

Plaintiff's PTSD not covered by No-Fault

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Plaintiffs seeking coverage under the Michigan No-Fault Act for a psychological injury like post-traumatic stress disorder face an uphill battle following a recent Court of Appeals decision.

In *Overweg v. Thomas* (MiLW No. [08-82000](#), 12 pages), the court said that a plaintiff suffering from PTSD after watching her husband die could not establish that she had an objectively manifested impairment subject to coverage.

Driving in separate car behind her husband, Frances Overweg watched as a third vehicle crashed into her husband's car. She found him pinned under debris and unable to free him, continued to watch as emergency personnel unsuccessfully attempted CPR.

In her suit seeking coverage for her resulting post-traumatic stress disorder, the defense argued that Overweg failed to satisfy the no-fault threshold to bring a tort claim because her PTSD was not an objectively manifested impairment of a body function.

In an unpublished decision, the Court of Appeals agreed, concluding that Overweg failed to establish that a particular body function had been affected by PTSD.

Simply stating a diagnosis of PTSD and concluding an impairment exists is not enough, said Dale L. Arndt, a Grand Rapids attorney who represented the defendant in the case.

"There have to be objective indicators that show some impairment of neurological or cognitive functioning and some indication that those impairments then impact or affect an individual's capacity to lead their normal life," he explained. Even accepting the PTSD diagnosis, the plaintiff "had no objective manifestations or limitations on her ability to carry out daily life."

Ronald M. Sangster, a Troy no-fault attorney not involved in the case, said the decision was the logical conclusion to case law stating that the focus should be on the impairment of the body function, not the injury to a part of the body.

"A serious injury to the brain that results in mere psychological injury without an objective impairment to another body part is simply not sufficient," he said.

The decision included a dissent decrying the “disconnect” between the legal and medical aspects of PTSD, arguing that the disorder affects the brain which in turn caused the plaintiff to function “differently in nearly every way than she did before the car accident.”

“This case exemplifies what is wrong with the Michigan automobile accident threshold,” said Farmington Hills attorney Steven M. Gursten, also not involved in the case. “The decision is a good example of where the law really fails. PTSD causes very real chemical and organic changes to the brain, which can be viewed in objective tests. For the majority to say that the impact of PTSD on the brain is not an objectively manifested impairment of a body function is absurd.”

Raoul V. Graham of Grand Rapids, who represented the plaintiff, declined to comment on the decision, noting that “the case is ongoing.”

‘An impairment is not the injury itself’

Overweg was following her husband, Harlan, on U.S. 131, driving home in the southbound lane. A northbound driver suddenly lost control, crossed the median and narrowly missed the plaintiff’s car before slamming into her husband’s vehicle.

Overweg parked and ran to her husband, who was unconscious, covered in cuts and bruises and pinned under debris. She attempted to lift the debris but was unable to free him.

After emergency personnel were able to free Harlan, Overweg watched unsuccessful attempts to revive him and perform CPR. He never regained consciousness and died.

Just a few months later, Overweg was diagnosed with PTSD and major depressive disorder. She sued the driver who crashed into her husband and his parents alleging negligence, gross negligence, owner liability and negligent infliction of emotional distress.

A trial court granted partial summary judgment for the defendants, concluding that there was no evidence that the plaintiff’s PTSD and major depressive disorder were objectively manifested impairments.

The parties then reached a settlement agreement regarding the plaintiff’s counts of negligence and owner liability, and appealed the summary judgment ruling on the negligent infliction of emotional distress claim.

PTSD satisfies the no-fault threshold of MCL 500.3135, Overweg argued, because it is a severe mental disturbance that caused her actual physical harm and her injury was a serious impairment of a body function that affected her ability to lead her normal life.

Emphasizing that an “impairment is not the injury itself” and that the plaintiff failed to provide evidence that she suffered from an objectively manifested impairment, the court affirmed summary judgment for the defendants.

Despite medical testimony that Overweg suffered from sleep deprivation, flashbacks and nightmares, heightened anxiety, loss of appetite, being easily startled and decreased activity, “this testimony does not establish that a particular body function has been affected by plaintiff’s PTSD,” the court said.

Overweg “failed to show how her PTSD has affected a particular body function. The record merely highlights plaintiff’s emotional or behavioral changes since the automobile accident,” the court said.

“While there is no dispute over plaintiff’s diagnosis of PTSD, this diagnosis alone — without supporting evidence to establish that the PTSD affected a particular body function — fails to create a genuine issue of material fact regarding whether plaintiff has an objectively manifested impairment.”

In a dissenting opinion, Judge Jane E. Markey said the majority failed to see the forest for the trees, emphasizing that PTSD “is real. It is an injury.”

One of the “trees” distracting the majority, Markey wrote, is the fact that “operation of the brain is the single most important body function of all. The fact that it controls both our physical and emotional functioning cannot be medically dissected, and neither should it be legally dissected.”

Doing so, she said, “creates a total fiction which is then the basis of a legal disposition that defies reality, reason and commonsense. If the brain is injured, it’s injured.”

Suggestions for both sides

For defense attorneys, Arndt advised a careful review of each piece of a plaintiff’s evidence, from exams to test results to clinical observations.

“Rather than just accepting the diagnosis, evaluate each and every aspect of the claimed symptomatology and address how that may or may not have impacted the plaintiff’s functional capacities,” he said.

Alternatively, Gursten offered plaintiffs’ attorneys some tactical suggestions to avoid a similar result.

Practitioners “have to appreciate that they have these additional obstacles to recovery and — legal fiction or not — they have to satisfy them or lose.”

Plaintiffs’ lawyers must first demonstrate objective physical manifestations of the client’s PTSD. “Have objective testing done that documents the organic damage to the brain caused by PTSD that can be measured,” Gursten said, like a PET scan. Such evidence should also provide support for the impact on an important body function, he added.

Arndt noted that Overweg’s evidence did not include radiographic studies and her diagnosis was based upon clinical examination.

The third prong of the analysis, the effect on the plaintiff’s normal life, may require additional documentation.

The Court of Appeals noted in its decision that Overweg’s treating physicians did not place any sort of restrictions upon her, such as limitations on driving or work.

Doctors may not realize that the decision not to impose restrictions could negatively impact a patient’s case, Gursten said, so a client may need to specifically request some form of limitations.