

**Raizner v M & G Taxi, LLC**

2024 NY Slip Op 32685(U)

July 30, 2024

Supreme Court, New York County

Docket Number: Index No. 154457/2021

Judge: James G. Clynnes

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“serious injury” threshold (*Toure v Avis Rent a Car Systems Inc*, 98 NY2d 345, 352 [2002] where the court found that in order to establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a “permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system”). Insurance Law 5102 (d) outlines the serious injury threshold:

a personal injury which results in ... permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent 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 90 days during the 180 days immediately following the occurrence of the injury or impairment.

Under the no-fault law, a plaintiff can maintain an action for non-economic loss, including pain and suffering, arising from a motor vehicle accident only if the accident caused a serious injury (*Licari v Elliott*, 57 NY2d 230 [1982]). The burden rests upon the movant to establish that the plaintiff has not sustained a serious injury (*Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986]). When the movant has made such a showing, the burden shifts to the plaintiff to produce prima facie evidence to support the claim of serious injury (*see Licari, supra, see also Lopez v Senatore*, 65 NY2d 1017 [1985]).

When a claim is raised under the permanent loss or limitation of use of a body organ or member, significant limitation of use of a body function or system, or the 90/180 days category, it can be substantiated by a medical expert assigning a numeric percentage of the loss of range of motion showing the extent or degree of the plaintiff's physical limitation. An expert may also offer a qualitative assessment, upon an objective basis, of a plaintiff's condition compared to the normal function, purpose and use of the affected body organ, member, function, or system (*Toure* at 352;

*Lopez*, 65 NY2d 1017; *Ramos v Dekhtyar*, 301 AD2d 428 [1st Dept 2003]). The expert must indicate what objective medical tests s/he performed to measure the range of motion restrictions (*Lloyd v Green*, 45 AD3d 373 [1st Dept 2007]).

In support of the motion, Defendants submit an independent orthopedic exam report by Dr. Louis McIntyre, orthopedic surgeon, a report by Dr. Gary S. Bromley, plastic surgeon, and Plaintiff's examination before trial testimony.

Dr. McIntyre examined Plaintiff on April 27, 2023, measured Plaintiff's range of motion with a goniometer and based normal values on AMA Guidelines. In his report, Dr. McIntyre notes normal range of motion in the thoracic and lumbar spine, forearm, and left knee. He reports that all orthopedic testing was negative, there were no muscle spasms or trigger points. Reflexes, muscle strength, sensation and muscle tone were all normal. Dr. McIntyre concludes that Plaintiff's alleged injury to the thoracic spine, lumbar spine, left forearm, and left knee were all resolved and that he had a normal examination of the left leg. Further, he finds no permanent injuries, disabilities, restrictions on daily life, and stated that Plaintiff can perform normal activities.

Next, Defendants submit an independent medical examination report from Dr. Bromley. Dr. Bromley reports scarring characterized by depigmentation of about 8 cm x 8 cm and is irregular in shape. Dr. Bromley reports no interference to daily living and does not warrant surgical intervention. Dr. Bromley also took photographs of Plaintiff's arm at the examination which are attached to his report.

In opposition, Plaintiff submits an affirmed medical report from Plaintiff's treating physician, Dr. Asher Goldstein, certified medical records from Dr. Goldstein, affirmation of Dr. Goldstein, affirmed medical reports from Dr. Joyce Goldenberg, a copy of a Conditional Payment

Letter from the Centers for Medicare & Medicaid Services (CMS), an affidavit of the Plaintiff, medical records from Mt. Sinai West, Hospital for Special Surgery, Dr. Patrick Reid, Dr. Corey Hunter, Dr. Ulysses Scarpidis, Columbia Pain Center/Dr. Michael Weinberger, Dr. Paul McCormick, and Plaintiff's deposition transcript with the errata sheet.

In his affirmed medical report, Dr. Goldstein, Plaintiff's treating physician, states that Plaintiff continues to follow up with him on a monthly basis. Dr. Goldstein reports limitation in Plaintiff's range of motion in his spine and knees. Specifically, Dr. Goldstein measures Plaintiff's range of motion with a goniometer and observes a limitation to Plaintiff's range of motion in the cervical spine, noting left lateral flexion at 25 degrees (45 degrees normal), right lateral flexion at 30 degrees (45 degrees normal), forward flexion at 40 degrees (50 degrees normal), and extension at 40 degrees (50 degrees normal), as well as tenderness in the muscles. As to Plaintiff's lumbar spine, Dr. Goldstein measures forward flexion at 45 degrees (60 degrees normal), extension at <5 degrees (25 degrees normal), and tenderness in the lower paraspinal muscles. As to Plaintiff's right knee, Dr. Goldstein measures 25-100 degrees (0-135 degrees normal) and as to Plaintiff's left knee, he measures 35-95 degrees (0-135 degrees normal).

