Viewpoint

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'Plaggemeyer' shows why Michigan needs new 'Auto Law' now

By Steven M. Gursten

Viewpoint

On May 12, *Plaggemeyer v. Lee* [Lawyers Weekly No. 08-70052] was issued by the Michigan Court of Appeals. This is the latest shocking case since *Kreiner v. Fischer*; a perfect example of why, when lawyers explain Michigan's car accident law, people are stunned that a law that was supposed to prevent clearly frivolous injuries is now barring many honest people from courts.

In the case, James Plaggemeyer was seriously injured in a car accident. He suffered a broken left femur and required surgery. He spent several days in the hospital recovering and needed a walker for an additional four weeks, crutches for the next eight weeks, and a cane for another six weeks.

Plaggemeyer testified he had difficulty walking for about a year after the accident, and he sometimes needed wife Ruth's support when walking. Nevertheless, the court threw his case out.

Plaggemeyer was unable to recover anything for his pain and suffering. The court found that since he was able to return to work approximately six weeks after his car accident - even though he was in severe pain, unable to walk and on medical restrictions for only sit-down duty - he failed to demonstrate a serious impairment of body function.

The court dismissed Plaggemeyer's testimony that he was forced to stop doing heavy yard work, use ladders, and had to give up the hiking, jogging, and tennis he enjoyed before his accident.

Instead, the court noted that he continued to camp and could ride his bicycle on "a very limited basis."

Here are the absurd "lessons" we've learned from the evolution of *Kreiner* to *Plaggemeyer*:

1. Pain doesn't count anymore: In *Plaggemeyer*, as in so many other cases, the court ignores the initial severity of the fracture and leg surgery and focuses instead on the total amount of time missed from work.

Plaggemeyer's greatest mistake was that he tried to gut it out and return to work, and for that, he was thrown out of court. Where many people would have remained on disability, he returned six weeks after his car crash. Michigan law punishes those most worthy of our respect and help.

Judge Pat M. Donofrio's analysis in the 2007 Michigan Court of Appeals case *Benefiel v. Auto Owners Insurance Company* is instructive here.

Donofrio tried to restore some common sense to Michigan's threshold law in *Benefiel*, with his observation that very severe initial injuries - such as surgeries that cause shorter but more extensive periods of impairment - should be treated differently than less serious injuries that may still cause lengthy periods of less encompassing impairment.

In the most critical part of the decision, the *Benefiel* court states: "... the more extensive the nature and degree 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."

2. How much time a plaintiff misses from work is the only thing that matters: Plaggemeyer testified he had to give up hiking, jogging, tennis, yard work, using ladders and other activities. Nevertheless, he returned to work six weeks after his shattered femur was repaired through surgery, and that was the deciding factor.

3. Think "binary code": Lawyers must now think in the nonsensical world of "can/can't" and "black/white." What hurt Plaggemeyer's case was that he tried to continue to do some things, and he was in fact able to continue to do them on a limited basis.

In other words, people who go back to doing the same things as they did before a car accident, even though they are very limited in duration, on pain medications and under restrictions, are punished.

Resuming any activity, however limited in duration or restricted in scope, is found to be "evidence" that these impairments are not serious.

4. The fantasy of physician-imposed restrictions continues: There is this bizarre and unrealistic expectation among some judges about physician-imposed medical restrictions. Doctors in real life don't sit down and dictate a long list of specific restrictions, yet many Michigan residents will continue to have their cases thrown out because of this misplaced belief.

As other panels noted in *Benefiel* and *McDanield v. Hemker*, physician-imposed restrictions are not required when they are based upon common sense, such as in *Plaggemeyer*; when someone with a broken femur and leg surgery says he can no longer jog or hike.

Anyone who has sat for an hour in a doctor's waiting room for a rushed, five-minute appointment knows how unrealistic it is to expect doctors to take time and dictate this supposed long list of specific medical restrictions like the judges in *Plaggemeyer* expected.

My heart goes out to Plaggemeyer. I feel terrible that he, through no fault of his own, was seriously injured in an automobile accident and received nothing.

Meanwhile, *Plaggemeyer* serves as another vivid example of how Michigan's car accident threshold law has lost its common sense and reason.

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