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NO-FAULT TORT THRESHOLDS: THE PLAINTIFF'S PERSPECTIVE

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I. Introduction

In the typical soft-tissue automobile accident personal injury case tried today, it is doubtful that a single issue presents as much importance to the outcome of the case as the factual question of whether the plaintiff has met a statutory "tort threshold," namely that he or she has suffered an injury which resulted in death, permanent injury or disfigurement, over $4,000 in medical treatment, or at least 60 days of disability. [1] 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.

The critical importance of these tort thresholds is not accidental. Indeed, they lay at the very heart of the Minnesota No-Fault ***986** Act (the Act). [2] As explained by the court in Coughlin v. LaBounty: [3]

> One of the stated purposes of the No-Fault Act is to prevent litigation over automobile accident claims. 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. [4]

Enacted in 1974, the Act had two primary goals, to see that every person injured in a motor vehicle accident, regardless of their fault or innocence, recovers quickly and easily from their own insurance company their "economic loss" benefits, generally their medical bills and wage loss. [5] 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, the Legislature sought to eliminate the overcompensation of victims and reduce the number of lawsuits arising out of motor vehicle accidents. [6] To accomplish

this end, the Legislature placed a new hurdle 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. [7] 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 ***987** of consortium. [8] “Seriously” injured victims, on the other hand, retained all of their rights to these traditional common law damages. [9]

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 any recovery of non-economic benefits. The answer, of course, is found in the no-fault thresholds contained in section 65B.51 of the Minnesota Statutes. The consequences of which class the victim falls into are obviously critical when pursuing a tort action, because the typical plaintiff has had all of his or her medical bills and wage loss paid for by no-fault, and the primary damages sought in a tort lawsuit are non-economic damages, the very damages that are dependent upon meeting a tort threshold.

This article will examine the no-fault thresholds found in section 65B.51, an analysis which requires one to keep in mind that the very purpose of the Act is to deny an entire class of automobile accident victims certain damages while at the same time allowing the seriously injured victim to recover all the traditional tort damages.

II. Legislative History

A complete review of the legislative history of the tort thresholds in section 65B.51, while beyond the scope of this article, is not only interesting but may prove helpful in a particular case. 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. [10] Professor Steenson examined the initial thresholds in the first bill that was introduced (as well as its source, the Uniform Motor Vehicle Accident Reparations Act), and the amendments which followed in both the Senate and the House, all of which reduced the descriptive thresholds from the initial “significant permanent injury,” “serious permanent ***988** disfigurement,” and “more than six months of complete inability of the injured person to work in an occupation,” to the present, less restrictive, thresholds. [11] While the reduction in the disability period from six months to sixty days is obviously less restrictive, Professor Steenson also confirmed 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.” [12]

Ultimately, the Legislature itself stated in section 65B.42(2) of Minnesota Statutes the purpose of these thresholds, namely, “[t]o prevent the overcompensation of those automobile accident victims suffering minor injuries by restricting the right to recover general damages to cases of serious injury. [13]

III. Burden of Proof

It is well established that the tort thresholds are not affirmative defenses but are 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. [14] However, it is 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. [15] 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. [16]

IV. Limitations on Applications of Tort Thresholds

It is important to remember that the Act itself limits the application of the thresholds, both in the damages it restricts and the ***989** type of case in which the thresholds apply. First, the Act only prohibits the recovery of "non-economic detriment" damages [17] if a threshold is not met. [18] Economic loss claims, on the other hand, are not subject at all to these thresholds. [19]

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

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. [20]

While the Act thus limits the threshold's application to only certain types of claims involving a motor vehicle accident, a recent Minnesota Court of Appeals decision has (incorrectly) expanded their application. The most common type of claim that involves a motor vehicle accident but is not a negligence claim is an uninsured motorist claim (UM), which is a contract action. It had long been assumed by those practicing in this area that UM claims were not governing by tort thresholds, but last year, the Court of Appeals ruled otherwise. In Johnson v. State Farm Mutual Automobile Insurance Co., [21] the court broadly construed the language of the Act in favor of the insurer, not the insured, and stated:

Applying these definitions, the phrase "with respect to a cause of action in negligence" appears to encompass more than simply "an action in negligence." Properly defined, the phrase refers to the operative facts underlying a negligence action. Johnson's contract action against her UM insurer, as required by the statute, arises out of the same operative facts that give rise to an action in negligence. Johnson's ability to collect under her UM coverage is conditioned on the existence of a cause of action in negligence. Consequently, the phrase "with respect to a cause of action in negligence" could refer to both a negligence action and the contract action arising from the same operative ***990** facts that is conditioned on the negligence. We recognize that the official headnote to section 65B.51 refers to "tort recovery" which, again, facially supports Johnson's claim that the legislature intended to limit the No-Fault thresholds to negligence actions. But the legislature has expressly provided that such headnotes "are mere catchwords to indicate the contents of the section or subdivision and are not part of the statute." Minn Stat. § 645.49 (1996). [22]

Recognizing that its conclusion benefited uninsured drivers, at the expense of injured victims, the court strained to support its conclusion:

Johnson argues that when an owner of a vehicle--i.e., Jenkins--has failed to obtain coverage for his vehicle, he should not be allowed to benefit from the No-Fault thresholds. This argument is supported by several writers in the area of no-fault benefits. See Michael K. Steenson, A Primer on Minnesota No-Fault Automobile Insurance, 7 Wm. Mitchell L. Rev. 313, 388 (1981) (stating that "quid pro quo for procuring the insurance required by the Act is the limited tort immunity granted by the tort thresholds. If the security has not been provided, the defendant is not entitled to that immunity")' Peter H. Berge and James R. Schwebel, The Practitioner's Guide to the Minnesota No-Fault Act § 8.3 (3d ed. 1988) (stating in a suit against such a driver no threshold need be shown). But the issues raised in this appeal do not include the issue whether a suit by Johnson against Jenkins

himself would be subject to the No-Fault thresholds. Johnson seeks recovery from State Farm, not Jenkins. As Johnson's UM insurer, State Farm does not stand in Jenkins's shoes but in the shoes of Jenkins's absent liability insurer. [23]

Consequently, the practitioner can no longer be certain that in other actions in which the plaintiff should not have to meet a threshold, their application will be limited as the Act intends. This would include intentional tort claims; 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. The plaintiff must be prepared for a defense attempt to apply the thresholds, ***991** and therefore be ready to limit Johnson's holding to UM cases. The Plaintiff must focus on the Johnson court's reliance on the fact that "UM insurance is intended to provide the coverage that would have been provided by the tortfeasor's liability carrier, had the tortfeasor been insured" and that the insurer who is "standing in the stead of that theoretical insurer" should "not be deprived of the provisions that would apply to an actual insurer." [24] The plaintiff must be prepared to show how and why intentional torts, products liability cases, and so on, fundamentally differ from UM cases, and therefore do not call for the application of thresholds.

Subdivisions 4 and 5 of section 65B.51 of the Minnesota Statutes 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. [25] 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. [26]

Even so, "maintenance or use," as used in subdivision 1 of section 65B to trigger application of the threshold, is defined to exclude claims arising out of the repair or service of vehicles. [27]

V. Specific Thresholds

A. Medical Expense Threshold

To meet the medical expense threshold, section 65B.51, subdivision ***992** 3(a) provides that the "sum of the following" must "exceed" $4,000:

> (1) Reasonable medical expense benefits paid, payable or payable but for any applicable deductible, plus

(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 an 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 . . . . [28]

"Reasonable medical expense benefits" refers to both the treatment and the cost. "Medical expense benefits" is defined in section 65B.44 of the Minnesota Statutes as, inter alia:

> all 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 rates customarily charged by the institution in which the recipient of benefits is confined. [29]

***993** 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. [30] In Krummi v. MSI Insurance Co., [31] the Minnesota Court of Appeals held that a medical examination ordered by an attorney to aid in trial preparation was 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. [32]

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. [33]

Even so, the court also recognized that there could be circumstances where active treatment is not rendered, but the examination might still be necessary for the ultimate treatment of the injury. [34]

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 necessary part of the overall treatment of the patient. The second ***994** opinion would then be reimbursable because it is necessary to, and a part of, the treatment. [35]

There are also a number of other significant restrictions on which medical expenses can be used to meet the tort threshold. First, in Coughlin v. LaBounty, [36] the court held that future medical expenses may not be included for the purpose of meeting the threshold. Looking to the language of section 65B.51, the court reasoned:

The language itself, "paid, payable or payable but for an[y] applicable deductible," indicates that the legislature intended to measure the seriousness by the reasonable medical expenses incurred in the past rather than the future. As Professor Steenson notes, "[The statute] precludes consideration of future medical expenses in computing the tort threshold." [37]

In another, often overlooked, clause of section 65B.51, the statute itself prohibits the inclusion of "diagnostic x-ray" costs in meeting the tort threshold.[38] In Rivard v. McGinnis,[39] 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 totaled $4,245, but the x-rays cost $595 of that amount.[40]

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 nonremedial rehabilitation expenses.[41]

The court rejected the plaintiff's argument that these x-rays were really remedial, and not simply diagnostic.[42]
***995** 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. 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 those instances.[43]

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."[44]
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. . . . The fact the x-rays in this case were not ordered in an attempt to reach the tort threshold is therefore unimportant.[45]

Consequently, the law is clear - diagnostic x-rays are excluded from the calculation of the medical expense threshold. The only appellate decision on whether the term "diagnostic x-ray" also includes MRI (magnetic resonance imaging) and CAT (computer assisted tomography) scans is the unreported case of Safinia v. Kruse.[46] Because MRI's use a magnetic field (compared to CAT scans, which use x-rays assisted by computer imaging), MRI's are not included in the plain language of the statute.

However, the Safinia court, in conclusory fashion, ruled that the purpose of the statute was to exclude all diagnostic (as opposed to remedial) expenses, and included MRI and CAT scans in the definition of "x-rays" .[47] Given this, the practitioner would be well ***996** advised to exclude all forms of diagnostic imaging from calculations of threshold amounts.

It is also important to keep in mind that subdivision 3(a)(4) of section 65B.51 also excludes expenses for treatment for rehabilitation which are: (1) not remedial, or (2) for occupational purposes.[48] This means that expenses for rehabilitation which are designed to enable a person to better adjust to a physical limitation, but do not fall into the categories of physical or medical therapy or occupational retraining, are subtracted.

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 (JIG) gives definitions of each term, [49] 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 that JIG 600, containing these definitions will be given to the jury. These definitions are as follows:

Disfigurement

A disfigurement is that which impairs or injures the appearance of a person. [50]

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. [51]

While the original no-fault bill as first introduced required a specified degree of severity for both a permanent injury and a permanent disfigurement (requiring a "significant" permanent injury ***997** and a "serious" permanent disfigurement), both of these qualifying terms were ultimately omitted from the final Act. [52] Because one of the primary purposes of the Act was to separate out so-called minor injuries and "restrict[ ] the right to recover general damages to cases of serious injury," [53] the question that naturally arises is whether the omission of these qualifying terms was meant to lessen the severity of the injury required, i.e. whether any permanent injury or disfigurement, no matter how minor it might seem, would meet the threshold.

The legislative history shows that the word "significant" was deleted to avoid use of a vague term difficult of legal application, [54] but the legislative history is otherwise not terribly helpful, and Professor Steenson has concluded that it "presents no conclusive answers." [55] What seems 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; and once there is evidence 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. [56]

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 cases to establish the full extent of the harm. Even though a plaintiff might be tempted in the case of a minor scar injury to establish permanency without medical evidence, the ***998** defense may argue that the plaintiff has not met his burden of establishing that the disfigurement will never heal or disappear, and 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 the issue of the death of a fetus or a stillbirth, and whether it is classified as a permanent injury, a death, or either. [57] If the fetus is viewed as part of a woman's body, it should be considered a permanent injury. If it is viewed as an individual life, then the loss would be considered a death. [58] In a New York case the court held that the death of a fetus was neither an injury to the mother nor a death, [59] 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. [60]

C. Sixty Days of Disability

Subdivision 3(c) of Section 65B.51 defines disability for threshold purposes as the "inability to engage in substantially all of the injured person's usual and customary daily activities." [61] The Minnesota Court of Appeals has held that this threshold requires only sixty cumulative days, and not sixty consecutive days. [62] In addition, a plaintiff's own testimony about his injury, his time off from work, and his limitation of movement, have been found sufficient evidence to create a jury issue as to whether the disability threshold was met. [63]

***999** The practitioner should be aware, however, of the tendency of some courts to restrictively construe this definition of disability. In a number of decisions, the court of appeals has ruled as a matter of law that the particular descriptions of what the plaintiff could not do during the sixty day period did not rise to the level of "disability" required by the statute. [64]

