

Accident Victims Didn't Meet Serious Impairment Threshold

Experts: Ruling Doesn't Create 'Bright Line'

By [Lynn Patrick Ingram](#)

An auto accident victim who could not perform his job at the same level for the same number of hours per day because of a back injury, and another who could not work or play guitar in his band for several months because of a hand injury, did not suffer serious impairments of bodily functions under the No-Fault Act, the Michigan Supreme Court has ruled 4-3 in a consolidated decision.

The Court of Appeals had found that the plaintiffs met the threshold because the injuries affected their general ability to lead their normal lives.

But the Supreme Court disagreed, reversing both decisions.

"[T]he effect of the impairment on the course of a plaintiff's entire normal life must be considered," wrote Justice Clifford W. Taylor. "Although some aspects of a plaintiff's entire 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."

According to Taylor, neither the plaintiff in *Kreiner v. Fischer* nor the plaintiff in *Straub v. Collette* met this threshold.

"Looking at Kreiner's life as a whole, before and after the accident, and the nature and extent of his injuries, we conclude that his impairment did not affect his overall ability to conduct the course of his normal life," Taylor stated. "While he cannot work to full capacity, he is generally able to lead his normal life."

Moreover, "[g]iven that Straub's injury was not extensive, recuperation was short, unremarkable, and virtually complete, and the effect of the injury on body function was not pervasive, we conclude that Straub's general ability to live his normal life was not affected," Taylor concluded. "There is no medical evidence that Straub has any residual impairment or that the course of Straub's life has been affected. The temporary limitations Straub experienced do not satisfy the statutory prerequisites."

Justice Michael F. Cavanagh, joined by justices Marilyn Kelly and Elizabeth A. Weaver, dissented, stating that they would apply the statute as unambiguously written and, thus, affirm the decisions of the Court of Appeals.

The 62-page decision is *Kreiner v. Fischer*, Lawyers Weekly No. 06-52918.

No Bright Line

Lansing attorney George T. Sinas, who represents the plaintiff in *Kreiner*, cautioned the bench and bar against reading too much into this opinion.

"This case does not offer any bright-line test," he stated. "If you look at footnote 19, the court says the serious impairment of body function inquiry must proceed on a case-by-case basis because the statute requires an inherently fact-specific circumstantial determination."

In these cases, "it's obvious the court very clearly believes that these two plaintiffs suffered relatively minor injuries," Sinas said. "Neither one of them spent a single night in a hospital."

Regarding *Kreiner*, Sinas noted that the court focused on the fact that he used to work eight hours, but now he can only work six, and, based on his own testimony, he was able to perform all the requirements of his job.

"In other words, what the court is basically saying is, Kreiner can do in six what he used to be able to do in eight," Sinas observed. "He never lost a day of work and in one of these footnotes they say he is earning more money now after the accident than he ever earned."

Detroit attorney Daniel S. Saylor, who represents the defendant in *Kreiner*, agreed with Sinas that the court did not create a bright-line test. However, he did note the court's provision of a framework for these cases.

"The Supreme Court does not try to tell you where the line is drawn, other than to say that the facts of this case don't make it, and the facts of this other case don't make it," he noted. "What the majority does, though, is tell you what kinds of questions to ask in each and every case because there is going to be a trial judge who has to decide these motions."

However, Bingham Farms lawyer Dondi Vesprini, who represents the plaintiff in *Straub*, said the court's new framework may backfire.

"This decision has taken an otherwise plain and unambiguous statute and turned it into a convoluted obstacle course which inevitably lends itself to conflicting decisions in the lower courts, which is the exact situation practitioners had hoped this decision would resolve," Vesprini said.

Southfield auto law expert Steven M. Gursten agreed, noting that there is "hardly any black letter law at all" in this decision

"All the majority gives us are two examples of what doesn't make a case," he said.

