MSC: Experimental procedures not covered under no-fault unless objective evidence of effectiveness exists

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Experimental medical procedures are not "reasonably necessary" under the no-fault act without objective, verifiable evidence of effectiveness, and therefore, not covered. The Michigan Supreme Court predictably divided 4-3 on this question in its July 29 *Krohn v Home-Owners Insurance Company* opinion, No. 140945. Expect this issue to pop up again when election season rolls around.

Justice Zahra wrote for the majority that Mr. Krohn, rendered paraplegic after a car accident, could not seek coverage for a procedure in Portugal because he could not present objective and verifiable evidence that the experimental treatment was "efficacious." The no-fault act requires payment for treatments "…reasonably necessary … for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a).

Mr. Krohn underwent surgery in Portugal whereby sinus stem cells are transplanted to the spine, with the aim that they develop into spinal cord nerves. The FDA has not approved the surgery, and it cannot be legally performed in the U.S. Insufficient research exists to apply for FDA approval.

Mr. Krohn regained a small amount of voluntary motor function after the surgery, but one of his experts could not say whether that was due to the surgery or post-surgery physical therapy. Plaintiff's expert also opined that the surgery was not considered "necessary" to treatment of a spinal cord injury. Some limited research is available on the procedure, but not enough for publication or FDA application. However, a second expert for Plaintiff testified that he believed the surgery was "necessary" to his treatment because he had no other available options. This was not enough to show effectiveness and thus that the treatment was "reasonably necessary."

The dissent, written by Justice Hathaway, argued that the majority's conception of "reasonably necessary" added extra-statutory requirements to MCL 500.3107(1)(a). The dissent also argued that the voters rejected a 1994 ballot proposal that would have excluded "experimental" treatments from the Section 3107 definition. Requiring a showing of efficacy equates to excluding "experimental" procedures, the dissent wrote. The majority responded that it was not categorically rejecting coverage for all "experimental" treatments under the no-fault act, but only finding that the jury's verdict finding "reasonably necessary" treatment here was contrary to the evidence.