For example, in Safinia v. Kruse, [65] the plaintiff claimed that he was unable to do karate or play soccer or racquetball for part of a year, and could not complete his normal household chores because standing for more than ten or fifteen minutes was painful. The plaintiff also alleged that he suffered pain while standing, walking, or sitting, and had to stretch or lie down on occasion to relieve the pain. [66] The court ruled that these facts were insufficient to meet the tort threshold requiring that Safinia prove that his injury resulted in disability of 60 days or more. [67] The court stated that it has construed "the statute's definition of disability as requiring a significant loss of the ability to work. In this instance, Safinia missed no work as a result of the accident; therefore, we must conclude that he was able to engage in this usual and customary daily activity." [68]

*1000 VI. Evidentiary Burdens and Other Liability

While the plaintiff has the burden of pleading and proving that he or she has met a threshold, [69] the defendant will be considered to have waived the issue if it is not raised at trial or in the formulation of a special verdict. [70] Defendants are not required to submit their own medical testimony to contest the plaintiff's medical proof. [71] In Nemanic v. Gopher Heating and Sheet Metal, Inc., [72] 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.

Finally, it is important to remember that in cases where liability against co-defendants is premised on theories other than negligence in the 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, and a defendant not directly liable to the plaintiff for failure to meet a threshold may still have liability for contribution. [73] In Moose Club v. LaBounty, [74] 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. [75]

VII. Conclusion

In the interest of ensuring a quick recovery for the most seriously injured automobile accident victims, the tort thresholds of the No-Fault Automobile Insurance Act deny another class of victims recovery of non-economic detriment damages. Given this, ***1001** practicing attorneys representing those potentially "less seriously" injured plaintiffs must be concerned with whether the facts of a particular case allow for recovery under the No-Fault Act. In particular, attorneys should familiarize themselves with the case law discussing the types of procedures which may or may not be aggregated toward the "$4,000 in medical treatment" threshold, or those cases addressing the "sixty days of disability" under the No-Fault Act. Careful analysis of these issues in the early stages of the litigation may be useful to prevent unproductive litigation and allow the attorney to develop more realistic expectations among clients.

Footnotes

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1 See Minn. Stat. § 65B.51, subd. 3 (1996).

2 See id. § 65B.41 (designating Sections 65B.41 to 65B.71 of the Minnesota Statutes as the "Minnesota No-Fault Automobile Insurance Act").

3 354 N.W.2d 48 (Minn. Ct. App. 1984).

4 Id. at 52 (emphasis added) (citation omitted) (citing Minn. Stat. § 65B.42(4)).

5 See Developments in Minnesota Law - I. Automobile Insurance, 59 Minn. L. Rev. 785, 865 (1974):
[n]o-fault insurance has been supported on the grounds that it will afford prompt and certain recovery of immediate out-of-pocket medical expenses and loss of wages, that it will lower the cost of insurance, that it will prevent the relative overcompensation of accident victims, and that it will speed the administration of justice by removing a significant number of negligence suits from crowded court calendars.

6 See id.

7 See Minn. Stat. § 65B.51, subd. 3 (1996) (prohibiting recovery of "noneconomic detriment" damages if an injured individual did not meet the threshold of at least $4,000 in "reasonable medical expenses"). This article refers to those persons with medical expenses of less than $4,000 as "less seriously" injured and those persons with medical expenses greater than $4,000 as "seriously" injured.

8 See id.; Minn. Stat. § 65B.43, subd. 8 (1996) (defining "non-economic detriment" as "all dignitary losses suffered by any person... including pain and suffering, loss of consortium, and inconvenience").

9 See supra note 7.

10 See Michael K. Steenson, No-Fault in a Fault Context: Tort Actions and Section 65B.51 of the Minnesota No-Fault Automobile Insurance Act, 2 Wm. Mitchell L. Rev. 109, 136-41 (1976).

11 See Steenson, supra note 10, at 136, 141 (citing the text of the Uniform Motor Vehicle Accident Reparations Act, Section 5, and the threshold provisions of the bill as introduced in the Minnesota Legislature as well as the final version codified in subdivision 3 of Section 65B.51 of the Minnesota Statutes).