According to Gursten, the bigger concern is the fact that a one-vote majority has made "such a radical change to a clear, unambiguous legislative definition of serious impairment."

But Detroit lawyer Mary T. Nemeth, who authored amicus briefs on behalf of Auto Club Insurance Association, said she sees the ruling as consistent with the way most lower courts have been interpreting the serious impairment definition.

"I don't see this a radical change in the law," she said. "I see this as the Supreme Court giving us specific guidance and, basically, approving the way the Court of Appeals generally has been interpreting these cases."

Sinas agreed with Gursten, though, noting that he is troubled by the court's "failure to adhere to its textualist claim."

"With all due respect to the court, based on my 28 years of being involved in the jurisprudence of no-fault, I will tell you that this is everything that textualism is not," he stated. "In this case, there is a tremendous amount of verbiage authored by the court that doesn't appear anywhere in the statute. For example, this reference to a requirement that we focus on the 'trajectory' of the plaintiff's life, or that the ultimate question is the effect on the plaintiff's general ability to conduct the 'course' of his life. These words are nowhere in the statute and they are not in any piece of legislative history that accompanied the passage of that statute."

But the most telling sign of the court's departure from its textualist roots, Sinas said, is the fact that it ignored the dictionary definition of the phrase "general ability," which is defined as a unitary phrase and simply means "ability."

"This statute, from a textualist perspective, says we must show an impairment that affects the injured person's ability to lead a normal life," he said. "That's what the statute requires, and everything else, all of the other gloss, is judicial legislation."

Wayne State University of Law Professor Robert A. Sedler went so far as to call the court's use of textualism "context specific."

"In other words, they will use it where the result is to rule against plaintiffs," Sedler stated. "The bottom line is that this is a very pro-defendant court and they make no secret about it."

But Saylor disagreed, saying the majority applied nothing other than a textualist approach, and did so genuinely.

"Both the majority and the dissenters would approach the 'general ability to lead his or her normal life' inquiry by comparing the person's before-accident life with the person's after-accident life," he explained. "The prime difference between the two positions is that the majority would step back and look at the entirety of those two perspectives, while the dissenters would look at the after-accident portion of the person's life only insofar as the disability or impairment existed. During the three or four months that Straub was experiencing the effects of his injury, the dissent noted, his life was rather significantly affected. True — but when consideration is given to the fact that, thereafter, he essentially returned to his pre-accident lifestyle, the significance of that initial post-injury period clearly diminishes. The majority believes that the 'big picture' approach, mandated by the text of the statute, requires that the duration of the disability (or, in this case, the brevity of the effect) be a relevant consideration."

Either way, lawyers may have to wait and see what happens now.

Gursten said he thinks the average person will be shocked by the ruling, and that the legislature may need to respond.

"If you stop a person on the street and tell them that someone who is completely innocent, who is hurt as a result of a drunk driver and has suffered a bone fracture or other serious injury and has to miss three or four months from work, or years later would still be missing approximately a quarter of his work week, now has no ability to sue under Michigan law, I think that person would be shocked," he observed. "I think most legislators and their constituents would be shocked as well because this was not the Legislature's intent."

Lansing lawyer Kevin J. Moody, who represents the Coalition Protecting Auto No-Fault (CPAN), the plaintiffs' amicus supporter, told Lawyers Weekly he also believes legislative action is in order.

"CPAN is concerned that this decision upsets the balance struck by the No-Fault Act," he stated. "Tort liability creates an important deterrent effect on the entire system and the imposition of a higher threshold will result in the failure to hold reckless and even drunk drivers accountable for their actions unless their victims are severely injured."

Moody said he thinks the new standard enunciated here "goes far beyond the statutory language, legislative history or even *Cassidy*," and that the language used in the decision "creates the clear danger that it will be misapplied to deny access to thousands of injured victims the Legislature did not intend to exclude."

The Legislature "needs to return the system to its intended balance," Moody stated.

