Report #10

The New York "No-Fault" Law:

Some thoughts on injuries in car accidents. Insurance companies try to sell the idea that if there is not a lot of damage to your car, you can't be seriously hurt. This has been disproved by numerous studies, but let me tell you about a demonstration that some attorneys have used at trial to demonstrate injury to the jury. A low speed car accident can push your body and brain back and forth, even without a lot of property damage. **A good lawyer trick:** A trial attorney may hold up and drop a carton of eggs to the ground. The eggs break, yet the carton remains visibly undamaged. Like the eggs, the human body can be hurt, yet a car, like the egg carton, can show very little outside damage.

Insurance companies seem to have the attitude that everyone exaggerates or fakes pain. In thousands of negotiations with insurance companies, I've heard them "poo-poo" clients' complaints of pain. Pain alone won't carry the day, either for settlement, or in court. Learn why by reading on.

What do we mean by "No-Fault"?

Put simply, No-Fault refers to having your accident-related medical bills paid, up to $50,000, regardless of whose fault the accident is. Two different things happen after a car accident. First: No-Fault insurance pays your medical bills and lost wages, except in certain instances involving buses, motorcycles and heavy trucks. No-Fault also protects pedestrians and bicycle riders. Second: This should not be confused with issues of liability in an accident, which are very much about who is at fault, and the focus of the second thing that may happen: a lawsuit. Let's learn about No-Fault insurance and what it means for your car accident case.

New York's No-Fault law was enacted on December 1, 1977 and is found at Article 51 of New York State's Insurance Law. Before the No-Fault statute, an

accident victim could sue for any kind of injury and often did. The insurance industry wanted to cut down on the small strain and sprain cases that were flooding the courthouses and, hopefully, reduce auto insurance premiums, so it proposed a trade. Smaller cases would not be allowed to recover money damages, and in exchange, the insurance companies would pay medical bills for those injured in a car accident, regardless of fault – even if the injured person caused the accident. If this sounds simple, it is anything but.

The goal of the No-Fault law is to compensate for "basic economic loss" by paying medical bills and lost wages. Under No-Fault, in order to sustain a lawsuit for pain and suffering and such, you need what the No-Fault statute calls a "serious injury." "Serious injury" is rather an unfortunate phrase as it implies a greater level of injury than required. One lawyer-commentator has said that it would have been far better for accident victims if the statute referred to a "qualifying injury" instead of a "serious injury." The serious injury requirement is intended to keep smaller cases out of court, and is referred to as the No-Fault "threshold." Frequently, it is used by insurance companies to keep deserving cases out of court, and lawyers not thoroughly familiar with the ins and outs of the No-Fault threshold can lose these cases, even when they shouldn't.

You should not be surprised if I tell you that insurance companies are cheap with No-Fault insurance benefits: even though No-Fault benefits are supposed to help the injured person, and the injured person is less able to bring a court case because of the No-Fault law. In many cases, the insurance companies nit-pick the amount of doctors' bills submitted under the No-Fault law or refuse to pay them for no good reason. The insurance carriers may send out an accident victim's medical records for "peer review," where a doctor that has never examined or even met the injured person recommends denying treatment as "unnecessary." Insurance companies are also quick to cancel No-Fault insurance benefits, which they are permitted to do after they hire a physician to examine the accident victim, if that physician finds that continued treatment would not benefit the accident victim. Would it shock you to learn that these physicians, paid by the insurance carriers, overwhelmingly find that further treatment is unnecessary and/or that the

injured person is able to return to work, thus justifying the discontinuance of No-Fault insurance benefits? Ironically, these insurance carrier-sponsored physicals are called "Independent Medical Examinations" – they are certainly not "independent."

How the No-Fault serious injury threshold works.

To recover non-economic loss damages and sue in a civil action, the injured person must establish that he or she satisfies the requirements of the No-Fault law. The No-Fault law precludes recovery for pain and suffering, between "covered persons," unless the accident victim proves a "serious injury." This is one of the most litigated sections of New York law, with many, many reported case decisions. Now remember, we are not even talking about liability or fault for the accident, which is a separate issue entirely. We are only talking about the degree of injury.

The nine No-Fault serious injuries in New York State's Insurance Law are:

1. Death (brought about by the accident);
2. Dismemberment – mangling, mutilation or dismemberment (loss of) a body part;
3. Significant disfigurement (a scar; there's no hard and fast formula for scar size – depends on the visibility of the scar; usually scars above scalp line don't clear the threshold) ;
4. A fracture (broken bone);
5. Loss of a fetus (traumatic abortion);
6. Permanent loss of use of a body organ, member, function or system (the first of the "tricky" categories);
7. Permanent consequential limitation of use of a body organ or member (pain alone won't do; headaches alone won't do; a herniated/bulging disc alone won't do; sprains/strains won't do);
8. Significant limitation of use of a body function or system; or,

9. A 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment (known as the 90 out of 180 days rule).

The first five are the easy categories, they are fairly straightforward.

The two less tricky categories:

Number "6": If you can no longer use a part of your body, you can qualify.

Number "9": Usual and customary daily activities generally means that you miss three months of work in the first six months after the accident, but there are two wrinkles. First: Your failure to work has to be medically determined. In other words, your doctor must say that you can't work. Second: You need to show that you couldn't do any of your other customary daily activities. This may be housework, driving the children to school, or other things.

The two trickier categories:

Numbers "7" and "8" have no fixed definition or explanation. Some cases make it; some don't. Your lawyer needs a thorough understanding of the current case law to know how the courts are applying these two threshold categories. Frequently, it comes down to documenting a reduced range of motion in the injured part of your body – for example the doctor determines that you can't fully bend or twist or turn your back or neck. I have more to say about these two categories as you read on.