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## Scar Tissue

[Trial courts' struggle to define limited-tort serious disfigurement threshold may be over](#)

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Two recent Pennsylvania trial court decisions, one at the state level and one in the federal system, have clarified the test and factors applicable to the issue of whether a scar amounts to a permanent serious disfigurement under the limited tort analysis in motor vehicle accident cases.

While determining whether an injury amounts to a permanent serious disfigurement would be easy in the case of Frankenstein, the Phantom of the Opera, or Captain Hook, in reality, the issue is case specific and, at times, difficult to assess by both the litigants and the court.

To date, this issue does not appear to have been addressed at the appellate level and it is rarely the subject of published trial court opinions. Last year's decision in *Newell v. Gibson*, PICS Case No. 07-0520 (C.P. Fayette Feb. 20, 2007) Solomon, J., set forth, for the first time, a concrete test to evaluate scar cases in the limited tort context. Also, in February, the federal court for the Middle District handed down the most recent opinion on the issue, captioned *Durosky v. United States*, slip opinion, 2008 WL 521204 (M.D. Pa. Feb. 27, 2008) Blewitt, M.J.

### Over the Threshold

By way of background, the Pennsylvania Motor Vehicle Financial Responsibility Law, at Section 1705(d), provides in pertinent part, that "[u]nless the injury sustained is a serious injury, each person who is bound by the limited tort election shall be precluded from maintaining an action for any noneconomic loss." In the MVFRL, the General Assembly has defined serious injury as "a personal injury resulting in death, serious impairment of body function or permanent serious disfigurement."

Under *Washington v. Baxter*, 719 A.2d 733 (Pa. 1998), the state Supreme Court adopted the parameters set forth in prior appellate decisions for the separate issue of deciding whether or not a plaintiff has sustained a "serious impairment of body function." The Supreme Court noted that factors applicable to the serious injury threshold included a review of the injuries alleged, the extent and permanency of any impairment, the length of time the impairment lasted and the treatment required to address the impairment.

The separate, open question of the appropriate test to determine a permanent serious disfigurement was not, and has not, been addressed by the high court.

### Are Scars Serious?

In the absence of any concrete test enunciated by any appellate court for the purpose of evaluating a claim of a permanent serious disfigurement, earlier trial courts essentially relied upon the above-noted serious injury test that was ultimately adopted by the Supreme Court in *Washington v. Baxter*.

In *Gemmel v. Barrett*, 35 Pa.D.&C.4<>th 38 (C.P. Indiana 1997), a key pre-*Washington v. Baxter* case, the Indiana County Court of Common Pleas applied the serious injury threshold to a scarring injury claim.

In *Gemmel*, the trial court found that the male plaintiff had established a permanent serious disfigurement in the form of the extensive scarring he had sustained to his face and shoulder regions. The court noted that

both the plaintiff's treating doctors and the defense expert had described the scarring as permanent and disfiguring. The trial court also took into account its own study of various photographs of the plaintiff's scarring.

In another pre-*Washington v. Baxter* trial court decision, the Bucks County Court of Common Pleas likewise applied the serious injury threshold to a limited tort scarring case in *Walsh v. Phillips*, 38 Pa.D.&C.4th 178 (C.P. Bucks 1997).

In *Walsh*, a male limited tort plaintiff sustained facial lacerations leaving a 7-centimeter scar to his right temple, a 3.5-centimeter scar on his forehead, and a 2.5-centimeter scar on his right upper eyelid. All of the scars were described by the plaintiff's treating plastic surgeon as permanent.

Foreshadowing a separate test for serious disfigurement cases, the trial court in *Walsh* granted the defendant's limited tort motion for summary judgment noting that its own repeated examination of the plaintiff's face revealed that the scars were "hardly discernible." The court stated that the "appearance of the plaintiff furnishes the best evidence of permanent and serious disfigurement" and, where the court was "barely able to discern the scars about which the plaintiff complained," summary judgment would be granted.

The *Walsh* court also dismissed the plaintiff's complaint that the stinging sensation of the scar stung amounted to a substantial impairment. The court further rejected the plaintiff's complaint that the scars were worse in the summer with sunburn by indicating, somewhat harshly, that the male plaintiff could avoid that situation by simply wearing sunscreen.

In *Reidinger v. Linebaugh*, 35 Pa.D.&C.4th 78 (C.P. Lancaster 1998), the trial court held that a limited tort female plaintiff's non-facial scars did not amount to a permanent serious disfigurement. In doing so, that court also relied upon the same serious injury threshold that was eventually adopted by the Supreme Court in *Washington v. Baxter*.

In *Reidinger*, the female plaintiff sustained a 4-centimeter laceration to the right inner leg which did not require stitches to repair. The plaintiff also had a separate scar from an incision below her right armpit from a related medical procedure to re-inflate her lung after the accident. The court noted that that scar was only visible if the plaintiff wore a bathing suit or a low cut tank top. The court further emphasized that the plaintiff did not change any of her clothing to hide her scars and that the scars were not readily noticeable by the general public. As such, the court concluded that the two scars did not amount to permanent serious disfigurement under the limited tort analysis.

The serious injury threshold was also applied in dicta in the limited tort case of *Krukowski v. Pep Boys*, 64 Pa.D.&C.4th 225 (C.P. Lackawanna 2003). In that case, a female plaintiff had been injured when a hubcap came off an automobile operated by the defendant and struck the plaintiff on her leg as she was exiting her own vehicle. As a result, the limited tort plaintiff sustained a laceration, and later, scarring over the lower front inside aspect of her right leg. The defendant moved for summary judgment on the grounds that the plaintiff's scarring did not amount to a "serious" injury, i.e. a permanent serious disfigurement, as required by the statute. The court separately held that the limited tort analysis did not apply in that case.

