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Article 51 of NYS Insurance Law: Serious Injury Threshold & Basic Economic Loss

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Personal injury lawsuits arising out of motor vehicle accidents are the most common form of tort cases that litigators typically encounter. New York has a very specific statutory framework for dealing with the damages portion of a motor vehicle accident plaintiff's case. This framework is contained within Article 51 of New York's Insurance Law. Despite the frequency and commonality of motor vehicle accident lawsuits, many aspects of how damages work pursuant to Article 51 are not fully appreciated by all practitioners in the tort litigation world. While these materials are not exhaustive, they are meant to assist in identifying the key issues that arise in all litigated matters to which Article 51 applies.

First-Party Benefits

In order to fully understand how Article 51 operates in the context of damages in third-party lawsuits, it is necessary to first appreciate how the first-party benefit system established by Article 51 works. The impetus for this whole framework was that the New York Legislature determined that the Court dockets were overloaded with what could be "minor" lawsuits arises out of automobile accidents. In an attempt to limit the quantity of such cases, Article 51 was created to provide both (i) a means to protect people injured in automobile accidents from incurring economic losses and, in exchange, (ii) provide a barrier for any lawsuits unless they could be considered significant.

The first objective was addressed in Section 5103 of the Insurance Law. This section establishes the first-party benefit system that is commonly known as "No-Fault." Section 5103 provides that every vehicle owner's policy within the State is liable to pay first-party benefits to any persons in that vehicle, regardless of fault for an accident.

First party benefits are defined through a combination of §5102(a) and §5102(b) and means that the insured is entitled to up to $50,000.00 from their own insurer for:

i. Necessary medical expenses;
ii. Up to $1,600.00/month in lost wages for three years[1]; and
iii. Incidental expenses up to $25.00/day.

The rationale for this is to provide insureds injured in automobile accidents with first-party benefits to ensure that they do not, in theory, fall into economic hardship as a result of their injuries. This "carrot" so-to-speak of the No-Fault system was intended to be offset by the limitations to be discuss later.

One notable exception to this framework to keep in mind, is that No-Fault first-party benefits do *not* apply to motorcycles.

While, just like with any insurance coverage situation, there are multiple nuances to the applicability of this system to certain situations, for the purposes of appreciating how damages work in third-party cases, it important to remember how this first-party benefit system operates because it informs how the damages in a third-party lawsuit will play out.

[1] $2,000.00 per month is considered "basic economic loss" per §5102(a). §5102(b) provides that first-party benefits paid for lost wages are those defined as "basic economic loss" less 20%.

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When Article 51 Applies

In the context of third-party lawsuits for automobile claims, the most important statute to be aware of is Section 5104(a) of the Insurance Law. This is the portion of the law that places limitations on people's ability to bring personal injury lawsuits. It is a definition-heavy provision that states:

> Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss…[2]

N.Y. Ins. Law §5104(a).

a. "Covered Person"

The first definition of note is that of a "covered person," as the limitations of Section 5104 only apply in lawsuits *by* a covered person *against* a covered person. "Covered person" is defined in §5102(f) and generally refers to individuals who are eligible to receive first-party benefits under the No-Fault system. A "covered person" includes the owner, operator or occupant of a "motor vehicle," and any pedestrian injured by a "motor vehicle."

Similarly, "motor vehicle" has a specific definition within the framework of Article 51. Through explicit reference to other statutes[3], a "motor vehicle" for the purpose of Article 51 means any vehicle driven on a public highway that is propelled by any power other than muscular power *except* (i) mobility assistance devices, (ii) vehicles that run on rails/tracks, (iii) snowmobiles, (iv) ATVs, (v) electric bicycle, (vi) agricultural vehicles and, most notably (vii) motorcycles.

Thus, for the limitations discussed shortly to apply, the lawsuit at-issue must be *by* a covered person *against* a covered person. The only exception to that is contained in the second part of §5104(a), which states that the limitations of Article 51 apply in situations in which a motorcycle owner/operator is the defendant.

b. "Arising Out of Negligence in the Use or Operation of a Motor Vehicle"

The second key triggering definition in Article 51 is that the limitations only apply if the lawsuit is based on theories of negligent use/operation of a motor vehicle. This is a self-explanatory definition, but is often overlooked by counsels in handling these claims. It is important to remember that, just because someone was hurt while *in* a car, doesn't necessarily mean that the lawsuit is based on theories of negligence operation of an automobile.

[2] The remainder of provision is discussed shortly.
[3] Notably §125 and §311 of the NY VTL.

