

Personal Injury Lawyer Litigation Strategies With Michigan's New Auto Accident Law

Published September 7th, 2010 by Steven M. Gursten

Michigan has an important new auto accident law that will result in enormous changes in the months ahead for car accident victims, personal injury lawyers for both the plaintiff and defense of these accident claims, and the auto insurance companies in this state. The new law was released by the Michigan Supreme Court on August 1, 2010, and the case is *McCormick v. Carrier*.

The ruling has overturned Michigan's previous (and the nation's harshest) auto accident threshold law. This new interpretation of Michigan's auto accident threshold law will open the door for legal pain and suffering recovery for many innocent and seriously injured car accident victims seeking compensation and who were barred by the old law.

Lesson for personal injury lawyers in Michigan: Making injuries real

Since the Michigan Supreme Court released this case in August of 2010, nearly every personal injury lawyer, insurance claims adjuster, and trial judge has been scrambling trying to figure out what this decision, weighing in at more than 100 pages, really means for people injured in car accidents in Michigan.

There are a lot of lessons to be learned after *Kreiner v. Fischer*. Read more about this case at www.michiganautolaw.com/michiganlawyers/kreinervfischer.php. What made the old law under *Kreiner* so frustrating for personal injury lawyers in Michigan was the focus on duration and temporal factors that punished people who suffered very serious injuries of near total incapacitation but of shorter duration.

Good people were also punished who tried, despite the pain and medical restrictions of their injuries, to try to get back to work as quickly as possible. The irony is this: despite the terrible public policy of *Kreiner* actually punishing these people who tried to go back to work in pain by throwing out their pain and suffering lawsuits, the focus on impairment required under *Kreiner* still provides a valuable road map for Michigan personal injury lawyers in auto cases in reaching today's jurors.

For example, we as lawyers should still try to "objectively show" injuries and prove they have a physical basis, even if this is no longer the law. The requirement that things be objectively manifested, that is, be objectively identifiable or have a physical basis has

now changed after *McCormick*. This will require the M Civil JI 36.11 definition of objectively manifested to now be changed as well.

But this old law and its relentless focus on objective injuries and showing impairment is still great advice for all personal injury lawyers. Lawyers should strive to make every personal injury as real and objective as they can. Lawyers should blow up x-rays so skeptical jurors can see them with their own eyes. The challenge is to make every injury real - something jurors can point to and see. In other words, something that is medically identifiable and that has a physical basis, even if that legal requirement is now changed after *McCormick*.

As a rule, jurors don't like lawyers, especially plaintiff personal injury lawyers, and the jury pool has been poisoned by 30 years of insurance industry propaganda about people exaggerating injuries and the need for tort reform. Jurors will be naturally suspicious. Anything you can do to reduce suspicion and increase credibility will improve your chances of successfully achieving a great trial result.

Understanding the difference between pain and impairment

Lawyers have a difficult time separating pain from impairment. But they are two very different concepts. And as a generalization, impairment matters more to juries than does complaints of pain when it comes to recovering pain and suffering damages in auto accident injury cases. Jurors - even less sympathetic jurors who may disregard pain complaints - will still give money based upon the degree of impairment, and the more impairment you as a lawyer can show and document after a car accident, the more likely you are to achieve a fair result for your client.

Pain is also much harder to prove and is also intangible, which means that what pain might mean to one juror might be very different from what it means to another.

This is the key: although jurors may not be as sympathetic about pain, they will compensate for impairment. **The more impairment you as a personal injury lawyer can demonstrate on behalf of our injured client, the better the trial verdict.**

Why personal injury attorneys should still focus on *Kreiner v. Fischer*

Which brings us back to *Kreiner v. Fischer*, even now in this new era of *McCormick v. Carrier* and the auto accident law in Michigan.

Personal injury lawyers would do well to relentlessly focus on the five *Kreiner* factors, even now, and even though it is no longer the law in Michigan if they want to achieve the fullest and fairest result for their clients. The five "non-exclusive" impairment factors from *Kreiner* are:

1. Nature and extent of the impairment;
2. Type and length of treatment required;
3. Duration of the impairment;
4. Extent of any residual impairment; and
5. Prognosis for eventual recovery.

These factors remain the key for personal injury lawyers to obtaining a significant trial verdict.

Even if these factors are no longer necessary to prove after *McCormick v. Carrier*, providing proofs to meet each one will certainly significantly increase the potential trial verdict on behalf of your client.

Last tip for personal injury attorneys: there is no magic

There really is no magic explanation as to why juries return more significant verdicts in some auto accident cases but not in others. So if there is no magic, why did these trial results occur?

The answer is that the insurance companies in these auto cases made the mistake of focusing only on the injury, and ignoring the impairment. If there are injuries they have little appreciation for, such as muscle spasms, bulging disks, “soft tissue injuries,” connective tissue and whiplash injuries, they will offer very little money on these types of injury cases. Mild traumatic brain injury cases, especially those of momentary loss of consciousness and delay in diagnosis and treatment, also fall into this category.

The mistake they are making is looking at the personal injury itself and assuming it is of limited value. This is the same mistake that lawyers may be making now after *McCormick*, asking if “whiplash cases” or “soft tissue” personal injury cases will now be viable cases or not. The answer is maybe - it depends upon the amount of impairment. These are exactly the types of cases where decisions must be made on a case-by-case basis, based upon the effect on the car accident victim by his or her attorney.

This mistake that insurance claims adjusters make all the time when evaluating car accident claims, is to focus on the injury only and to ignore completely the impairment. If there is an objectively manifested impairment of an important body function that has been affected - now “some effect” and “influences some of plaintiff’s capacity to live his or her normal life” - that should be enough to at least create a question of fact. Again, it must be a case-by-case basis.

Success for personal injury attorneys evaluating auto accident cases

There is no such thing as a small case. There is such a thing as small impairments.

“Small cases” with big impairments and likable and credible clients equals a big case and likely, a big result.

Small offers of \$0 to \$25,000 on “small cases” with big impairments and likable and credible clients (usually) equal big trial verdicts.

For more detailed information on the new auto accident law and best practices on pursuing Michigan auto accident cases, Michigan Auto Law has created a comprehensive **Attorney Guide for Michigan Lawyers** at <http://www.michiganautolaw.com/michiganlawyers/index.php>.

Michigan Auto Law is the leading largest law firm exclusively handling car accident, truck accident and motorcycle accident cases throughout Michigan for more than 50 years. Our auto accident attorneys have received the largest reported jury verdict for an automobile accident case in Michigan in seven of the past 10 years, including 2009, according to published year-end verdicts and settlements reports. Visit our website at www.michiganautolaw.com.

Steven M. Gursten is recognized as one of the nation’s top experts in serious car and truck accident injury cases and automobile insurance no-fault litigation. Steve has received the largest jury verdict for an automobile accident case in Michigan in four of the past seven years, and the largest Michigan car accident settlement in 2009. To view Steve’s complete bio go to http://www.michiganautolaw.com/firm_profile/attorney-steven-gursten.php.