MICHIGAN LAWYERS WEEKLY
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Viewpoint

Will 'Benefiel v. Auto-Owners' restore common sense to Michigan's broken 'Auto Law'?

By Steven M. Gursten, Esq.

Rarely does the *Michigan Lawyers Weekly* completely miss the point of an important case, but I feel compelled to respectfully suggest that your recent story on *Benefiel v. Auto Owners Insurance Company* did exactly that. (See "What was life like before ...?," Feb. 25, 2008.)

Benefiel is the most important automobile negligence case to be decided since the Michigan Supreme Court decided *Kreiner v. Fischer*.

It is a published decision, and it may hopefully help lawyers and judges better understand Michigan's chaotic threshold law.

Lawyers and judges have tried to understand how a short and unambiguous statute defining "serious impairment of body function" first became "a legislative re-enactment of *Cassidy v. McGovern*," despite the Michigan Legislature's clear rejection of *Cassidy*'s "objective person" life impact test in favor of a much easier "subjective person" life impact test, and then continuing to evolve into something far worse than *Cassidy*.

We have witnessed countless car accident victims have their cases dismissed, even after suffering serious fractures requiring surgery. We have watched our car accident threshold law evolve into something far worse than anyone intended. We have seen judges completely ignore the initial "nature and extent" of injuries, no matter how serious or devastating those injuries are, and focus, instead, exclusively on factors like length, duration, and even permanency of impairment.

The result has been some of the most alarming and notorious "*Kreiner* casualty" cases involving people who have suffered very serious personal injuries with periods of near-total disability, albeit for shorter periods of time.

It is in this last regard that *Benefiel* now offers some hope of restoring much needed common sense to our automobile accident threshold law.

Benefiel instructs judges that they must consider both "the more extensive nature and extent of the impairment" and the "length and duration of the impairment."

In the most critical part of the decision, the *Benefiel* court states: "... the more extensive the nature and extent of the impairment, the lesser the need for a lengthy or permanent duration of impairment in order to qualify an impairment as a serious impairment of body function."

If this sounds like common sense, then it is common sense that has been sorely lacking as more and more "*Kreiner* casualties" focus almost exclusively on the length and duration of injuries to the exclusion of all else.

Benefiel refers back to *Kreiner*, noting that even the Court's majority found "that the duration of impairment is short does not necessarily preclude a finding of a 'serious impairment of body function.'"

Benefiel's other great benefit is to provide a much needed roadmap for Michigan lawyers litigating automobile accident cases.

The decision contains an extensive analysis of the "multifaceted inquiry" that has been so lacking by so many of the unpublished appellate decisions.

Benefiel starts with the "type and length of treatment required" and the "nature and extent of the impairment."

In this regard, the court notes that the neck surgery that Mr. Benefiel underwent was "extensive and extremely serious."

"Type and length" and "nature and extent" are two of the five objective factors the Michigan Supreme Court wrote in *Kreiner* that a trial court is to consider in determining whether a plaintiff has suffered a serious impairment of body function under Michigan law.

The court notes that neck surgery is a very complicated operation, with many serious risks that include paralysis and even death. *Benefiel* also notes that this type of surgery will require extensive rehabilitation.

In regards to "the duration of impairment," "the extent of any residual impairment," and "the prognosis for eventual recovery" — the three remaining factors from *Kreiner* — the court notes that the plaintiff's spine "is now fused together for the rest of his life," and "it necessarily follows that plaintiff no longer has the ability to move his neck in a normal manner and has lost range of motion since his vertebrae are now, and forever will be, fused together by bony growth, a metal plate, and screws in his spine."

There is, thus, "lifelong impairment of lost mobility and range of motion" in his neck, the court concluded.

It should be noted that *Benefiel* is not the first auto case to deal with a neck surgery.

There are other cases, such as *Swick v. Okorn*, which involved a similar neck surgery and approximately seven months off work, yet, unlike Mr. Benefiel, Mr. Swick's case was dismissed. The operation itself did not change between *Swick* and *Benefiel*. This surgery has not suddenly become more dangerous, or, quoting *Benefiel*, more "extensive and extremely serious" in the last couple years.

This contrast exemplifies just how confusing Michigan's auto threshold law has become in the post-*Kreiner* era.

Yet the analysis made in *Benefiel* of the medical evidence and the record is notably absent from the short, typically one- or two-page unpublished "*Kreiner* casualties" opinions with which lawyers have become so familiar. These cursory, unpublished opinions raise troubling questions of judges

ruling more on the basis of political predisposition than precedent, and without a careful and reasoned application of law to the facts.

