner is that the plain language of the statute cannot be added to by any qualifying language such as serious or significant. Once there is evidence

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in the record that the injury or disfigurement is permanent in nature, it then becomes a jury issue of whether the threshold is met.

In order to establish this evidence of a permanent injury or disfigurement, medical evidence is usually necessary. For example, the plaintiff's own statement as to permanency was held insufficient to establish permanency,[10] and summary judgment was upheld against a plaintiff whose letter from her doctor stating she had a "disability of her spine" was insufficient medical evidence of permanency.[11]

While certain injuries or disfigurements may be so obviously permanent that a person could meet the threshold as a matter of law even without medical evidence (i.e. the loss of a limb or massive burn injuries), the plaintiff in these cases is surely going to present medical evidence to establish the full extent of the harm. While a plaintiff might be tempted in the case of a minor scar injury to establish permanency without medical evidence, the defense may argue that the plaintiff has not met his burden of establishing that the disfigurement will never heal or disappear. The far safer course is to establish the fact of the permanency by competent medical evidence in order to guarantee that the case will go to the jury.

Although the issue has not arisen in Minnesota, other jurisdictions have addressed whether the death of a fetus or a stillbirth is classified as a permanent injury, a death, or neither. If the fetus is viewed as part of a woman's body, it should be considered a permanent injury. If it is viewed as a life, then it would be a death.[12] In a New York case, the court held that the death of a fetus was neither an injury to the mother or a death, a decision the New York legislature found so contrary to the spirit of the no-fault law that they amended the injury threshold to include loss of a fetus.[13]

C. *60 Days of Disability*

Section 65B.51 subd.3(c) defines disability for threshold purposes as the "inability to engage in substantially all of the injured person's usual and customary daily *activities*" (emphasis added). The Court of Appeals has held that this threshold requires only 60 *cumulative* days, and not 60 *consecutive* days.[14] A plaintiff's testimony concerning his injury, his time off from work, and his limitation of movement, has has been considered sufficient evidence to create a jury issue as to whether the disability threshold was met.[15]

VI. Waiver and Contribution

While the plaintiff has the burden of pleading and proving that they have met a threshold,[16] the defendant will be considered to have waived the issue if they do not raise it at trial or in the formulation of a special verdict.[17] A defendant is *not* required to submit their own medical testimony to contest the plaintiff's medical proof. In *Nemanic v. Gopher Heating and Sheet Metal, Inc.*,[18] the court held that the defendant could contest the plaintiff's proof and create a jury issue simply by a cross-examination of the plaintiff's expert witness and the introduction of the plaintiff's medical records.

It is also important to remember that in cases where liability against co-defendants is premised on theories other than the negligent operation of a motor vehicle, the failure to meet a threshold may affect the plaintiff's right to recover against one defendant but not others. A defendant not directly liable to the plaintiff for failure to meet a threshold may still have liability for contribution. In *Moose Club v. LaBounty*,[19] the Court of Appeals held that the thresholds are a technical defense resulting in no recovery, but they are not a determination of no liability. Thus, a finding that the plaintiff did not meet a threshold does not destroy common liability for the purpose of contribution.

VII. Conclusion

While tort thresholds cannot be ignored, neither should they be feared. As seen above, they may stand as a bar to recovery but they do not apply to all types of cases or damages arising out of motor vehicle accidents. In addition, these thresholds cannot be expanded beyond their statutory language to increase the plaintiff's burden. Ultimately, the fact that tort thresholds may bar recovery in some cases is, for good or bad, precisely what the Minnesota Legislature had in mind.

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1. 354 N.W.2d 48 (Minn.Ct.App. 1984).
2. *Murray v. Walter*, 269 N.W.2d 47, 50 (Minn. 1978); *Lipa v. Johnson*, 381 N.W.2d 64, 66 (Minn. Ct. App. 1986).
3. Steenson, 2 Wm. Mitchell L. Rev at 142.
4. Minn. Stat. section. 65B.43 subd. 8.
5. Minn. Stat. section. 65B.51 subd. 1.
6. 363 N.W.2d 856, 857 (Minn. Ct. App. 1985).
7. 354 N.W.2d 48 (Minn. Ct. App. 1984), *pet. for rev. denied* (Minn. Jan. 9, 1985).
8. 454 N.W.2d 453 (Minn. Ct. App. 1990).
9. 7 Wm. Mitchell L.Rev. 313, 390 (1981).
10. *Marose v. Hennameyer*, 347 N.W.2d 509 (Minn. Ct. App. 1984).
11. *Kissner v. Norton*, 412 N.W.2d 354 (Minn. Ct. App. 1987).
12. *Roberts v. Hazle Yellow Cab Co.*, 13 D&C 3d 126 (Penn. Comm. Pleas 1979).
13. *Raymond v. Bartsch*, 84 A.D. 2d 60, 447 N.Y.S. 2d 32 (1981).
14. *Linder v. Lund*, 352 N.W.2d 68, 71 (Minn. Ct. App. 1984).
15. *Lipa v. Johnson*, 381 N.W.2d 64 (Minn. Ct. App. 1986).
16. *Lipa v. Johnson*, 381 N.W.2d 64, 66 (Minn. Ct. App. 1986).
17. *Murray v. Walter*, 269 N.W.2d 47, 50 (Minn. 1978).
18. 337 N.W.2d 667, 670 (Minn. 1983).
19. 442 N.W.2d 334 (Minn. Ct. App. 1989).