Article 51's Limitations on Damages

If it is determined that a lawsuit involves a covered person making claims against another covered person based upon theories of negligent use or operation of a motor vehicle, then the limitations on damages contained in Article 51 apply. To wit, when triggered, Article prevents a plaintiff from recovering:

i. Noneconomic damages, unless plaintiff has a "serious injury"; and
ii. "Basic Economic Loss"

Based on that framework, every case to which Article 51 applies must be analyzed by looking at the two categories of damages – noneconomic and economic – separately. The restrictions on one type of damages do not in any way impact the other category.

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Serious Injury Threshold

When the circumstances warrant the application of the limits outlined in Section 5104, then an injured party cannot maintain a cause of action for non-economic loss unless they have suffered a "serious injury."

"Serious injury" is a specific legal definition. NY Ins. Law §5102(d) defines "serious injury" as any personal injury which result in any of the following nine categories:

1. Death;
2. Dismemberment;
3. Significant disfigurement
4. Fracture;
5. Loss of fetus;
6. Permanent loss of use of a body organ, member, function or system;
7. Permanent consequential limitation of use of a body organ or member;
8. Significant limitation of use of a body function or system; or
9. A medically determined injury or impairment of a non-permanent 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment (commonly known as the "90/180" category).

So long as just one of a plaintiff's injuries qualifies as a "serious injury," they are permitted to recover noneconomic damages for *all* of their injuries, even those that, on their own, would not qualify under any of the categories. *Kapassakis v. Metro. Trans. Auth.*, 193 A.D.3d 835, (2d Dept. 2021)(a "finding that the plaintiff sustained [a single serious injury] satisfies the no-fault threshold, thereby eliminating that issue from the case and permitting the plaintiff to recover any damages proximately caused by the accident.")(*citing Kelley v. Balasco*, 226 A.D.2d 880, 880 (3d Dep't 1996); *see also Bonner v. Hill*, 302 A.D.2d 544, 545 (2d Dep't 2003)("By establishing that any one of several injuries sustained in an accident is a serious injury…a plaintiff is entitled to seek recovery for all injuries.").

As an initial point, it is important to recognize a confusing split between the Appellate Departments concerning how exactly the serious injury threshold is viewed in terms of the elements of a tort case. The Second and Third Departments treat the serious injury threshold as a component of damages. *See e.g., Van Nostrand v. Froehlich*, 44 A.D.3d 54 (2d Dep't 2007) and *Kelley v. Balasco*, 226 A.D.2d 880 (3d Dep't 1996). In contrast, the First and Fourth Departments consider the threshold to be a component of liability. *See e.g., Bush v. Kovacevic*, 140 A.D.3d 1651 (4th Dep't 2016) and *Ruzycki v. Baker*, 301 A.D.2d 48 (4th Dep't 2002). This is important because prejudgment interest pursuant to CPLR §5002 is triggered once a party is deemed "liable" to the plaintiff. Thus, the triggering event for prejudgment interest in these types of cases is dramatically different depending upon the venue of the matter.

Significant Disfigurement

The one serious injury category that is, almost by definition, entirely subjective is the significant disfigurement category. This is because whether or not something significantly effects the appearance of one's body is entirely relative to that person. The Appellate Division has stated that a "significant disfigurement exists if a reasonable person viewing the plaintiff's body in its altered state regards the condition as unattractive, objectionable, or the subject of pity or scorn" *Sanchez v. Dawson*, 120 A.D.3d 933, 934 (4th Dep't 2014)(internal citations omitted). It should be clear from that definition that this category is likely the most difficult category to address on motion and, almost always, is left to a trier of fact to decide. *See e.g. O'Brien v. Bainbridge*, 89 A.D.3d 1511 (4th Dep't 2011); *Langensiepen v. Kruml*, 92 A.D.3d 1302 (4th Dep't 2012).

While more than forty years old, the case *Waldron v. Wild*, 96 A.D.2d 190 (4th Dep't 1983) provides useful commentary on how to evaluate cases alleging a significant disfigurement. Of note, the *Waldron* Court identifies some factors to consider when evaluating whether or not a disfigurement is "significant," such as the injury's location, the age, sex and occupation of the plaintiff, the presence of other scars/disfigurements on the plaintiff, and even "any other distinguishing features which will detract from the person's appearance as it existed prior to the date of the accident." *Waldron* 96 A.D.3d at 247.

Despite the inherent difficulties in determining if a defect to one's body is a "significant disfigurement," if a claimed scar/disfigurement really is incredibly minimal, Court are willing to dismiss such claims on summary judgment motions. *See e.g. Fernandez v. Hernandez,* 151 A.D.3d 581 (1st Dep't 2017)(dismissing disfigurement claim when IME doctor found no evidence of scarring and plaintiff's own medical records never mentioned scarring); *Heller v. Jansma*, 103 A.D.3d 1160 (4th Dep't 2013)(dismissing disfigurement claim when the alleged 1 ½ inch scar on plaintiff's leg was "imperceptible" in photographs despite plaintiff's testimony that it "bothered" her); and *Mahar v. Bartnick*, 91 A.D.3d 1163 (3d Dep't 2012)(dismissing disfigurement claim when the scar was on the back of plaintiff's head and could be covered by hair, making it "not readily visible").

