

HOW DO YOU PROVE YOUR CLIENT'S INJURY CROSSES THE NO-FAULT THRESHOLD?

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I. DEFINITION OF SERIOUS IMPAIRMENT

A.MCLA 500.3135(7) states that "as used in this section, 'serious impairment of body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

1. This definition sets forth a three-prong test:

- a. plaintiff must suffer an objectively manifested injury,
- b. the injury must affect an important body function,
- c. the injury must affect the individual's general ability to lead his or her normal life.

2. As discussed below, the first and second prongs (objectively manifested injury and important body function) have ended up being relatively easy to satisfy. It is the third prong of the test (the impact on the plaintiff's lifestyle) that is resulting in the greatest problems for plaintiffs. As a result, while all practitioners must be prepared to establish to the court how the first and second prongs are met, the primary focus must address the third prong.

3. The court of appeals has directed that trial courts should consider the following list of non-exclusive factors in considering whether an injury constitutes a serious impairment:

- a. extent of injury
 - b. treatment required
 - c. duration of disability
 - d. extent of residual impairment
 - e. prognosis for eventual recovery
- Kern v Blethen-Coluni, 240 Mich App 333 (2000).

4. IMPORTANT RECENT COURT OF APPEALS DECISIONS. There are three Court of Appeals decisions from 2002 that substantially help plaintiffs in their effort to establish serious impairment of body function. All three cases turned on the lifestyle impact question and are a must read for plaintiff's attorneys. The cases are as follows:

- a. Kreiner v Fischer, 251 Mich App 513 (2002) (reversing the trial court's grant of summary disposition)
- b. Straub v Collette, ___ Mich App ___, COA #236505 (publ. 12/20/02) (reversing the trial court's grant of summary disposition)
- c. Shively v Bogias, COA #237052 (unpub. 11/26/02) (reversing the trial court's grant of summary disposition).

II.OBJECTIVELY MANIFESTED IMPAIRMENT

A.The courts have been relatively liberal in determining and finding that the plaintiff's medical evidence satisfies the objective manifestation element of the threshold requirement. Identified below is a list of the types of tests, studies and/or examination findings that may amount to objective manifestation. The list below is not intended to be a complete list, but simply a representation of the types of tests that may amount to objective manifestation and some of the applicable cases.

- 1.x-rays, MRI, CT scans
- 2.EEG's. Pettie v Brock, COA #238713 (unpub. 2/28/03)
- 3.EMG, nerve conduction studies. Thalji v Detroit Edison Co, COA #226426 (unpub. 3/26/02)
- 4.Neuropsych testing
- 5.Muscle spasms and numbness. Harris v Lemicex, 152 Mich App 149 (1986); Franz v Woods, 145 Mich App 169, 175-76 (1985); Hicks v Trammer, COA #3217237 (unpub. 1/30/01); Roy v Thomas, COA #222220 (unpub. 7/31/01); Waller v Continental Insurance Co, COA #234323 (unpub. 11/22/02)
- 6.Loss of normal spinal curvature. Sherril v Bugoski, 140 Mich App 708 (1984)
- 7.Limited flexion diagnosis by passive range of motion testing. Arabo v Turnbull, 157 Mich App 575(1987); Roy v Thomas, COA #222220 (unpub. 7/31/01)
- 8.Softening of cartilage in knee. Howitt v Billings Feed & Lawn Inc., COA # 216738 (unpub. 1/30/01)
- 9.Cervical/lumbar subluxation by x-ray. Metivier v Schutt, COA #216325 (unpub. 7/31/01); Randolph v Givan, COA #233104 (unpub. 9/3/02); Howitt v Billings Feed & Lawn Inc, COA #216738 (unpub. 1/30/01)
- 10.TMJ by CT scan. Metivier v Schutt, COA #216325 (unpub. 7/31/01)
- 11.Broken/fractured tooth. Mirling v Carell, COA #216843 (unpub. 1/30/01)
- 12.Trigger points (fibromyalgia). Roy v Thomas, COA #222220 (unpub. 7/31/01)
- 13.Spinal hematoma, positive straight leg raising test, testimony that 50% of the physical examination was objective and 50% subjective. Mitchell v Stewart, COA #215052 (after remand) (unpub. 8/29/00)
- 14.Swelling of the eye and vision test. Herdus v Raffensberger, COA #219378 (unpub. 11/17/00)
- 15.Herniated or bulging disc. Giardi v Sopoliga, COA #224150 (unpub. 11/20/01); Pettie v Brock, COA #238713 (unpub. 2/28/03); Thalji v Detroit Edison Co, COA #226426 (unpub. 3/26/02)
- 16.Mild closed head injury with some cognitive difficulties and some depression. Block v Pawluk, COA #225124 (unpub. 1/4/02)
- 17.Radiculopathy. Hoffman v Despelder, COA #238141 (unpub. 1/24/03)
- 18.Thermography. Argenta v Shahan, 135 Mich App 477 (1984)

