# 5 Things to Know About New York's Serious Injury Threshold

## (1) Know the Insurance Law § 5102(d) Qualifiers

Article 51 of the Insurance Law provides that a plaintiff in a personal injury action arising out of negligence in the use or operation of a motor vehicle must establish that he/she has incurred a basic economic loss exceeding $50,000 or must establish that he/she has suffered "serious injury". Insurance Law § 5104(a), (b). Serious injury is defined as personal injury which results in one of the following :

- Death
- Dismemberment
- Significant disfigurement
- Fracture
- Loss of a fetus
- Permanent loss of use of a body organ, member, function or system
- Permanent consequential limitation of a body organ or member
- Significant limitation of use of a body function or system
- Medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

Insurance Law §5102(d).

### (2) Gaps in Treatment Must be Explained

In Pommells v. Perez, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005), Court of Appeals held that a gap in treatment puts into question the reliability of the medical expert's conclusions about causation and also the seriousness of the injuries themselves. The Court specifically stated, "[a] plaintiff who terminates therapeutic measures following the accident while claiming 'serious injury' must offer some reasonable explanation for doing so." Id. at 574, 797 N.Y.S.2d at 385.

Plaintiffs : If your opponent moves for summary judgment pursuant to Insurance Law 5102(d), and points to a gap in treatment, your opposition papers must explain the reasons for the discontinuity. A doctor's affirmation is one way to address the gap. That doctor's opinion will likely be given more credibility and weight where the doctor's last examination of the Plaintiff is contemporaneous with the affirmation. *See*, Dooley v. Davey, 21 A.D.3d 1242, 804 N.Y.S.2d 432 (3 Dept., 2005), *citing* Davis v. Evan, 304 A.D.2d 1023, 758 N.Y.S.2d 203 (3 Dept., 2003). Note that if the condition is permanent, a contemporary examination may not be necessary.

Defendants : If you are moving for summary judgment, and there is a gap in Plaintiff's treatment–point it out and emphasize it. The Courts view the gap in treatment as an issue of causation. A doctor's opinion that the gap in treatment demonstrates a lack of causation and/or demonstrates a total resolution of the causally related injury is (obviously) helpful. Note that Plaintiff's claim that she discontinued treatment as a result of no-fault denials or lack of insurance may be enough to explain the gap.

Cases : Quezada v. Luque, 27 A.D.3d 205, 810 N.Y.S.2d 463 (1 Dept., 2006);Tuna v. Babendererde, 32 A.D.3d 574, 819 N.Y.S.2d 613 (3 Dept., 2006); Chan v. Casiano, 36 A.D.3d 580, 828 N.Y.S.2d 173 (2 Dept., 2007); Hasner v. Budnik, 35 A.D.3d 366, 826 N.Y.S.2d 387 (2 Dept., 2006); Moore v. Sarwar, 29 A.D.3d 752, 816 N.Y.S.2d 503 (2 Dept.,2006); Mullings v. Huntwork, 26 A.D.3d 214, 810 N.Y.S.2d 443 (1 Dept., 2006)

### (3) Pre-Existing Injuries Must be Addressed

In Pommells v. Perez, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005) the Court of Appeals also dealt with the issue of a plaintiff's pre-existing medical condition or intervening medical problem on summary judgment. The Court held that when the defendant moves for summary judgment and raises an issue of whether a pre-existing medical condition caused the alleged injury, the plaintiff must address the question of whether the symptoms and/or injuries were actually caused by the accident to survive summary judgment.

Plaintiffs : If your opponent moves for summary judgment on the threshold, and a pre-existing injury is present, in response, you must address it. The best way to do this is with a doctor's affirmation. The pre-existing injury should be addressed, in its entirety and in detail, by your doctor. A conclusory doctor's affidavit is insufficient to raise an issue of fact on this point. Further, a doctor's affidavit that completely ignores the prior injury will be insufficient.

Defendants : Asymptomatic prior injuries might not shift the burden. Courts have held that a doctor's opinion noting an asymptomatic pre-existing "degenerative" spine condition does not shift the burden to the Plaintiff to address the prior injury under the Pommells v. Perez holding. *See*, Ashquabe v. McConnell, 14 Misc.3d 211, 829 N.Y.S.2d 427 (Sup. Ct. Erie Cty., 2006), *aff'd* — A.D.3d —; 848 N.Y.S.2d 794 (4 Dept. 2007); Mack v. Pullum, 37 A.D.3d 1063, 829 N.Y.S.2d 774 (4 Dept., 2007).

Cases : Agard v. Bryant, 24 A.D.3d 182, 805 N.Y.S.2d 348 (1 Dept., 2005); Montgomery v. Pena, 19 A.D.3d 288, 798 N.Y.S.2d 17 (1 Dept., 2005); Carter v. Full Service, Inc., 29 A.D.3d 342, 815 N.Y.S.2d 41 (1 Dept., 2006); Hernandez v. Almanzar, 32 A.D.3d 360, 821 N.Y.S.2d 30 (1 Dept., 2006)

### (4) Deficiencies Must be Quantified

"In order to establish a permanent consequential limitation or a significant limitation of use, the medical evidence submitted by plaintiff must contain objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system." Toure v. Avis Rent-A-Car Systems, 98 N.Y.2d 345, 353, 746 N.Y.S.2d 865 (2002). The Court of Appeals in Toure v. Avis Rent-A-Car Systems established that an expert's conclusory findings, without support, will not suffice to establish a serious injury under the Insurance Law. *See also,* Sarkis v. Gandy, 15 A.D.3d 942, 789 N.Y.S.2d 578 (4 Dept., 2005) (holding that plaintiff did not sustain a serious injury where plaintiff's experts made only conclusory, unsupported findings with respect to range of motion); Simpson v. Feyrer, 27 A.D.3d 881, 811 N.Y.S.2d 788 (3 Dept., 2006); Hock v. Aviles, 21 A.D.3d 786, 801 N.Y.S.2d 572 (1 Dept., 2005).

