



## **NO-FAULT THRESHOLD BOOBY TRAP**

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The New York State No-Fault threshold requires that a person injured in a motor vehicle accident have suffered a "serious injury," as defined by New York State Insurance Law in order to bring a lawsuit in court. I do not have the time or inclination to go into a prolonged analysis of what constitutes a serious injury under the No-Fault law. For that analysis I refer you to my free book:

["Warning! Things That Can Destroy Your Car Accident Case \(And the Insurance Companies Already Know These Things\)."](#) Click on the link (if you cannot access the hyperlink, see url at the end of this article) and fill in the form, and you'll instantly get a copy of the book in PDF format.

The point of this article is to observe the never ending give and take that is No-Fault serious injury threshold litigation. The insurance companies are always on the lookout for ways to convince a judge that the injured car accident victim doesn't qualify as seriously injured. They try to get the hurt plaintiff's case thrown out on paper - without ever reaching a jury - by way of a "motion."

For a while, insurance carriers were able to defeat accident victims with motions by showing a "gap" in treatment. That means if my client was treating for injuries from an accident then stopped, after a period of time they would be presumed to not have a serious injury. Many judges bought this argument; and many deserving injured plaintiffs had their cases thrown out of court.

So this was defense law firms' "punch." Then plaintiffs' law firms came up with a "counter-punch." To overcome a gap in treatment, the accident victim needed an explanation. And it developed that an acceptable explanation was something like: "I stopped treating because my No-Fault insurance benefits were canceled by the insurance company and I could not pay for treatment," and/or "The treatments only gave me temporary relief from my pain, so instead I did exercises at home that my doctor taught me" - which works best if the plaintiff describes the exercises, and if his or her doctor also gives an affidavit stating that the plaintiff was not being cured anyway, and was just as well off medically if he or she did exercises at home. The doctor should also describe the exercises prescribed. This counter-punch works for accident victims injured in car accidents.

However, the treatment "gap" was yesterday's pitfall. A new "punch" or booby-trap sprung by the defense bar is that of case dismissal based on making a motion containing an affidavit by a radiologist, hired by the defendant's insurance carrier to read MRI films previously taken of the plaintiff's affected body parts, finding "degenerative changes" that pre-exist the accident. The judge could find that there is no accident-related injury shown and certainly no "serious injury" related to the automobile accident and throw out the plaintiff's case.

I see two possible counter-punches or work-arounds to this. There are recent appellate cases where an injured plaintiff's neurologist reads the MRI film and give an affidavit: (1) finding an accident-related injury, and, (2) giving causation, which means relating the injury to the car accident.

An alternative technique is to get an affidavit from the client's radiologist (who may sometimes have to be dragged kicking and screaming). Never examining or even seeing the plaintiff, a radiologist can't give causation. However, since we need to get a short affirmation from the radiologist (anyway) to make his/her report admissible in opposition to a defense summary judgment motion based on the No-Fault serious injury threshold, I would add a sentence saying that the radiologist has read/reviewed the affirmed report of the defense radiologist [insert name], dated [insert date], and disagrees with the findings set forth therein, and particularly the defense radiologist's findings of degenerative changes. (I keep this language as terse as possible, for radiologists tend to scare easily)

Keep in mind:

- a. The injured plaintiff's radiologist must actually be sent the defense radiologist's report(s).
- b. The injured plaintiff's attorney will probably have to pay a few dollars (more) for this opinion from the client's radiologist (and for reading the defense radiologist's reports).
- c. The plaintiff's other doctor(s) are needed to show causation.

And here's a REMINDER from out of left field: Attach property damage photos to the plaintiff's opposition to a defense (threshold) summary judgment motion, authenticated by plaintiff. Sexy property damage photos may tilt an uncertain judge in favor of the car accident victim.

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