III.IMPORTANT BODY FUNCTION

A.The courts have been relatively liberal in determining and finding that the plaintiff's injury satisfies the important body function element of the threshold requirement. Identified below is a list of the types of functions that can amount to an important body function. The list below is not intended to be a complete list, but simply a representation of the types of functions that may amount to an important body function and some of the cases addressing this issue.

- 1.Movement of neck, shoulders and back. *Freel v Dehaan*, 155 Mich App 517(1986); *Mekliir v Bigham*, 147 Mich App 716 ,(1985); *Shaw v Martin*, 155 Mich App 89 (1987); *Hicks v Trammer*, COA #217237 (unpub. 1/30/01); *Roy v Thomas*, COA #222220 (unpub. 7/31/01)
- 2.Memory. *Shaw v Martin*, 155 Mich App 89 (1987)
- 3.Sleep. *Hicks v Trammer*, COA #217237 (unpub. 1/30/01)
- 4.Ability to walk. *LaHousse v Hess*, 125 Mich App 14 (1983); *Howitt v Billings Feed & Lawn Inc*, WL 759967 (unpub. 1/30/01); *Kern v Blethen-Coluni*, 240 Mich App 333 (2000)
- 5.Movement of jaw. *Metivier v Schutt*, COA #216325 (unpub. 7/31/01)
- 6.Heart and breathing functions. *Kanaziz v Rounds*, 153 Mich App 180 (1986); *Range v Gorosh*, 140 Mich App 712 (1984)
- 7.Ability to see. *Herdus v Raffensberger*, COA #219378 (unpub. 11/17/00)
- 8.Ability to eat. *Mirling v Carell*, COA #216843 (unpub. 1/30/01)

B.It is also important to keep in mind that whether something is an important body function may depend completely on your client and his activities of life. For example, a fractured pinky on a non-dominant hand may not be an important body function for many people. However, for a concert pianist that same fractured pinky may result in significant disability from work and impairment of an important life activity (the ability to play the piano). Thus, every injury needs to be evaluated in light of the individual plaintiff and their activities and life circumstances.

IV.AFFECTS ABILITY TO LEAD HIS OR HER NORMAL LIFE

A.IMPORTANT POINTS TO REMEMBER.

