News Story

MICHIGAN LAWYERS WEEKLY
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Ruling may ease proof of no-fault causation

By Todd C. Berg, Esq.

Michigan Supreme Court -- Analysis

The Michigan Supreme Court has allowed a Michigan Court of Appeals ruling to stand, which requires no-fault insurers to pay PIP benefits whenever an insured can show "almost any causal connection" between accidental bodily injury and the use of a motor vehicle.

No-fault defense specialists predict the ruling will have an opening-of-the-floodgates effect on personal protection insurance (PIP) benefits lawsuits.

Detroit attorney James G. Gross of Gross & Nemeth PLC agreed.

"Grafting the 'almost any causal connection' standard onto the 'arising out of' requirement sends the message to trial courts that almost anything will do," he said. "I think it will certainly open the floodgates to more litigation."

But lawyers who represent no-fault plaintiffs say the decision shouldn't be cause for alarm because it merely confirms what practitioners have long understand the law to be.

In *Scott, et al., v. State Farm Mutual Automobile Insurance Company*, the Court of Appeals identified the standard of proof required by MCL 500.3105(1) of the No-Fault Act to trigger a no-fault insurer's duty to pay PIP benefits to an insured "for accidental bodily injury arising out of the ... use of a motor vehicle as a motor vehicle ..."

In its April 15, 2008, unanimous per curiam published opinion, the court said: "Almost any causal connection will do."

And, although "'arising out of' requires more than an incidental, fortuitous, or but-for causal connection," the court said, it "does not require direct or proximate causation." The judges also said the "chain of causation" may be "somewhat attenuated" and need not "exclude other possible causes" of the injury at issue.

Judges Kurtis T. Wilder, William B. Murphy, and Patrick M. Meter signed on to the *Scott* opinion, which ultimately affirmed the trial court's denial of State Farm's summary disposition motion.

Initially, the Michigan Supreme Court disagreed with the Court of Appeals on the causation-standard issue.

In a Dec. 3, 2008, order, a four-justice majority concluded one adjustment needed to be made the Court of Appeals decision.

"[W]e vacate that portion of the judgment of the Court of Appeals that stated, with respect to the causation test under MCL 500.3105(1), that 'almost any causal connection or relationship will,'" read the court's order, which was joined by then-Chief Justice Clifford W. Taylor and Justices Maura D. Corrigan, Robert P. Young Jr., and Stephen J. Markman.

The justices reasoned the Supreme Court's decisions in *Putkamer v. Transamerica Insurance Corporation of America* in 1997 and in *Thornton v. Allstate Insurance Company* in 1986 had limited the No-Fault Act's "arising out of" test to proof of a causal connection that was more than incidental, fortuitous, or but-for.

Nevertheless, the justices agreed to deny State Farm's application for leave to appeal.

Justice Michael F. Cavanagh said he would've denied leave "without the further statement found in the majority's order."

Then-Justice Marilyn Kelly, joined by Justice Elizabeth A. Weaver, dissented.

Thirty years of precedent makes clear that "evidence establishing almost any causal connection [between an injury and use of a motor vehicle] will suffice when it more than merely fortuitous, incidental, or but for," Kelly said. "The level of proof could be described as a scintilla of proximate cause."

By June 2009, however, a new justice had joined the court and a new four-justice majority had formed, reconsidering the former majority's position. (In January 2009, Diane M. Hathaway replaced Taylor, having defeated him in his re-election bid in the November 2008 election, and Kelly was elected chief justice.)

In their June 5 order vacating the Dec. 3 ruling, Chief Justice Kelly and Justices Cavanagh, Weaver and Hathaway dispensed with the previous order's language rejecting the Court of Appeals' endorsement of the "almost any causal connection" standard.

Effectively, they reinserted into the Court of Appeals opinion the causation-standard language that the former majority had previously excised.

Because the justices agreed to uphold the court's denial of State Farm's leave application, the Court of Appeals published opinion, with its "almost any causal connection" standard, stands as binding precedent on all Michigan courts, except the Supreme Court.

Corrigan, joined by Young and Markman, dissented from the court's June 5 order in *Scott*.

The Supreme Court has never adopted the "almost any causal connection" standard, despite opportunities to do so in *Putkamer* and *Thornton*, she said.

Plus, Corrigan noted, "the 'almost any causal connection' language naturally suggests that the requisite causal connection may be established on weaker evidence than the more specific and narrowly drawn 'more than incident, fortuitous, or but for' standard."

Troy attorney James L. Borin of Garan Lucow Miller PC, who focuses his practice on no-fault defense, said there's "no question" that Corrigan's assessment is correct.

Accordingly, he said, the ruling will "lead to a lot more litigation, especially jury trials, because judges will be hesitant to grant summary disposition."

Borin said "almost any evidence" can meet the "almost any causal connection" standard. It's going to be a lot easier now to create a question of fact so as to survive summary disposition, he said.

Gross said the idea that the "almost any causal connection" standard had been an integral part of no-fault law for 30 years was "hogwash."

He said, "[a]nyone who thinks that doesn't know what no-fault law looks like."

Southfield attorney Wayne J. Miller of Miller & Tischler, P.C., whose office represents the plaintiff in *Scott* and who, personally, has written and spoken extensively about no-fault law, disagreed.

The Court of Appeals "decision is consistent with many years of case law," he said.

The Supreme Court's June 5 "decision restores a solid and clear body of law," Miller said.

According to the Court of Appeals opinion in *Scott*, only two published Court of Appeals cases, other than *Scott*, have cited the "almost any causal connection" standard.

The first case was the 1979 ruling in *Shinabarger v. Citizens Mutual Insurance Company*. The second case was the 1983 decision in *Bradley v. Detroit Automobile Inter-Insurance Exchange*.

Southfield attorney David E. Christensen of Gursten Koltonow Gursten Christensen & Raitt PC, who focuses his practice on representing no-fault plaintiffs, said the Supreme Court's rulings in *Putkamer* and *Thornton* support, rather than undermine, the "almost any causal connection" standard.

The "Supreme Court has had at least two cases before it in which it could have shown disapproval and stricken the 'almost any causal connection or relationship' language, and it has declined both times," he said. "Because that standard has been in place for 30 years and has never been overturned, it remains binding precedent."

Miller said the wording of the standard was "correctly broad."

He said, "[i]t probably means more jury trials, but that's the way things should be."

Christensen said *Scott* stands as an important reminder that the "standard for establishing causation in no-fault claims" is "incredibly low."

"[P]ractitioners and courts have lost sight of the very liberal standard of proof for establishing causation in PIP claims," he said. "Far too often the courts and both attorneys in PIP cases believe that 'proximate cause' is the standard, when, in fact, it has not been the standard since at least 1975."

Farmington Hills attorney Janet C. Barnes of Secrest Wardle, who represents State Farm in *Scott*, declined to comment.

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June 22, 2009