The report lists Plaintiff's injuries as permanent, saying that in the future, he will need a powered scooter for ambulation, will need continuous pain management treatment, physical therapy, a guided home exercise program, and additional knee and spine surgeries. Due to limitations of daily living, he will benefit from a home attendant eight hours a day, seven days a week. Dr. Goldstein asserts that the accident was the direct cause of the injuries, and exacerbation of previous injuries to his back and knee, opining that "accident is a substantial factor in causing the increased pain and restricted range of motion in his lumbar spine and left knee," which led to "multiple extensive thoraco-lumbar surgeries and his subsequent debilitation."

The certified medical reports produced by Dr. Goldstein range from August 10, 2019, to September 15, 2020. The August 10 report states that Plaintiff now relies on a walker, can barely walk, and his skin has not healed from the accident. The September 15 report notes worsening pain in the L5, knee and an MRI showing a meniscal tear. Dr. Goldstein emphasizes that in the lumbar spine there is abnormal range of motion with pain during movement, and also evidence of a Cluneal nerve block. The medication given to Plaintiff was “providing barely acceptable pain relief.” Plaintiff is assessed as having chronic lower back pain, sacroiliitis, lumbar failed back surgery syndrome, pain in left knee, and TMJ syndrome

In Dr. Goldstein’s affirmation, he opines that “as a result of the April 23, 2019, incident, Mr. Raizner sustained a permanent consequential limitation and a significant limitation of use of the lumbar spine.” And that the “motor vehicle accident was a substantial factor in causing an exacerbation of Mr. Raizner’s pre-existing lower back condition.” These injuries have “adversely affected” Plaintiff’s abilities to perform recreational and activities of daily living compared to before the accident. While he used to be able to stand for 30 minutes and sit for 45-60 before the accident, now he can only stand for 15-20 and sit for 20-30 minutes due to pain in the lower back. While he used to walk 10 blocks a day, not he cannot walk just one before pain starts and requires a cane. In addition, Plaintiff is no longer able to be independent in performing daily activities. He used to get dressed and go grocery shopping, now it takes him two hours to get clothes on, and he relies on someone else to go grocery shopping and cook his meals.

Immediately following the alleged accident, Plaintiff was sent to Mt. Sinai West. The report notes “significant skin tears to left forearm,” sacral hematomas, contusion on the head, neck pain, and back pain. There is no evidence of fracture in any body parts. Plaintiff underwent an MRI at Hospital for Special Surgery on June 14, 2019. While degeneration was noted throughout

the cervical and thoracic spine, disc extrusions and fragments, displacement of nerve roots, neural foraminal narrowing, and impingement were all found to be present.

Dr. Joyce Goldenberg examined Plaintiff on June 23, 2019. Her report states that neurological examinations reveal increased back pain, decreased sensitivity to touch on the left C5, C6, C7, L4, L5, S1 dermatomes. Significantly decreased muscle strength in the upper extremities, including the biceps, deltoids, triceps, and supraspinatus, and the lower extremities, including the hips, quadriceps, and hamstrings were also found.

Dr. Goldenberg measured Plaintiff's range of motion with a goniometer or an inclinometer with normal values based on the American Academy of Orthopedic Surgeons' Standards. Dr. Goldenberg reports significant range of motion limitations in the cervical spine, lumbar spine, right hip, and left hip. In the cervical spine, flexion at 30 degrees (45 degrees normal), extension at 21 degrees (45 degrees normal), right side bends at 20 degrees (45 degrees normal), left side bends at 22 degrees (45 degrees normal), right rotation at 21 degrees (60 degrees normal), left rotation at 23 degrees (60 degrees normal). In the lumbar spine, flexion at 49 degrees (85 degrees normal), extension at 3 degrees (25 degrees normal), right side bends at 12 degrees (35 degrees normal), left side bends at 10 degrees (35 degrees normal), right rotation at 21 degrees (45 degrees normal), left rotation at 20 degrees (45 degrees normal). In the right hip, flexion at 102 degrees (120 degrees normal) extension at 18 degrees (30 degrees normal), adduction at 26 degrees (35 degrees normal), abduction at 35 degrees (45 degrees normal), internal rotation at 31 degrees (45 degrees normal), and external rotation at 45 degrees (45 degrees normal). In the left hip, flexion at 105 degrees (120 degrees normal) extension at 20 degrees (30 degrees normal), adduction at 28 degrees (35 degrees normal), abduction at 37 degrees (45 degrees normal), internal rotation at 32 degrees (45 degrees normal), and external rotation at 45 degrees (45 degrees normal).

Plaintiff underwent a bilateral nerve block by Dr. Corey Hunter, anesthesiologist. Dr. Hunter reports over 50% of pain relief as a result. In his visit with Dr. Paul McCormick, imaging shows “a previous anterior fusion at L5-S1...some modest stenosis particularly in the foraminal areas...significant deformity both in the coronal and sagittal plane.” Plaintiff was then referred to Dr. Patrick Reid at the Neurological Institute at Columbia University. There, Plaintiff was presented surgery that “is fraught with risk,” consisting of T4-pelvis, transforaminal lumbar interbody fusion, posterior column osteotomy and deformity correction. He elected to undergo the surgery, which took place on October 6, 2020. Still, he reports back pain, but at lower levels than before the surgery. He attended rehab as part of the recovery process. Plaintiff underwent revision of the T4-pelvis instrumentation on February 12, 2021, after disconnecting right-sided iliac bolt in the accessory rod while getting out of bed.