- 1.This is a subjective, not objective, test. Thus, it specifically looks at the activities and lifestyle of the individual plaintiff. It necessarily requires a comparison of the pre-collision activities and lifestyle with the post-collision activities and lifestyle.
- 2.Do not assume that the underlying injury alone is sufficient. The focus under this third prong is not on the injury itself, but on the impairment or affect it has on the individual's life. The practitioner must focus on the impairment and not the original injury. Therefore, injuries that have historically been assumed to meet the threshold requirement, such as fractured collarbones or herniated discs will not be sufficient unless you can also show how these injuries have impaired and affected the plaintiff's normal life. Thus, change your focus from the client's pain and injury to the client's impairment and impact on their life. This is also useful in ultimately convincing a jury of your client's injuries because it gets away from subjective pain and focuses on the easier to understand impairment, affect and impact on an individual's life.
- 3.Similarly, in attempting to get a judge and/or jury to understand why there is pain and/or limitations suffered by your client, it is important to focus, explain and have the decision maker understand the "mechanism of the injury." In other words, understand the medical to the point of being able to explain how the particular body part or function is supposed to work, how it is mechanically injured in the collision, and how it then affects the individual in terms of activities and causing pain. Reviewing and understanding the literature concerning the mechanism of injury is important; as is the testimony and support of the treating physicians. Moreover, the general mechanism of injury and functioning of the body are fertile grounds for cross-examination of any defense medical examiner. Most will admit the general concepts of how the body is supposed to work, that it can be injured in certain ways from trauma and that there are injuries, pain and limitations that result. The DME may dispute that your client suffered these injuries, these limitations and this pain in this motor vehicle collision; however, he will likely

admit that all are feasible in the context of the manner in which the body works, the forces imparted on the body in a collision, and the manner in which certain injuries cause certain limitations and pain.

4. By focusing on and fully developing the impairment and affect that an injury has had on an individual's life and the mechanism/mechanics of the injury itself, not only will the practitioner increase the odds of establishing serious impairment and thus beating a motion for summary disposition, but you will also increase the value of the claim at case evaluation, settlement negotiations and/or trial.

B. KEYS TO ESTABLISHING LIFESTYLE IMPACT:

1. The attorney and client must be fully prepared for this issue. Laziness must be eliminated.

2. Preparation for establishing the lifestyle impact must begin at the initial interview. The client must have the issue explained to him/her fully and understand the importance and necessity of establishing an impact on the client's general life.

3. In analyzing the lifestyle impact of an injury, look at the eight major areas of life.

- a. work
- b. recreational/social
- c. personal care/fitness
- d. domestic chores
- e. marital relationship
- f. family relationships
- g. rest and sleep
- h. emotional well being

In analyzing your client's injuries, attempt to obtain evidence that supports an impact in each of these eight areas of life.

4. **KNOW YOUR CLIENT.** Effective methods for developing and learning the impact an injury has had on your client's life.

a. Get to know your client. Talk to and/or meet with your client regularly enough that you have an understanding of what is going on in their life and can appreciate the ways in which the injuries have affected them

b. Encourage your client to keep a diary in which the client records the affects of the injury. Ask your client to provide you with the diary periodically. When you receive it, read it and think about whether you want to get additional information from your client on any of the topics addressed in the diary. Encourage your client to continue keeping the diary throughout your representation.

c. During the period of time for which you are attempting to establish a serious impairment exists, have your client complete the activities questionnaire. See attached Exhibit A. (This document courtesy of James Carlin, Esq.)

5. Once you have a general list of the ways in which the collision and injuries have affected your client's lifestyle, go back to the client and ask a long list of questions as it relates to each of the effects or impacts. In this regard, with respect to each activity or impact, ask the who, when, what, where, how often questions. Learn as many facts as

possible about each of the specific activities and impacts before the collision and compare that with the client's post-collision status.

For example, do not rely on the client's general statement that she is no longer able to play "volleyball." You need to know more than this simple statement. How often did she play volleyball before the collision? Who did she play with? Where did she play? You need to know the details of each activity before the collision. Thereafter, follow up and know the specific details about the post-collision activity. Has the client played volleyball at all since the collision? With whom? When? How did it go? Why hasn't she played again? Having this detailed information will allow you to not only prepare a more substantive and persuasive affidavit and/or brief, but will allow you to provide meaningful testimony at the time of trial.

6. Remind your client to tell her physician about all the physical limitations and restrictions affecting her life. Having this information in the physician's records is certainly useful. In addition, the physician will be more apt to give favorable testimony concerning the relationship between the lifestyle impact and the injuries at the time of deposition or trial if he has previously discussed these issues with the client and the facts are contained in his records.