Fracture

The most clear, objective category of serious injury is the fracture category. It is interesting to note that the original version of Article 51 specifically required that fractures be "compound or comminuted" to qualify as serious injuries. However, an amendment in 1977 removed that qualification and now Article 51 simply requires a "fracture." *See Catalan v. Empire Storage Warehouse, Inc*., 213 A.D.2d 366, 367 (2d Dep't 1995)(briefly explaining 1977 amendment).

It is self-explanatory to some extent that a "fracture" means a break in bone. *See Catalan,* 213 A.D.2d at 367 (torn cartilage is not a "fracture").

The one area that was, for a point, unclear was how the Law treated injuries to teeth. That, however, seems to be relatively decided at this point: fractures of teeth do qualify as a fractures for the purposes of serious injury analysis. *Maniscalco v. Thomas*, 217 A.D.3d 761 (2d Dep't 2023); *Moffitt v. Murray*, 2 A.D.3d 1110 (3d Dep't 2003)("Fractured teeth constitute a serious injury.") *Kennedy v. Anthony*, 195 A.D.2d 942 (3d Dep't 1993)(fractured tooth that required dental procedure to address did qualify under the fracture category. Court opines that "[i]t is entirely appropriate to refer to a tooth or any other bony, hard material as being fractured. Nothing brought to our attention indicates that a fractured tooth was not intended by the Legislature to come within the definition of a fracture.")

Loss of Fetus

The least common type of serious injury to encounter is a claim of loss of fetus. These situations are considered injuries to the pregnant mother and they must be supported by medical records that causally link the loss of the fetus to the subject motor vehicle accident. *See Alladkani v. Daily News, L.P.*, 262 A.D.2d 511 (2d Dep't 1999)(claim dismissed when medical records all labeled the loss of fetus event, which occurred three weeks post-accident, as a "complete abortion/miscarriage" and did not reference the motor vehicle accident).

While there is limited case law on this topic, said case law does seem clear that "loss of fetus" only applies in situations in which the unborn child does not survive. In *Leach v. Ocean Black Car Corp*, 122 A.D.3d 587 (2d Dep't 2014), the plaintiff was pregnant at the time of the crash. The crash caused her placenta to separate from the wall of her uterus and the treating doctors decided that they had to deliver the baby prematurely by way of caesarean section. The Court determined that the meaning of the term "loss of fetus" does not include the premature birth of a living child because the policy implications underlying the inclusion of a "loss of fetus" category, namely the impact of an event as causing "injuries" to someone, were not involved.

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Permanent Loss of Use

The most misused, but also simultaneously unnecessary, of the serious injury categories is the "permanent loss of use of a body organ, member, function or system" category. It is misused in the sense that almost all plaintiff attorney's list this category as an applicable category in the case's Bill of Particulars. It is unnecessary because, as shown below, any injury that would qualify under this category would, without question, also qualify under one of the other categories as well.

The seminal case on "permanent loss of use" is the Court of Appeals case of *Oberly v. Bangs Ambulance Inc.*, 96 N.Y.2d 295 (2001). The Court began by noting that this case was the first and only Court of Appeals case to ever address the "permanent loss of use" category. In analyzing it, the Court realized that unlike with the "limitation" categories (discussed next), the Legislature did not use qualifying language such as "significant" or "consequential" and instead simply said a "permanent loss of use." The Court then reasoned that, in order for an injury to qualify under this category, the injured plaintiff must have suffered a "total" and complete loss of the ability to use a part of their body. *Oberly*, 96 N.Y.2d at 299.

Given that an injury under this category must therefore involve a (i) permanent and (ii) "total" loss or use of a body organ, member, function or system, it logically follows that there can only be a few situations in which an injury would qualify under this category, all of which are incredibly disabling. Some potential examples include the plaintiff actually losing a limb, some form of paralysis or blindness/deafness. In each of those hypotheticals, the plaintiff's injuries would very clearly qualify under one or more of the other categories as well.

Permanent Consequential Limitation / Significant Limitation of Use

The two "limitation" categories of serious injury – permanent consequential limitation and significant limitation of use – are the most heavily litigated of Article 51's categories, in large part because of the relatively vague standards of determining whether or not a particular injury qualifies under either category.