Plaintiffs : If you are relying on a claim of decreased range of motion, you must submit proof of the Plaintiff's actual range of motion and compare it with the normal range of motion. Conclusory opinions of "decreased range of motion" will not be sufficient to raise issues of fact as to serious injury. Also, keep in mind that you may need to establish objective deficiencies, such as decreased range of motion, to meet the threshold. Courts have repeatedly held that proof of a herniated disc, without objective tests, is insufficient to meet the threshold. Cotto v. JND Concrete & Brick, Inc., 41 A.D.3d 415, 837 N.Y.S.2d 728 (2 Dept., 2007); Caldwell v. Grant, 31 A.D.3d 1154, 818 N.Y.S.2d 700 (4 Dept., 2006); Burke v. Carney, 37 A.D.3d 1107, 829 N.Y.S.2d 358 (4 Dept., 2007).

Defendants : Plaintiff's subjective complaints of pain, without any objective medical evidence in support, are insufficient to establish a serious injury. Gonzalez v. Green, 24 A.D.3d 939, 805 N.Y.S.2d 450 (3 Dept., 2005) *citing,* Scheer v. Koubeck, 70 N.Y.2d 678, 679, 518 N.Y.S.2d 788 (1987). Accordingly, (in back and neck cases) you can expect Plaintiff to submit proof of objective findings of decreased range of motion, muscle spasms, etc. If you can, point out where Plaintiff's complaints are merely "subjective". Further, argue that some limitations are so "mild, minor or slight" that they do not constitute a threshold injury. Miki v. Shufelt, 285 A.D.2d 949, 728 N.Y.S.2d 816 (3 Dept., 2001). As stated above, an MRI showing herniated discs (without more) will not meet the threshold.

Cases : Davis v. Evan, 304 A.D.2d 1023, 758 N.Y.S.2d 203 (3 Dept., 2003); Grimes-Carrion v. Carroll, 17 A.D.3d 296, 794 N.Y.S.2d 30 (1 Dept., 2005); Desulme v. Stanya, 12 A.D.3d 557, 785 N.Y.S.2d 477 (2 Dept., 2004); Ellithorpe v. Marion, 34 A.D.3d 1195, 824 N.Y.S.2d 836 (4 Dept., 2006); Flanagan v. Klein, 35 A.D.3d 1174, 825 N.Y.S.2d 895 (4 Dept., 2006)

### (5) Medical Records Must be Certified

Proof submitted in support of summary judgment motion, or in opposition thereto, must be in admissible form. Zeigler v. Ramadhan, 5 A.D.3d 1080, 744 N.Y.S.2d 211 (4 Dept., 2004) (unsworn, unsigned affidavit from plaintiff's physician was insufficient to raise a triable issue of fact). Specifically, movant for summary judgment on the issue of serious injury threshold may not rely on unsworn medical records in support of his/her motion. Dumont v. D.L. Peterson Trust, PHH, 307 A.D.2d 709, 762 N.Y.S.2d 743 (4 Dept., 2003); Nkhereanye v. Hillaire, 35 A.D.3d 419, 826 N.Y.S.2d 373 (2 Dept., 2006); Elder v. Stokes, 35 A.D.3d 799, 828, N.Y.S.2d 138 (2 Dept., 2006); Phillips v. Zilinsky, 39 A.D.3d 728, 834 N.Y.S.2d 299 (2 Dept., 2007).

Plaintiffs : Certify your medical records. This is difficult to do last minute, so get the certification with your initial medical requests. Also, be aware that a defendant may rely on any records which have been provided by Plaintiff and/or Plaintiff's counsel without the requirement that these records be certified. Wiegand v. Schunck, 294 A.D.2d 839, 741 N.Y.S.2d 360 (4 Dept., 2002), *citing,* Lowe v. Bennett, 122 A.D.2d 728, 511 N.Y.S.2d 603 (1 Dept., 1986), *aff'd* 69 N.Y.2d 700, 512 N.Y.S.2d 364 (1986); *see also*, Patton v. Matusick, 16 A.D.3d 1072, 791 N.Y.S.2d 753 (4 Dept., 2005).

Defendants : Again, Certify your medical records. Again, this is difficult to do last minute, so get the certification with your initial medical requests. Also, note that some Courts have recognized that a defendant moving for summary judgment may submit unsworn medical reports and records of the plaintiff's physicians to demonstrate a lack of serious injury. However, when the defendant does so, he/she "opens the door" for the plaintiff to rely on the same unsworn or unaffirmed reports and records in opposition of the motion. Kearse v. New York City Transit Authority, 16 A.D.3d 45, 47, 789 N.Y.S.2d 281, 283 (2 Dept., 2005), *citing* Pech v. Yael Taxi Corporation., 303 A.D.2d 733, 758 N.Y.S.2d 110 (2 Dept., 2003).

Cases : *see above.*