7. LAY WITNESSES. Once you have gathered information concerning the activities from the client, get a comprehensive list of lay witnesses who can provide additional information on the lifestyle impact of the injury. Be creative in your thought process as to the types of lay witnesses from whom you may get information. Include in your thought process the obvious categories of family, friends and co-workers, but also think of others such as clergy, neighbors, teachers, supervisors, etc. The earlier you gather information from these lay witnesses, the better off you will be. A common operating procedure for plaintiff's attorneys is to wait and contact lay witnesses once in litigation and as trial approaches. Under today's environment, this is too late. There are multiple reasons for this.

a. The earlier you have the information from the lay witnesses, the more effectively you can use it in understanding and developing your client's impairments, whether in pre-litigation or early litigation settlement negotiations, or in coordinating the testimony of physicians.

b. The earlier you contact the lay witnesses and get them involved, the more complete and accurate the information you will receive concerning their knowledge of the plaintiff's injuries and progression over time.

c. With scheduling orders requiring that lay witnesses be disclosed earlier and earlier, attorneys need to disclose these witnesses if they wish to use them later in the litigation (whether with affidavits in response to a motion for summary disposition or as witnesses at trial).

8. Ultimately, you will want to obtain affidavits and/or deposition testimony from the lay witnesses. This evidence can be used to support your motion for summary disposition on the issue of serious impairment or to defend against the defendant's motion for summary disposition. In addition, it will further develop and document the lay witness evidence for use at trial.

9. PLAINTIFF'S DEPOSITION. There is nothing more important than the plaintiff's deposition in establishing serious impairment. The lawyer and client must be fully prepared to disclose and discuss every single affect and impact the injury has had on

the plaintiff's life. In order for the plaintiff's deposition to go as well as possible, preparation needs to have started at the beginning of the representation and continued throughout. As stated above, by using the initial interview, diaries and activity lists as a prompt, the client will be prepared on this topic.

a. **DEP PREP.** The old days of preparing the client for 15-30 minutes before their deposition is over. The plaintiff's attorney must spend a substantial amount of time with the client in preparation for the deposition. This is also most effective if done in the days leading up to the deposition rather than immediately beforehand. Regardless of the amount of preparation and discussions that have gone on throughout the representation, it is critical that the attorney spend a significant amount of time discussing and reviewing the impact issues with the client leading up to the deposition.

b. **Do not allow your client to give BAD TESTIMONY.** The client must not say things like "the injury has not had much impact" or "I can do almost everything." Statements like these in a deposition are killers and will be cited and referenced at length by defense counsel, the trial judge and the court of appeals. See, e.g., *Herdus v Raffensberger*, COA #219378 (unpub. 11/17/00) (affirming dismissal on the lifestyle impact where the plaintiff testified that his normal activities were only "a little, but not much" affected); *Hicks v Mumin*, COA #214004 (unpub. 1/12/01) (affirming dismissal on the lifestyle impact where the plaintiff testified that his injury caused him "a little problem, but not much" and that he could "do most of the things that he could do before the accident").

c. **NON-CONTINUING THRESHOLD INJURY.** Remember to focus on the period of time during which you are attempting to establish a serious impairment of body function. If you are attempting to establish a closed period serious impairment, then make sure the client focuses on that period of time when talking about limitations, restrictions and impairments. The non-continuing threshold rule contained in M Civ JI 36.01A which states:

If you find plaintiff suffered serious impairment of body function, but her injury has ceased, or may in the future cease, to be a serious impairment of body function, that fact will not relieve defendant from liability for any of the noneconomic loss damages suffered by plaintiff as a proximate result of defendant's negligence.

See *Straub v Collette*, ___ Mich App ___, COA #236505 (publ. 12/20/02) (stating that "importantly, an injury does not need to be permanent in order to constitute a serious impairment of body function.")