To remedy this, *Benefiel* provides a roadmap for judges. It instructs judges that they have a duty to examine the evidence and to then compare and contrast all of the five objective factors in *Kreiner* to determine if the plaintiff has suffered a serious impairment of body function. A judge is to then weigh these factors depending on the specific factual circumstances of each case. *Benefiel* reminds lawyers that it is our responsibility to provide the trial court with the necessary record and evidence to show how our client's injuries meet these five factors. In most automobile accident cases, any analysis will require an in-depth scrutiny of an injured person's medical records, work history and recreational activities.

Regarding the issue of "self-imposed versus physician imposed restrictions," a phrase gratuitously added by the majority in *Kreiner*, *Benefiel* injects a dose of needed sanity and common sense.

The Court of Appeals observes that "the activities that plaintiff states he can no longer engage in are limitations that logically track the objective manifestations of his injuries and resultant impairment, and serve to bolster our analysis of the other factors."

Lawyers litigating car accident cases have seen many seriously injured people's cases dismissed because of this completely unrealistic expectation. There is this foundationless belief of some judges that a treating doctor will write a long, exhaustive list of restricted activities for patients. Anyone who has spent an hour waiting for a five-minute doctor appointment knows how ridiculous this is, but dozens of otherwise deserving and seriously injured plaintiffs have had their cases dismissed for exactly this reason.

Now, hopefully after both *Benefiel* and *McDanield v. Hemker*, common sense restrictions consistent with objective injuries will now be sufficient, without the fictional and completely unrealistic expectation that a plaintiff must somehow produce long lists of activities that have been restricted by a treating doctor.

Benefiel also notes that any consideration of a self-imposed restriction is "but one factor in a much more comprehensive analysis of the totality of the circumstances involving all five factors of the *Kreiner* framework," an important reminder that should be included by any lawyer responding to a motion for summary disposition.

There are still many aspects of Michigan's current automobile accident threshold law not to like. Our auto law still discriminates against people injured in car accidents: those out of the workforce who are injured, elderly, very young, or already disabled are treated far harsher under our current impairment threshold. Our law also has the absurd public policy of punishing those people most worthy of our respect and help: those who have suffered serious injury, but try to return to work as soon as possible even though they are in pain.

For lawyers, we must prove our cases not only with the express language of the statutory definition created by the Michigan Legislature, but with the judicially imposed language created by the Michigan Supreme Court in *Kreiner*: language such as "course or trajectory," "entire normal life," "whole life," "physician imposed versus self-imposed restrictions," and other words found nowhere in the statute or legislative history, but that have had a profound impact on our cases.

Lawyers must also wrestle with the contradiction of how an injury can be short-lived, but still must affect the "course or trajectory" of a person's normal life in order to be a serious impairment of body function.

It is in this last regard that *Benefiel* may provide the most help for lawyers and judges.

People who suffer very serious injuries with short but profound periods of near total disability, and who go on to make good medical recoveries are still deserving of "pain and suffering" compensation under Michigan's auto law.

Will *Benefiel* restore some measure of sanity and common sense to Michigan's auto threshold law?

Today, the post-*Kreiner* battlefield is littered with casualties that go far beyond what anyone ever imagined. We have seen hundreds of innocent people who suffered significant injuries, including fractures and surgeries resulting in periods of near-complete disability, but have still been dismissed by the courts.

On March 6, 2008, *Donovan v. Metro Plant Services* was released.

Donovan is the first unpublished decision since *Benefiel* that involves a relatively short-lived impairment. The case concerns a one- to two-month period of near total disability following an arthroscopic shoulder surgery. The court notes that the plaintiff "could not, or only could with great pain and difficulty, work, drive, bathe himself, dress himself, tie his own shoes, brush his hair, clean, cook, mow, do laundry, and he was unable to raise his left arm more than 6 inches away from his thigh. He was generally unable to engage in normal activities or his usual routine."

Citing to *Benefiel*, *Donovan* notes that the plain, unambiguous statutory language of MCL 500.3135(7) contains no express or implicit time component for determining what "affects the person's general ability to lead his or her normal life."

Donovan further notes that the Michigan Supreme Court's reference in *Kreiner* to impairments of short duration and the possibility that such impairments would still satisfy the threshold for recovering noneconomic pain and suffering damages most certainly was meant to address post-surgical cases such as this one, in which a short-lived impairment severely or completely hampers nearly all aspects of a person's life.

Finally, *Donovan* finds that "the course or trajectory of a person's life can be affected, if even momentarily, by a devastating, yet short-lived impairment."

Michigan's auto law remains badly broken and in desperate need of repair.

But, at least now, for the first time in years, there is a glimmer of hope that some measure of common sense and sanity can be restored for car accident victims who have suffered clearly devastating injuries of shorter duration.

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March 17, 2008