MSC Opinion: McCormick v. Carrier

3. August 2010 By Aaron Lindstrom

Under Michigan's no-fault automobile-insurance statute, an accident victim typically does not have the right to sue the person who caused the accident. Instead, the victim is entitled to recover directly from the insurer, without regard to fault, thereby obtaining a certain and prompt recovery for economic loss, but giving up the uncertain possibility of greater relief through tort law. The statute provides, however, a limited exception: an injured person may sue under tort law "if the injured person has suffered death, *serious impairment of body function*, or permanent serious disfigurement." MCL § 500.3135(1) (emphasis added). The legislature defined "serious impairment of body function" to mean "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL § 500.3135(7).

In *McCormick v. Carrier*, No. 136738 (July 31, 2010), the Michigan Supreme Court interpreted the phrase "serious impairment of body function" and, in a 4-to-3 decision, overturned the Court's 2004 decision in *Kreiner v. Fisher*, 471 Mich. 109 (2004), that had interpreted the same language. The majority (with Justice Cavanagh writing for Chief Justice Kelly and Justices Weaver and Kelly) held that a serious impairment of body function exists if there is "(1) an objectively manifested impairment (observable or perceivable from actual symptoms or conditions) (2) of an important body function (a body function of value, significance, or consequence to the injured person) that (3) affects the person's general ability to lead his or her normal life (influences some of the plaintiff's capacity to live in his or her normal manner of living)." In a lengthy dissent, Justice Markman (joined by Justices Corrigan and Young) argued that the majority improperly eliminated any temporal requirement from consideration of the third prong. The justices also divided over the proper application of *stare decisis*: Justice Cavanagh spoke for his and Chief Justice Kelly's view in the primary opinion, Chief Justice Weaver and Hathaway each wrote separately on the topic, and Justice Markman devoted a substantial part of the dissent to the doctrine. The different opinions in *McCormick* thus provide insight not just into the current state of no-fault insurance law but also into the ongoing debate among the justices over judicial philosophy and the role of *stare decisis*. Further discussion of the case follows after the jump.

The case arose from a work accident, where a coworker at General Motors backed a truck into Rodney McCormick, knocking him over and then running over his ankle. Mr. McCormick sustained a fracture and had surgery two days later to insert metal hardware into his ankle to stabilize the bone fragments. He was restricted from weight-bearing activities for a month and underwent months of physical therapy. About nine months after his first surgery, the metal hardware was removed in a second surgery, and he ultimately returned to work (in a different job at GM but with the same pay) 19 months later. He was able to return to pre-injury activities, including fishing and being a weekend golfer. He also testified that his life returned to normal, but with some limited pain.

When he brought a tort suit based on his injury, the trial court granted summary judgment to the defendant (GM's indemnitor), concluding that McCormick's recovery meant he could not meet the serious-impairment threshold under *Kreiner*, and a 2-1 majority of the Court of Appeals agreed. The Supreme Court majority, however, held that *Kreiner* deviated from the statutory text of MCL § 500.3135 and therefore both overruled *Kreiner* and reversed the grant of summary judgment.

Justice Cavanagh first explained the legal developments leading to *Kreiner*. The legislature adopted the no-fault system in 1973 but did not define "serious impairment of body function." Nine years later, the Supreme Court decided *Cassidy v. McGovern*, 415 Mich. 483 (1982), in which it interpreted the statute to require a plaintiff to show an objectively manifested injury and impairment of an important bodily function, which the *Cassidy* Court defined to mean "an objective standard that looks to the effect of an injury on the person's general ability to live a normal life." Four years later, in *DiFranco v. Pickard*, 427 Mich. 32 (1986), the Court rejected the limitation that it be an "important" body function that is impaired. In 1995, the legislature intervened by adopting the current definition, which reinstated the *Cassidy* requirement that the body function that is impaired be "important." Then, in 2004, the *Kreiner* Court interpreted the new definition and concluded that a person's "general ability to lead his or her normal life" meant that "the effect of the impairment on the course of a plaintiff's entire normal life must be considered," and if "the course or trajectory of the plaintiff's normal life has not be affected, then the plaintiff's 'general ability' to lead his normal life has not been affected." The majority in *McCormick* concluded that *Kreiner*'s focus on the "entire" life and the "trajectory" of the life constituted a significant error because those words imposed a "sense of permanence" requirement that the statutory text did not. Justice Cavanagh also faulted the *Kreiner* Court for creating a list of "extra-textual factors"—including "the duration of the impairment"—that could not be found in the statute itself.