Thus, it is important for practitioner's to focus on the period of time where a client's injuries are the most significant, severe and life altering. In other words, just because the plaintiff's deposition, the motion for summary disposition and/or trial are being heard two or more years after the collision, does not mean that the practitioner needs to focus on the injuries and their affect at that point in time. Obviously, the value of a case will be greater if the injury continues to have a significant affect on a plaintiff's life. However, an injury can still satisfy the threshold injury requirement if it met the definition at some point in time. Thus, analyze each client's injuries and the affect they had on the individual's life at various points in time and determine the best strategy for establishing and surviving serious impairment in your specific case.

d. Be prepared to ask questions at your client's discovery deposition. The

days of sandbagging defense counsel with the extent and details of your client's injuries and impact on their life are over. This information needs to be provided as thoroughly and in as great of detail as possible. If defense counsel does not adequately explore the entire impact that the injury has had on your client's life, then you should. If you have prepared your client adequately and are informed of the details of your client's injury and the impact on his life, then it will be easy for you to ask detailed supplemental questions at the discovery deposition in order to have all of the facts on the record.

10. CONTACT THE TREATING DOCTORS. Talk with your treating physicians and know what they will or will not support. The earlier you know this, the better off you will be. If you have adequately prepared your client and understand the full affect and impact the injuries have had on her, then you can have discussions with the treating physicians pre-litigation or early in the litigation to learn their opinions. While getting information from the treating physicians early on is highly useful, odds are your busy schedule will result in you simply doing so during the litigation and shortly before the motion for summary disposition. In response to or in support of a motion for summary disposition on serious impairment, seriously consider getting an affidavit and/or taking the deposition testimony of the treating physicians. Do not be afraid to take the physician's trial deposition for use at the hearing on the motion for summary disposition. Remember, the real fight in this litigation now begins with the judge's determination of serious impairment. If you do not survive that hearing, you lose. There is very little chance of success in the court of appeals. Moreover, if the treating physicians support your client and their restrictions, this testimony will go a long ways toward not only beating a motion for summary disposition, but potentially having it granted in your favor.

a. Obviously, at deposition or in an affidavit, you will cover all of the standard areas with the treating physician, i.e. history and physical, treatment, prognosis, etc. In addition, as it specifically relates to the lifestyle impact inquiry, you must ask detailed and specific questions. For example, ask the physician "how would the injury or impairment affect my client's ability to do A, B, C, D, . . . ?" Keep asking this question over and over with each of the activities that your client has identified as being negatively impacted by her injuries and impairments.

b. Remember that the client's self-imposed restrictions may not be enough. Multiple court of appeals decisions have commented that the plaintiff's claimed lifestyle impact is based solely on "self-imposed restrictions" and not on limitations imposed by a physician. See e.g. *Bahri v Gottis*, COA #227913 (unpub. 2/22/02) (commenting that the plaintiff "voluntarily limited her usual activities"); *Nechovski v Gutt*, COA #228668 (unpub. 4/26/02) (stating that a plaintiff's "self-imposed restriction on athletic activities does not affect one's general ability to lead a normal life where one can still work and engage in social and everyday activities"); *Hoffman v Depelder*, COA #238141 (unpub. 1/24/03) (acknowledging that all the plaintiff's activity limitations were self-imposed). Thus, obtaining evidence and/or testimony from the treating physician that the impact on the plaintiff's activities and lifestyle are medically indicated is crucial.

c. Keep in mind that treating physician's conclusions as to whether your client's injuries are "serious" or amount to a serious impairment of body function or that the plaintiff's injury affects his normal life, are not relevant or admissible. See e.g. *Howitt v Billings Feed & Lawn Inc*, COA #216738 (unpub. 1/30/01) (stating that even though the plaintiff's doctor expressed an opinion that the plaintiff's injury did not affect his normal life, "the issue is one of law for the court and a party's expert is not qualified to interpret and apply the law."); *Bahri v*

Gottis, COA #227913 (unpub. 2/22/02) (stating that "while plaintiff's expert opined that the plaintiff's injury was serious, the issue is one of law for the court and a party's expert is not qualified to interpret and apply the law.").