Vesprini agreed, saying the high court overstepped its bounds.

"There can be no predictability as to the interpretation of a statute when the court is seemingly wearing the hat of a second legislature, importing requirements into a statute that the original Legislature failed to include in drafting its plain and unambiguous language," he observed.

But East Lansing attorney John A. Yaeger, who represents the defendant in *Straub*, disagreed.

"I think the court is trying to provide clarity to the overall area by going back and relating this decision to the original trade-off of no-fault ...," he said.

In any event, Saylor said he thinks it will all come out in the wash.

"While the Supreme Court has provided some detail in terms of what questions the lower courts should be asking in future cases, it has not specified how the lower courts should answer those questions. Those will be provided in the ensuing appellate decisions over the next several months and years," he said. "I do not believe that this case sounds a death knell to plaintiffs' auto-negligence cases at all."

'Kreiner'

Plaintiff Richard Adam Kreiner complained of pain in his lower back, right hip and right leg following an auto accident. Medical tests revealed mild nerve irritation to his lower back and degenerative disc disease, among other things. As the plaintiff continued to experience pain and discomfort, his doctor prescribed various medications and exercise.

Before the accident, the plaintiff worked as a self-employed carpenter. He continued this job after the accident, although he could no longer perform the same type of work for the same length of time as he could before the accident.

The plaintiff sued defendant Robert Oakland Fischer, seeking noneconomic damages under the No-Fault Act, MCL 500.3135.

The trial court found that, although the plaintiff had an objective injury involving an important bodily function, the injury "was not 'serious enough' to impinge on plaintiff's ability to lead a normal life."

The Court of Appeals reversed, however, stating that the statute "explicitly requires only that the impairment 'affect the person's general ability to lead his or her normal life.'"

The Supreme Court then vacated the Court of Appeals decision and remanded the matter for consideration of "whether plaintiff's impairment affects his general ability to lead his normal life."

On remand, the same panel of the Court of Appeals again reversed the trial court's decision, finding that "one's general ability to lead his or her normal life can be affected by an injury that impacts the person's ability to work at a job, where the job plays a significant role in that individual's normal life, such as in the case at bar."

'Straub'

In the companion case, plaintiff Daniel Lee Straub was injured when his motorcycle collided with a car being driven by defendant Phillip Collette. The defendant had turned onto a street in front of the plaintiff.

The plaintiff suffered a "boxer's fracture" to his non-dominant left hand. The injuries required two out-patient surgeries — one to repair tendon damage to his hand and one to remove pins that were placed in his hand during the first surgery.

The plaintiff returned part-time to his job as a cable-lineman about two months after the accident, and resumed full-time status the following month. However, he was unable to play in his band until approximately four months after the accident, and when he resumed playing in the band he had to modify his hand position to accommodate his inability to straighten his fingers.

In addition, the plaintiff had a "bow shop" which he had difficulty operating, and he processed deer, which he was no longer able to do.

The plaintiff sued the defendant seeking noneconomic damages under the No-Fault Act.

The trial court granted the defendant's motion for summary disposition, finding that the plaintiff failed to present evidence of a serious impairment of body function. The Court of Appeals reversed, however, stating that the plaintiff was not required to show that the injury "seriously" affects his life.

Instead of granting leave to appeal, the Michigan Supreme Court remanded the matter for reconsider in light of its order in *Kreiner*.

Opening 'Act'

Justice Taylor began his analysis by examining the origin and development of the No-Fault Act.

"[W]ith the enactment of the No-Fault Act ... the Legislature abolished tort liability generally in motor vehicle accident cases and replaced it with a regime that established that a person injured in such an accident is entitled to certain economic compensation from his own insurance company regardless of fault," Taylor explained.

"In exchange for the payment of ... no-fault economic loss benefits from one's own insurance company, the Legislature limited an injured person's ability to sue a negligent operator or owner of a motor vehicle for bodily injuries," he noted. "In particular, the Legislature significantly limited the injured person's ability to sue a third party for noneconomic damages, e.g., pain and suffering."