Plaintiff also submits certified medical records by Dr. Michael Weinberger of Columbia Doctors. In his records, Dr. Weinberger compares current MRI findings to Plaintiff’s MRI from before the accident. He finds moderate T12 vertebral body compression fracture, posterior fixation hardware from upper thoracic spine to sacrum, and left knee osteoarthritis.

In instances where a defendant asserts that the evidence reveals a preexisting injury or a degenerative condition, the plaintiff must present evidence to the contrary (*Brewster v FTM Servo, Corp.*, 44 AD3d 351 [1st Dept 2007]). By relating Plaintiff’s injuries to the accident, Plaintiff’s treating physician raises triable issues of fact as to the permanent loss of use of a body organ, member, function, system, a scar; a fracture of a bone, a significant limitation of use of a body function or system, and a permanent consequential limitation of use of a body function or system categories of Insurance Law 5102 (d) (*Williams v Perez*, 92 AD3d 528, 529 [1st Dept 2012]; *Perl v Meher*, 18 NY3d 208 [2011]; *Elias v Mahlah*, 58 AD3d 434 [1st Dept 2009]).

Plaintiff submits photos taken by Dr. Bromley, plastic surgeon, showing extensive scarring within the meaning of Insurance Law 5102 (d). Significant disfigurement qualifies as a serious injury “a reasonable person viewing [the] plaintiff’s body in its altered state [regards] the condition as unattractive, objectionable, or the subject of pity and scorn.” (*Siegle v. County of Fulton*, 174 A.D.2d 930 (1991)). It is up to the court to first decide whether there has been a prima facie showing of disfigurement, and if there is, the question then goes to the jury (*Matula v. Clement*, 132 A.D.2d 739 (1987) where a permanent scar of approximately six inches on the shoulder constituted a “significant disfigurement” for the jury). In order to obtain summary judgment, Defendant’s experts must note whether the scars are well healed, or otherwise objectionable (*De Diaz v. Klausner*, 223 A.D.3d 461 (2024)).

Here, photos taken by Dr. Scarpldis, plastic surgeon, show a scar on the arm “of about 8 x 8 centimeters.” He relates the scar to traumatic injury and calls it a “cosmetic concern.” The independent medical exam conducted by Dr. Bromley notes “depigmentation of the skin in an area covering approximately 8 x 8 cm.” He then states that the “area is irregular in shape.” He does not opine as to whether it is well healed or otherwise objectionable. This raises an issue of fact, and thus allows the jury to decide on whether it falls under the meaning of 5102(d).

Under New York Insurance Law 5102 (a), “there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss.” Basic economic loss is capped at \$50,000 (*Shalom v. Sahani*, 137 A.D.2d 454 (1988) where the jury award of \$56,500 was reduced by the \$50,000 that constitute basic economic loss that is not recoverable); (*Marmol v. Mutino*, 202 A.D.3d 540 (2022) holding that Plaintiff was barred from suing for medical expenses because basic economic losses totaled less than \$50,000). Here, Plaintiff submits a lien from the Centers for Medicare & Medicaid Services (CMS) for \$185,560 in medical benefits

on behalf of the plaintiff for the medical treatment he received for his injuries. That is above the \$50,000 threshold, and therefore, is recoverable.

According to Plaintiff's examination before trial, he was confined to bed for "a few months" after the accident, and for six months following the surgery, which took place in October 2019. Plaintiff maintains that he has not been able to swim, shop, or drive following the accident. He paid out of pocket for a healthcare worker. He also stresses that he has been in constant pain ever since the incident. Plaintiff's Bill of Particulars states that he was confined to home for approximately one year following the accident. Defendants, on their end, did not provide medical evidence to contradict this, thereby failing to meet the burden for summary judgement (*see De Diaz* at 462, where the plaintiff's Bill of Particulars stated she had been confined to their home since the accident, and Defendant did not submit medical evidence contradicting her claim of disability during this period).

The Court's function in adjudicating a motion for summary judgment is issue-finding, not issue-determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). Because the parties' respective experts materially disagree on the nature and permanence of the alleged injuries, as well as causation, summary judgment must be denied.

Accordingly, it is

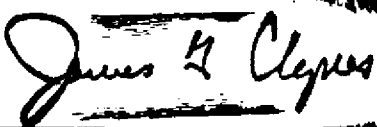
**ORDERED** that the motion by Defendants for summary judgment and dismissal of Plaintiff's complaint on the grounds that Plaintiff cannot meet the serious injury threshold requirements under Insurance Law Section 5102 (d) is DENIED; and it is further

**ORDERED** that any requested relief not specifically addressed herein has nonetheless been considered and is denied; and it is further

**ORDERED** that within 30 days after entry, Plaintiff shall serve a copy of this Decision and Order upon Defendants with Notice of Entry.

This constitutes the Decision and Order of the Court.

7/30/2024  
DATE

  
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JAMES G. CLYNES, J.S.C.

<b>CHECK ONE:</b>	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	