11.HIRE A VOCATIONAL REHABILITATION EXPERT. A vocational expert can assist with establishing the residual limitations your client has and the affect those limitations will have on day-to-day activities. A vocational witness can also assist with linking up the specific post-collision changes in lifestyle with the injuries and collision. Moreover, some vocational experts can provide economic calculations and assist with the development of an excess economic claim (including wages and/or services). It may be useful and/or necessary to have functional capacity testing performed to provide the vocational rehabilitation expert additional foundation for his opinions.

12.PLAINTIFF'S INDEPENDENT MEDICAL EXAMINATION. A plaintiff's IME can help you support or establish the five Kern factors considered in determining the serious impairment of body function question and/or help create a question of fact for submission to the jury. The plaintiff's IME can also assist with any causation question and provide an opinion concerning the relationship between the collision and post-collision limitations and changes in lifestyle.

13.CONSIDER OTHER TYPES OF DAMAGE EXPERTS, including the following:

a.pharmacologist - - to talk about what the pain medications are, what they mean, the harms and risks plaintiff is exposed to in taking the medications and the long term effects that may be suffered as a result

b.pain or grief counselor - - to establish the long term effects of pain that can cause depression and limit a person's ability to function in every aspect of their life. Reactive depression is a common problem for patients suffering chronic pain. A plaintiff's attorney must present testimony from a treating physician, psychologist or pain or grief counselor on this topic.

V.MOTIONS FOR SUMMARY DISPOSITION.

A.DO NOT BE AFRAID TO BRING THE MOTION YOURSELF.

If your injuries warrant it, be prepared to file a motion for summary disposition on serious impairment. This is an effective way to limit the issues at the time of trial to the amount of money that should be awarded for the injuries only. After you have had an opportunity to provide the defense counsel with all of the medical records, serve a request to admit on serious impairment. Serve the same request to admit again after your client's deposition. If defense counsel denies it both times, seek sanctions if the court ultimately grants your motion for summary disposition.

B.DEFENDING MOTIONS FOR SUMMARY DISPOSITION.

1.Prepare a thorough and detailed brief in response to defendant's motion. Attached as Exhibit B is a sample brief dealing with whether a soft tissue neck injury meets the serious impairment threshold - Irving v State Farm.

2.Because of the number of Court of Appeals decisions that state the 1995 definition of serious impairment is a return to the Cassidy era, many defense attorneys cite Cassidy era cases in support of their argument that the plaintiff's injuries are minor and the case should be dismissed. However, it is important to keep in mind that there were many decisions during the Cassidy era that were favorable to the plaintiff.

a. In this regard, not all soft tissue cases were losers during the Cassidy era. Consider the following examples:

Argenta v Shahan, 135 Mich App 477 (1984) - - Court of Appeals affirms a \$300,000 jury verdict in a soft tissue case that was objectively manifested by thermography and range of motion limitations. See also Kluck v Borland, 162 Mich App 694 (1987) and Wood v Dart, 154 Mich App 586 (1986) for further utilization of thermography.

Galli v Reutter, 148 Mich App 313 (1985) - - Affirms jury verdict in soft tissue aggravation of prior existing arthritic condition.

Vreeland v Wayman, 141 Mich App 574 (1985) and Franz v Woods, 145 Mich App 169 (1985) - - Holding that the Cassidy rule did not stand for the proposition that soft tissue injuries never qualify.

Wood v Dart, 154 Mich App 548 (1986) - - Reverses summary disposition in soft tissue case with positive EMG finding.

Washington v VanBuren Co Road Comm, 155 Mich App 527 (1986) - - Reverses summary disposition in low back injury with preexisting asymptomatic degenerative disc disease in older citizen.

b. There were also many fractured bone cases that were favorable to the plaintiff under Cassidy. Consider for example the following cases:

Cassidy v McGovern, 415 Mich 483 (1982) - - Fractured lower leg held to be serious impairment of body function as a matter of law.