Following the enactment of the No-Fault Act in 1973, the high court, in an advisory opinion, found the act constitutional.

The court later tweaked the provisions of the act in specific cases. In *Cassidy v. McGovern*, for example, the court said that to satisfy the "serious impairment" threshold, an "important" body function must be impaired, the injury must be "objectively manifested" and the injury must have an effect "on the person's general ability to live a normal life."

According to Taylor, this formula became the central inquiry for a court to resolve when a plaintiff alleged that the tort threshold for a third-party tort suit had been met.

However, four years later, in *DiFranco v. Pickard*, the court held that the phrase "serious impairment of body function" involved two inquiries: (1) 'What body function, if any, was impaired because of injuries sustained in a motor vehicle accident?' and (2) 'Was the impairment serious?'" The court also readopted the old advisory opinion rule that the serious impairment issue was to be decided by a jury whenever reasonable minds could differ on the issue even if there were no material factual dispute about the nature or extent of the injuries.

Finally, *DiFranco* said that the jury should consider such factors as "the extent of the impairment, the particular body function impaired, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors," Taylor observed.

Eventually, a bill was placed before the Legislature to reform the No-Fault Act.

Pursuant to the bill, "serious impairment of body function" contains the following components: an objectively manifested impairment, of an important body function, and that affects the person's general ability to lead his or her normal life, Taylor explained, noting that, under the bill, courts, not juries, should decide these issues.

'General Ability'

Taylor next boiled down the issue in these cases to whether the plaintiffs' impairments affect their general ability to lead their normal lives.

"In order to be able to maintain an action for noneconomic tort damages under the No-Fault Act, the 'objectively manifested impairment of an important body function' that the plaintiff has suffered must affect his 'general ability' to lead his normal life," the justice explained. "Determining 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."

Taylor then turned to the dictionary, finding that whether a plaintiff is "generally able" to lead his normal life requires considering whether the plaintiff is "for the most part" able to lead his normal life.

In addition, to "lead" one's normal life contemplates more than a minor interruption in life, Taylor observed. To "lead" means, among other things, "to conduct or bring in a particular course."

Given this meaning, "the objectively manifested impairment of an important body function must affect the *course* of a person's life," he said.

Road Map

Taylor then created a road map for courts to use in deciding whether a plaintiff meets the serious impairment threshold.

First, "a court must determine that there is no factual dispute concerning the nature and extent of the person's injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function," the justice explained. "If a court so concludes, it may continue to the next step. But, if a court determines there are factual disputes concerning the nature and extent of a plaintiff's injuries that are material to determining whether the plaintiff has suffered a serious impairment of body function, the court may not decide the issue as a matter of law."

Second, "if a court can decide the issue as a matter of law, it must next determine if an 'important body function' of the plaintiff has been impaired," Taylor continued. "It is insufficient if the impairment is of an unimportant body function. Correspondingly, it is also insufficient if an important body function has been injured but not impaired."

Third, "[I]f a court finds that an important body function has in fact been impaired, it must then determine if the impairment is objectively manifested," Taylor added. "Subjective complaints that are not medically documented are insufficient."

Fourth, "[i]f a court finds that an important body function has been impaired, and that the impairment is objectively manifested, it then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life," Taylor concluded.

"In determining whether the course of plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, 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," he explained. "Once this is identified, the court must engage in an objective analysis regarding whether any difference between plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's 'general ability' to conduct the course of his life. Merely 'any effect' on the plaintiff's life is insufficient because a de minimus effect would not, as objectively viewed, affect the plaintiff's 'general ability' to lead his life."

Taylor then provided a "nonexhaustive" list of objective factors that he said may be of assistance in evaluating whether the plaintiff's "general ability" to conduct the course of his normal life has been affected. 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.