Having concluded that *Kreiner* misinterpreted the statute, the majority next considered whether it would nonetheless follow *Kreiner* because of the principle of *stare decisis*, and it concluded that four *stare decisis* factors did not counsel in favor of upholding *Kreiner*. First, the majority concluded that *Kreiner*'s test was unworkable in practice, as evidenced in part by a great increase in the number of appeals arising out of MCL § 500.3135(7). Second, overturning *Kreiner* would not hurt individuals relying on its rule, because it is a rule that comes into play only after a person is injured in an automobile accident, making it very unlikely that people are adjusting their behavior based on its rule. Third, the public interest weighed in favor of a correct interpretation of the statute because that would better effectuate the legislature's intent. The fourth factor the majority considered—whether the precedent being overturned was an abrupt and largely unexplained departure from precedent—was a neutral factor. Addressing the dissent's arguments about *stare decisis*, Justice Cavanagh stated that "[t]he dissenters' stare decisis protestations should taste like ashes in their mouths" because the dissenters

"paid absolutely no heed" to the principles of *stare decisis* when they "denigrated the wisdom of innumerable predecessors" but now attempt to rely on the doctrine "to save their recent precedent." Finally, Justice Cavanagh noted that the statute did not contain an express temporal requirement and stated that the majority did not hold that temporal considerations are irrelevant.

Justice Weaver concurred separately to address *stare decisis*. She explained that she does not agreed with the standardized test for *stare decisis* in Chief Justice Kelly's opinion in *Peterson v. Magna Corp.*, 484 Mich. 300 (2009), because *stare decisis* must be evaluated on a case-by-case basis.

Justice Hathaway also concurred separately to state that *stare decisis* must focus on the individual case but is appropriate here.

In dissent, Justice Markman criticized the majority opinion for adopting a rule that "as long as the plaintiff's general ability to lead his normal life has been affected, apparently even for a single moment in time, the plaintiff has suffered a 'serious impairment of body function.'" In his view, temporal considerations are necessary to prevent this prong of the statute from being meaningless: "How can it possibly be determined whether an impairment 'affects the person's general ability to lead his or her normal life' without taking into account temporal considerations?" For example, "[w]hat if a person gets hit in the head and passes out for five minutes, but after those five minutes is completely unaffected by the impairment?" That situation, Justice Markman reasoned, cannot be what the legislature meant by "serious impairment of body function," especially given the fact that it grouped this exception to the no-fault system with exceptions for "death" and "permanent serious disfigurement."

The dissent also concluded that the 1995 legislation essentially rejected *DiFranco*, rather than just modifying it, as the majority contended, and with one exception—changing the phrase "the person's ability to live *a* normal life" with "the person's ability to lead *his or her* normal life"—codified *Cassidy*. The dissent found this particularly significant because Justice Cavanagh authored *DiFranco*, which the legislature rejected, and also authored the dissent in *Kreiner*, which the Court now overruled to resuscitate the ruling of *DiFranco*. But Justice Markman's biggest complaint was that the justices in the majority applied *stare decisis* on an *ad hoc* basis, making it (he contended) impossible for parties to tell in advance what tools for decision would be applied to their case. In his words, "the suspicion simply cannot be avoided that these varying and indeterminate rules, and tools, may be largely a function of the outcome preferred by the judge and by his or her personal attitudes toward the parties and their causes." As another example of choosing tools of decision on a case-by-case basis, he observed that the majority was unusually silent on the issue of legislative history. He noted that "[o]ne of the most common and compelling critiques of the use of legislative history is that a judge can always find *something* in the legislative

history to support the interpretation he personally wishes to give to a law," which is why using legislative history has been described as "entering a room, looking over the assembled multitudes in the crowd, and picking out your friends." But here, Justice Markman objected, "the majority enters a room, and, finding *no* friends in sight, makes a quick exit." And returning to the theme of *stare decisis*, the dissent noted that the three dissenting justices were not changing their view of *stare decisis* now, for they had never viewed *stare decisis* as an inexorable command and still believed "that a judge's primary obligation is to the law and the constitution, not to the judgments of his or her predecessors." Instead, it was the current majority, he contended, that previously viewed adherence to precedent as very important. The dissent ended by cataloguing the instances in which the recent majority has overturned precedents from the last decade and then by listing six cases the majority has accepted for next year in which the dissent expects the majority to overturn other precedents.