LaHousse v Hess, 125 Mich App 14 (1983) - - Fractured femur held to be a serious impairment of body function as a matter of law.

Range v Gorosh, II, 140 Mich App 712 (1984) - - The Court of Appeals held that six (6) fractured ribs, a fracture of the right clavicle and a fracture of a toe in the right foot constituted serious impairment of body function as a matter of law.

Esparza v Manning, 148 Mich App 371 (1986) - - The court held that six (6) fractured ribs requiring three (3) days of hospitalization and subsequent use of a rib belt and restrained activities for two (2) months constituted a serious impairment of body function as a matter of law.

Freel v Dehann, 155 Mich App 517 (1986) - - Summary disposition in favor of defendant reversed by the Court of Appeals regarding injury involving two (2) compression fractures and the case was remanded for trial.

c. Obviously, these cases were decided under the Cassidy definition and our current definition is materially different with its primary focus on the subjective lifestyle. Nonetheless, these cases may be used in an effort to educate judges that the Cassidy era does not stand for the proposition that all cases should be dismissed.

d. Moreover, the plaintiff's lawyer must be familiar with and cite to the current era cases that are favorable. *Kreiner v Fischer*, 251 Mich App 513 (2002); *Straub v Collette*, ___ Mich App ___, COA #236505 (publ. 12/20/02); *Shively v Bogias*, COA #237052 (unpub. 11/26/02); *Roy v Thomas*, COA #222220 (unpub. 7/31/01) (affirming a \$135,000 jury verdict in a cervical soft tissue/fibromyalgia case).

3. MAY FINDINGS. Ensure that your response brief provides a satisfactory amount of facts and information to allow the trial court to create a factual record for appellate review as to the nature and extent of the impairment suffered by your client. *May v Summerfield*, 239 Mich App 197 (1999). Potentially assist the trial court by providing an order for the judge to use as a checklist of the factual findings of impairment when arguing and opposing a motion for summary disposition.

4. Use M Civ JI 50.10 and 50.11, if applicable.

5. ADMISSIBILITY OF MEDICAL RECORDS for summary disposition hearing. Effective January 1, 2001, MCR 2.116(G)(6) states as follows:

Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.

Thus, all documentary evidence, including medical records, must be "admissible as evidence." It appears that the standard of practice is still to simply submit medical records to the court in support of and in opposition to motions for summary disposition on the serious impairment of body function issue. However, as recently as February 21, 2003, the Court of Appeals, in an unpublished decision, commented that their role in reviewing a serious impairment issue was "hampered by the parties reliance on inadmissible evidence." See *White v Wier*, COA #236000 (unpub. 2/21/03). After citing the revised court rule, the Court of Appeals stated that "both parties submitted unauthenticated medical records that contained multiple levels of hearsay" and that "the depositions of plaintiff's treating physicians were never taken." As a result of this court rule and cases like *White*, practitioners need to begin submitting authenticated medical records and taking the depositions of the treating physicians prior to motions for summary disposition on serious impairment.

6. Provide the trial court with relevant caselaw and jury instructions concerning serious impairment. Recent caselaw, particularly *Kreiner v Fischer*, 251 Mich 513 (2002), highlight the importance of fully understanding the serious impairment definition and what is necessary to establish it. There is a significant amount of appellate caselaw that misstates the 1995 definition of serious impairment. The Court of Appeals decisions have repeatedly made two principle mistakes in analyzing this issue. First, there are definitive statements that the 1995 definition is a return to *Cassidy*. This is completely false. The most obvious example of how the 1995 definition is not a return to *Cassidy* is that *Cassidy* was an objective analysis on the lifestyle impact and the 1995 legislation is clearly a subjective analysis. Second, numerous appellate decisions state that the plaintiff's injuries are simply not serious or serious enough or very serious, etc. In light of the three part definition of serious impairment, there is no separate analysis of the seriousness of the injury. This was recently confirmed in the *Kreiner* decision. You must be prepared to provide the trial judges with the appropriate legal analysis and caselaw to