Yet, Lackawanna County Judge Carmen Minora went on to indicate, in dicta, that had he been required to specifically address the issue of whether the plaintiff's scar amounted to a serious injury, he would have found that reasonable minds could differ on the issue and that, therefore, the plaintiff would be allowed to proceed to the jury.

As support, the court in *Krukowski* applied the *Washington v. Baxter* factors and noted that the plaintiff had been forced out of work for a month by the laceration to her leg. Also, in addition to experiencing the laceration itself, the plaintiff was also later bothered by a burning sensation and numbness related to the scar. The court also considered the extent of treatment the plaintiff had received from a plastic surgeon and noted that the surgeon opined that the plaintiff was left with a permanent discolored scar that had either some pigmentation in it or possibly even some motor oil or dirt from the hubcap. Minora also relied upon his own review of the appearance of the plaintiff's scar as depicted in photographs.

Thus, as recently as a few years ago, in the absence of any other appellate guidance, the trial courts continued to feel compelled to pigeonhole scarring cases into the serious injury threshold analysis, the only test available at the time.

### **More Than Trifling**

Then, just last year, in the common pleas case of *Newell v. Gibson*, Judge Gerald R. Solomon finally adopted a more specific and seemingly workable test to evaluate claims of permanent serious disfigurement.

In *Newell*, the trial court granted summary judgment in favor of the defense on the limited tort issue of whether the plaintiff's physical injuries amounted to serious injuries. However, summary judgment was denied on the plaintiff's scarring/disfigurement claim.

The male plaintiff in *Newell* had sustained a 10-centimeter facial laceration that ran from his right ear and down his right jaw line. The wound required 15 stitches to close. The defense moved for summary judgment arguing that the plaintiff's injury did not amount to a permanent serious disfigurement.

Solomon noted that the limited tort statute did not define "permanent serious disfigurement" and that there were few Pennsylvania cases that had even addressed the issue. Accordingly, he turned to the law of other jurisdictions, namely New Jersey, as well as the above-noted Bucks County Court of Common Pleas decision in *Walsh*, for guidance in crafting a test. The court in *Newell* also referred to the case of *Beazley v. Pierce*, 19 Pa.D.& C.3d 729 (C.P. York 1981) which offered a test for evaluating a claim of a "permanent, irreparable and severe" cosmetic disfigurement under the old Pennsylvania No-Fault Motor Vehicle Insurance Act. The *Beazley* court defined that test as requiring a showing of "a disfigurement which is more than a trifling mark discoverable only on close inspection, but which substantially detracts from the appearance of the person disfigured or mars the natural expression so as to attract embarrassing attention."

Based upon those sources of guidance, the *Newell* court also held that, in order for a permanent disfigurement to be serious, it had to be "more than a trifling mark discoverable only on close inspection." The court further held that, in terms of facial scars, the injury "must mar the natural expression so as to attract attention." Factors to be considered included "the appearance, coloration, and size of the plaintiff's scars." The court also stated that "the appearance of the plaintiff is the best evidence." Applying the test to the facts before it, the *Newell* court noted that the plaintiff's scar was quite perceivable from the photographs in that it was significantly pigmented and lengthy. The court found the 10 centimeter scar running from the plaintiff's ear and down his jaw line to be "an unsightly and obvious mark that substantially detracts from the appearance of the husband-Plaintiff and mars his natural expression." The court was also persuaded by the fact that the plaintiff felt compelled to grow a beard to hide his scar from obvious view. As such, the court denied the defendant's limited tort motion and allowed the permanent serious disfigurement issue to proceed to a jury.

In *Durosky*, the most recent decision addressing the permanent serious disfigurement issue, the federal magistrate judge relied upon the more general serious injury threshold and not the more specific permanent serious disfigurement test from the still unpublished decision issued by the *Newell* court. Nevertheless, the *Durosky* decision remains instructive on the factors to be considered.

In *Durosky*, the limited tort male plaintiff sustained facial scarring about the right side of his face. The court relied upon photographs of the scars, the plaintiff's medical expert's report, and judge's own personal observation of the plaintiff's scars. It was additionally indicated that the plaintiff's medical expert opined that, even with a successful scar revision surgery, the plaintiff would still be left with a permanent, disfiguring scar deformity. As such, the court allowed the permanent serious disfigurement claim to proceed to a jury.

### **What Happens Next?**

Until there is appellate court guidance on a separate standard of review for scarring cases, it appears that some trial court judges may still feel compelled to apply the serious injury threshold to evaluate limited tort scar cases.

Yet, it is anticipated that, if faced with the issue, the appellate courts of Pennsylvania would adopt the serious disfigurement threshold set forth in the *Newell* decision as the proper test.

That is, in order for a permanent disfigurement to be serious, the scar would have to be "more than a trifling mark discoverable only on close inspection." It would also appear that, in order for facial scars to be found serious, the scar would have to substantially detract from the appearance of the person disfigured or mar the injured party's natural expression so as to attract embarrassing attention.

The most important factors to be considered would be the extent and placement of the original laceration or wound, whether stitches were required to repair the wound, the size and extent of discoloration of the resultant scar, and the extent of treatment thereafter.

Other factors to consider would include whether the plaintiff grew facial hair or changed to a different hairstyle or style of dress in order to hide a scar, and whether the scar is noticeable to the general public. Also important in this analysis would be the opinions of medical experts as to the permanency of the scar and whether the disfigurement could be lessened or even eradicated by revision surgery.

Last but not least, as repeatedly indicated in the decisions noted above, the best evidence would obviously be the court's own in-person or photographic review of the disfigurement at issue. •