"This list of factors is not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves," he noted. "For example, that the duration of the impairment is short does not necessarily preclude a finding of a 'serious impairment of body function.' On the other hand, that the duration of the impairment is long does not necessarily mandate a finding of a 'serious impairment of body function.'"

Instead, "in order to determine whether one has suffered a 'serious impairment of body function,' the totality of the circumstances must be considered, and the ultimate question that must be answered is whether the impairment 'affects the person's general ability to conduct the course of his or her normal life,'" Taylor stated.

'Kreiner' Reversed

Taylor then applied his analysis to the facts of the respective cases.

As for *Kreiner*, he first noted that there was no factual dispute material to the determination of whether Kreiner suffered a serious impairment of body function.

Thus, he turned to the questions of whether he experienced a serious impairment of body function, and whether it was objectively manifested.

"Kreiner's medically documented injuries to his lower back, right hip, and right leg constitute an impairment of an important body function that was objectively manifested," he observed.

Finally, he addressed the "ultimate issue" of whether the impairment affected his general ability to lead his life.

"We find that Kreiner's impairment did not affect his overall or broad ability to conduct the course of his normal life," Taylor wrote. "In fact, his life after the accident was not significantly different than it was before the accident. He continued working as a self-employed carpenter and construction worker and was still able to perform all the work that he did before, with the possible exception of roofing work. His injuries did not cause him to miss one day of work."

'Straub' Reversed

Taylor also reversed *Straub*.

First, he found that there is no material factual dispute regarding the nature and extent of Straub's injuries.

Next, "Straub's injuries to his non-dominant hand ... constituted an impairment of an important body function that was objectively manifested," he observed.

Finally, Taylor noted, the impairment did not effect Straub's general ability to live his life.

"While an injury need not be permanent, it must be of sufficient duration to affect the course of a plaintiff's life," the justice observed.

"Straub's treatment consisted of having his wounds sutured, wearing a cast, and taking antibiotics and pain medication," Taylor noted. "Four days after the accident, outpatient surgery was performed on the fingers and palm. The treatment was not significant or long-term. Within two months, the fracture and surgical wounds had healed. There were two sessions of physical therapy. At that point, Straub discontinued all medical treatment. Plaintiff estimated he was ninety-nine percent back to normal by mid-January 2000."

Tortured Logic

According to Justice Cavanagh's dissent, the majority went outside the plain language of the statute in creating its test for whether a plaintiff meets the serious impairment threshold.

"Under the plain and unambiguous language of MCL 500.3135(7), the serious impairment of body function threshold is satisfied where the impairment is (1) an objectively manifested impairment (observable and identifiable), (2) of an important body function (a body function that the particular plaintiff deems valuable), (3) that affects the person's general ability to lead his normal life (influences most, but not necessarily all, of the particular plaintiff's capacity to lead his own unique preaccident lifestyle)."

According to Cavanagh, the Legislature's statutory definition does not lend itself to any bright-line rule or imposition of non-exhaustive list of factors.

Instead, the "serious impairment of body function" inquiry proceeds on a case-by-case basis because the statute requires inherently fact-specific and circumstantial determinations, he observed.

"The Legislature recognized that what is important to one is not important to all, a brief impairment may be devastating whereas a near permanent impairment may have little effect," Cavanagh stated. "The Legislature avoided drawing lines in the sand and so must we."

Based on this test, Cavanagh said both Kreiner and Straub met the statutory threshold.

"[T]he impairment to Straub's hand had an influence on most, but not all, of his capacity to lead his preaccident lifestyle," Cavanagh explained. "Therefore, under the plain and unambiguous language of MCL 500.3135(7), Straub has satisfied the tort threshold and I would affirm the decision of the Court of Appeals."

In reaching this conclusion, Cavanagh said the majority reached a contrary conclusion by imposing additional requirements on Straub that the Legislature never envisioned.