refute these improper arguments by defense counsel. Note that two unpublished court of appeals decisions after Kreiner use the wrong analytical standard. See Spivack v Coeppen, COA #229408 (unpub. 6/25/02); Spies v Parker, COA #227581 (unpub. 6/25/02). Despite the analysis contained in Kreiner, both cases affirmed dismissal of the plaintiff's case stating that the effect on the plaintiff's life was not "sufficiently severe" or that the impairment wasn't "serious." As stated, this is simply an inappropriate analysis and attorneys must be prepared to convince trial judges not to engage in this line of reasoning.

C.MAKE IT VISUAL - - USE DEMONSTRATIVE AIDS.

1.Life activity calendars. The life activity calendars can graphically and persuasively show the impact an injury has had on the client's life by comparing the person's pre- and post-collision lifestyle. Calendars using shapes, sizes and colors depict the change that has occurred. Attached as Exhibit C is a sample life activity calendar. The attached exhibit is in black and white, while the original would have multiple colors for the different activities. There are expert services that can be hired to provide this documentary evidence, i.e. Robert W. Johnson & Associates, 4970 El Camino Real, Suite 250, Los Altos, CA 94022, (800) 541-7435. However, these can also be prepared with some time, effort and a color printer or copier.

Also attached as Exhibit C is a sample pain and suffering chart. This chart can document visually the lack of pain, treatment and medication before a collision compared with after. Assuming your client was healthy before the collision, then the calendar would be blank (as in the attached example). After the collision the calendar can document physician visits, medications, therapy, etc. This visually shows a significant change centering around the collision itself.

2.Use exemplar medical diagrams or videos to visually explain to the judge the injury your client suffered and the treatment. Attempt to purchase demonstrative aids that visually depict the injuries and treatment your client has undergone.

Consider videotaping your client's actual treatment. Instead of then having a demonstrative exemplar exhibit, you can actually present the real thing.

Many medical procedures sound relatively simple but when seen visually one realizes that they are a serious invasive procedure that is likely painful and limiting. Your job is to make the judge appreciate and understand the seriousness of the treatment your client has undergone. Whether you present a video showing 30 injections of prolotherapy into your client's back or an open reduction internal fixation surgery, a video will go a long ways towards bringing it home for the decision maker. Not only will it help you establish serious impairment, but it will also be an effective demonstrative aid at the time of trial.

3.Day-in-the-life video.

4.Photos of the injury.

D.THE KEYS TO AVOIDING SUMMARY DISPOSITION.

1.Detailed testimony from the plaintiff explaining how the injuries affect his normal daily life and activities. Try to have evidence or testimony in all eight major areas of life.

2. Lay testimony or affidavits to support the affect the injuries have on the plaintiff`s life.

3. Consistent and extensive medical treatment.

4. Support from the treating physician:

a. Well documented objective findings

b. Restrictions on activities

c. Testimony that the changes in the plaintiff`s lifestyle and activities are consistent with and explained by the collision and injuries

5. Well written and thorough brief

a. Exhibits including authenticated medical records and physician deposition testimony or affidavit

b. Demonstrative exhibits

If, despite all your preparation and efforts, your case is dismissed at summary disposition, immediately contact Attorney Michael Morse and the MTLA committee convened for the purpose of assisting lawyers with the decision on whether to appeal. This committee will voluntarily review your case and the appellate issues and provide you with an opinion as to whether there is a reasonable chance of success on appeal. If there is a reasonable chance for a successful appeal, the committee may also assist in helping you find appellate counsel to assist with the appeal. If we are going to stem the tide of bad law, we must do a better job of choosing our appellate battles.

VI. CONCLUSION.

Preparation. Preparation. Preparation. The key to successfully establishing that your client`s injuries are a serious impairment of body function requires preparation. Do not be lazy.