12 See Steenson, supra note 10, at 138 (quoting a tape of the Minnesota Senate debate on S.F. 96 (May 9, 1973)).

13 Minn. Stat. § 65B.42(2) (1996) (emphasis added).

14 See Murray v. Walter, 269 N.W.2d 47, 50 (Minn. 1978); Lipa v. Johnson, 381 N.W.2d 64, 66 (Minn. Ct. App. 1986).

15 See Minn. Stat. § 65B.51, subd. 3 (1996).

16 See Steenson, supra note 10, at 142.

17 See supra note 8 for definition of “non-economic detriment.”

18 See Minn. Stat. § 65B.51, subd. 3 (1996) (limiting damages for non-economic detriment to only those persons meeting the tort thresholds specified).

19 See id.

20 See Minn. Stat. § 65B.51, subd. 1 (1996).

21 574 N.W.2d 468 (Minn. Ct. App. 1998).

22 Id. at 471.

23 Id. at 472.

24 Id.

25 Id., subd. 5.

26 Id., subd. 4.

27 Id. § 65B.43, subd. 3 (stating that “[m]aintenance or use of a 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”).

28 Id. § 65B.51, subd. 3(a) (emphasis added). As originally enacted, the Act contained a $2,000 medical expense threshold. See Steenson, supra note 10, at 140; Minn. Stat. Ann. § 65B.51, Historical and Statutory Notes (West 1996). This was increased to $4,000 by a l978 amendment. See Minn. Stat. Ann. § 65B.51, Historical and Statutory Notes (West 1996).

29 Minn. Stat. § 65B.44, subd. 2 (1996). This provision continues:
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.
See id.

30 See Krummi v. MSI Ins. Co., 363 N.W.2d 856, 857 (Minn. Ct. App. 1985).

31 See id.

32 See id.

33 Id.

34 See id.

35 Id.

36 354 N.W.2d 48, 52 (Minn. Ct. App. 1984).

37 Id. (citations omitted) (citing Michael K. Steenson, Minnesota No-Fault Automobile Insurance 161 (1982)).

38 See Minn. Stat. § 65B.51, subd. 3(a)(4) (1996) (stating that the medical expenses threshold of $4,000 shall not include "[t]he amount of medical expense benefits paid... for diagnostic X-rays...").

39 454 N.W.2d 453, 454 (Minn. Ct. App. 1990).

40 See id.

41 See id. (citing **Michael** K. Steenson, A Primer on Minnesota No-Fault Automobile Insurance, 7 Wm. **Mitchell** L. Rev. 313, 390 (1981)).

42 See Rivard, 454 N.W.2d at 454.

43 Id. at 455 (citations omitted) (citing American Heritage Dictionary 1045 (2d ed. 1982)).

44 See Rivard, 454 N.W.2d at 455.

45 Id. (citations omitted).

46 No. C8-96-1623, 1997 WL 118200 (Minn. Ct. App. March 18, 1997), review denied, (Minn. May 28, 1997).

47 See id. at *2. This finding runs contrary to statutory construction rules under which one would expect an exclusion of coverage from a remedial statute to be strictly construed. See, e.g., Stang v. Minnesota Teachers Retirement Assoc. Bd. of Trustees, 566 N.W.2d 345, 349 (Minn. Ct. App. 1997) (holding that since the "teachers retirement statutes are remedial in nature, they are entitled to liberal construction to insure the beneficial purposes intended" and thus any exclusions are "strictly interpreted"). However, this aspect of the issue was not addressed by the Safinia court. See Safinia, 1997 WL 118200, at *2.

48 See Minn. Stat. § 65B.51, subd. 3(a)(4) (1996).

49 See Minnesota Dist. Judges Ass'n Comm. on Jury Instruction Guides, Minnesota Jury Instruction Guides (Civil) JIG 600 (**Michael** K. Steenson, rep.) in 4 Minn. Practice 402-03 (3d ed. 1986).

50 See id. at 403.

51 See id.

52 See supra note 12 and accompanying text.

53 Minn. Stat. § 65B.42(2) (1996) (emphasis added).

54 See Steenson, supra note 10, at 138.

55 See Steenson, supra note 10, at 147.

56 See Kissner v. Norton, 412 N.W.2d 354, 357 (Minn. Ct. App. 1987) (holding summary judgment was properly granted against plaintiff who offered no medical evidence of permanency except the letter of a doctor stating she had a "disability of her spine"); Marose v. Hennameyer, 347 N.W.2d 509, 511 (Minn. Ct. App. 1984) (holding the plaintiff's affidavit, as the only evidence of the permanency of her injury, was insufficient).