"While this roughly four-month serious impairment of body function may appear to be at odds with the stated purpose of the No-Fault Act, any trepidation over such a policy concern is best left to the Legislature," Cavanagh stated. "Because the statute does not speak in terms of 'residual impairment,' 'recuperation,' or 'permanency,' this court should avoid reading those requirements into the plain and unambiguous text of the statute."

Cavanagh made similar observations concerning Kreiner.

"Under the circumstances presented in this case, I would affirm the decision of the Court of Appeals because if Kreiner's claims are true, his injuries had an influence on most, but not all, of his capacity to lead his preaccident lifestyle," he noted, again criticizing the majority's handling of the decision.

"Despite the majority's assertions to the contrary, its application of its stated test in *Kreiner* demonstrates that it believes that every aspect of a person's life must be affected in order to satisfy the tort threshold, and the effects must last the course of the plaintiff's entire normal life," he stated, noting that such an "all or nothing" approach is not supported by the unambiguous text of the statute.

"The plain and unambiguous language set forth by the Legislature simply requires that the impairment affect a person's general ability to lead his normal life," Cavanagh concluded. "Unlike the majority, I prefer to simply apply MCL 500.3135(7) as written and leave any unresolved policy concerns in the hands of the Legislature."

Taylor's Rebuttal

Taylor responded to Cavanagh's dissent by pointing out that "the dissent's approach leads to the rather dismaying conclusion that the intent of the Legislature in 1995 was, in effect, to pull down the no-fault temple and produce an auto insurance catastrophe for the state's drivers."

That is, "the dissent concludes that the 1995 amendment, despite no words to this effect, was designed, as the thrust of his argument makes clear, to undermine the great compromise (no-

fault benefits in return for limited tort remedies) that all previous Supreme Court decisions have recognized as existing in the no-fault legislation and that is an indispensable requirement to make no-fault viable," Taylor wrote.

"We decline to join him in this calculated exercise predicated on what we believe is a studied ignorance of what the Legislature intended," he concluded.

Final Word

Finally, Cavanagh responded to Taylor's criticism of his dissent.

"The majority suggests that my approach is sacrilegious to the 'no-fault temple' and is an exercise predicated on 'studied ignorance,'" he noted. "While admittedly unaware that I was required to worship the no-fault insurance gods, I believe that my 'studied ignorance' is more properly labeled as 'judicial restraint.' If ignorance comes from applying this unambiguous statute as written and not substituting my own view for that of the Legislature, I must say that ignorance is bliss. If so-called wisdom comes from rewriting this unambiguous statute to comport with my own preference on how the statute *should be* written and applied, in this instance I must choose 'ignorance.'"

Today's decision, Cavanagh concluded, "serves as a chilling reminder that activism comes in all guises, including so-called textualism."

Serious Impairment Threshold Test

This flow chart is designed to help lower courts decide whether a plaintiff meets the serious impairment threshold (based on Taylor's opinion in Kreiner).

1. Is there a factual dispute concerning the nature and extent of the person's injuries that is material to the determination whether the person has suffered a serious impairment of body function?

- If yes, the court may not decide the issue as a matter of law and the inquiry stops here.
- If no, the court shall continue to question #2.

2. Has an "important body function" of the plaintiff been impaired?

- If no, the plaintiff has not met the threshold and the inquiry stops here.
- If yes, the court shall continue to question #3.

3. Is the impairment objectively manifested?

- If no, the plaintiff has not met the threshold and the inquiry stops here.
- If yes, the court shall continue to question #4.

4. Does the impairment affect the plaintiff's general ability to lead his normal life? The court must engage in an objective analysis of whether the impairment affects the person's general ability to conduct the course of his or her normal life. Objective factors that may be considered include, but are not limited to: 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.

- If no, the plaintiff has not met the threshold and the inquiry stops here.
- If yes, the plaintiff has met the serious impairment threshold.

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