57 For example, Section 39:6A-8(a) of the New Jersey Statutes includes "loss of fetus" among the various personal injuries covered under the "verbal threshold option" of the No-Fault Insurance Act. See N.J. Stat. Ann. § 39:6A-8 (West 1996). New Jersey insureds may elect instead a "tort option" which has a higher premium but "permits unrestricted recovery of noneconomic damages." Jimenex v. Baglieri, 704 A.2d 1285, 1288 (N.J. 1998). See also infra note 60 and accompanying text.

58 See Roberts v. Hazle Yellow Cab Co., 13 Pa. D. & C.3d 126 (Penn. Comm. Pleas 1979); Raymond v. Bartsch, 84 A.D.2d 60, 447 N.Y.S.2d 32 (1981).

59 See Raymond, 84 A.D.2d at 61, 447 N.Y.S.2d at 33 (holding that "loss of the fetus [did not] constitute... 'permanent loss of use of a body organ, member, function or system' under New York's No-Fault Insurance Law).

60 See N.Y. Ins. Law § 5102(d) (McKinney 1997), as amended in 1984 by L. 1984, c. 955, § 4 (including "loss of fetus" in the definition of "serious injury").

61 Minn. Stat. § 65B.51, subd. 3(c) (1996) (emphasis added).

62 See Lindner v. Lund, 352 N.W.2d 68, 71 (Minn. Ct. App. 1984) (citing Steenson, supra note 10, at 151).

63 See Lipa v. Johnson, 381 N.W.2d 64, 66 (Minn. Ct. App. 1986).

64 See Safinia v. Kruse, No. C8-96-1623, 1997 WL 118200, *1 (Minn. Ct. App. March 18, 1997), review denied, (Minn. May 28, 1997). (reversing jury finding that plaintiff was disabled for sixty days or more because he did not miss work as a result of the accident); Burks v. Citywide Cab Co., No. C8-90-2581, 1991 WL 34671, *2 (Minn. Ct. App. March 19, 1991), review denied, (Minn. May 10, 1991) (affirming summary judgment for defendants where three-year-old plaintiff who suffered a broken leg was able to put weight on the leg within eight days of the injury and provided no evidence that she was unable "to engage in substantially all of her usual and customary daily activities"); Kissner v. Norton, 412 N.W.2d 354, 357 (Minn. Ct. App. 1987) (holding plaintiff could not have been disabled for sixty days where she only missed four days of work and did not provide any evidence that she was "unable to 'engage in substantially all of her usual and customary daily activities"'); Lindner v. Lund, 352 N.W.2d 68, 71 (Minn. Ct. App. 1984) (affirming summary judgment for lack of sixty days of disability where plaintiff's only evidence was that he missed some family activities, was confined to the house for only three days, and was not confined to bed or hospitalized); Marose v. Hennameyer, 347 N.W.2d 509, 511 (Minn. Ct. App. 1984) (finding plaintiff did not meet sixty day threshold where she was off work for a total of nine days and was seen at a clinic only six days).

65 No. C8-96-1623, 1997 WL 118200, *1 (Minn. Ct. App. March 18, 1997), review denied, (Minn. May 28, 1997).

66 See id.

67 See id. at *2.

68 Id. (citations omitted).

69 See Lipa v. Johnson, 381 N.W.2d 64, 66 (Minn. Ct. App. 1986).

70 See Murray v. Walter, 269 N.W.2d 47, 50 (Minn. 1978).

71 See, e.g., Nemanic v. Gopher Heating & Sheet Metal, Inc., 337 N.W.2d 667, 670 (Minn. 1983) (noting that since the burden is on the plaintiff to provide medical evidence, the defendant simply has to raise an issue of whether the threshold was met).

72 See id.

73 See, e.g., Moose Club v. LaBounty, 442 N.W.2d 334, 337-39 (Minn. Ct. App. 1989) (holding that a finding by the trial court that the plaintiff had not met the tort thresholds simply meant the plaintiff could not recover general damages under the No-Fault Act, but not that defendants were not liable under other legal theories).

74 See id. at 339.

75 See id.

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