While technically two separate categories, the only real actionable difference between the two is the permanency, or lack thereof, of the specific injury at-issue. Obviously an injury must be medically diagnosed as "permanent" in order for it to qualify under the permanent consequential limitation category. *Feggins v. Fagard*, 52 A.D.3d 1221 (4th Dep't 2008).

Beyond the temporal difference, the categories both are aimed at qualifying injuries based upon the limited effect that those injuries have had on the plaintiff. The Court of Appeals, in the seminal case of *Licari v. Elliot*, 57 N.Y.2d 230 (1982) established that the use of the terms "significant" and "consequential" means that the alleged injury must result in "more than a minor limitation." *Licari*, 57 N.Y.2d at 236 (reasoning that the purpose of Article 51 is to "keep minor personal injury cases out of court"). Thus, while the concept of an injury limited someone to a degree "more than minor" is incredibly vague on its face, it is nevertheless the key analysis when determining whether or not an injury qualifying under either of these categories.

New York Courts require objective medical proof that an injury limits a plaintiff to a degree "more than minor." The most-cited case as to the standard of assessing the required severity of an injury is *Toure v. Avis Rent A Car Sys*, 98 N.Y. 2d 345 (2002), with over 15,000 citing references listed on WestLaw. The standard set out in *Toure* is:

> In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitation to the normal function, purpose and use of the affected body organ, member, function or system.

Toure, 98 N.Y.2d at 350 (internal citations omitted).

Thus there are two routes to show that an injury does or does not qualify under these categories: (1) documented loss of range of motion (quantitative) and (2) combination of medical provider's subjective assessment of injury that is correlated by objective medical evidence (qualitative).

i. Quantitative method

The first, and most-oft used, method for arguing that a particular injury does or does not qualify under the limitation categories is the quantitative method. The whole focus of this method is on references within a plaintiff's medical records that objectively document an injury's impact on that person's range of motion.

As an initial point, it is absolutely imperative that there be evidence as to *how* the range of motion data was obtained or else those numbers will not, as a matter of law, be considered by the Court. *Tully v. Ken-Ton Union Free Sch. Dist.*, 207 A.D.3d 1215, 1220 (4th Dep't 2022); *Paveljack v. Cirino*, 93 A.D.3d 1286 (4th Dep't 2012). In the event that the actual records lack reference to what tool(s) were used to measure range of motion, that can be cured with a supporting affirmation/affidavit from whomever the treating provider was.

There is no definitive, consensus percentage reduction in range of motion that serves as a threshold limit to determine whether or not a condition qualifies under these categories. Additionally, the various Appellate Departments vary in comparison to each other. Notwithstanding those caveats, it seems relatively clear that something in the range of 20% documented reduction in range of motion is the key benchmark. *See Summers v. Spada*, 109 A.D.3d 1192 (4th Dep't 2013)(Defendant's MSJ denied when Plaintiff had at least a 25% reduction in range of motion); *Mangano v. Sherman*, 273 A.D.2d 836 (4th Dep't 2000)(Defendant's MSJ denied due to reduced range of motion of 20% to 30%); *Murphy v. Arrington*, 295 A.D.2d 865 (3d Dep't 2002)(Defendant's SJ affirmed when reduction was 7.5%); *Sellitto v. Casey*, 268 A.D.2d 753 (3d Dep't 2000)(10% reduction in range of motion "is not a significant limitation."); and *Waldman v. Dong Kook Chang*, 175 A.D.2d 204 (2d Dep't 1991)(15% limitation is not enough. "It is well established that a minor limitation of movement is not significant.").

ii. Qualitative method

In contrast to the quantitative method, the qualitative method focuses on treating provider's medical opinion as to the severity of the limitations that an injury have caused a plaintiff. *Toure* provides that the qualitative assessment of an expert under this category is okay so long as the evaluation has an objective basis and compares the plaintiff to a "normal" (i.e. uninjured) person. The rational is that, when supported by objective evidence, the expert's opinion can be "tested during cross-examination, challenged by another expert and weighed by the trier of fact." *Toure,* 98 N.Y.2d at 345.

Given the reliance upon an expert's opinion, as opposed to simply objective medical data like range of motion, it is of the utmost important that any arguments as to the qualitative method are supported by very direct and detailed statements in an expert's affirmation/affidavit. *See e.g.*, *Tully v. Ken-Ton Union Free Sch. Dist.*, 207 A.D.3d 1215 (4th Dep't 2022)(Plaintiff's experts failed to provide persuasive evidence that she was significantly limited compared to uninjured person); *Wilber v. Breen*, 25 A.D.3d 836 (3d Dep't 2006)(while plaintiff's expert opined that plaintiff was permanently hurt, could not perform some routine activities and even used that statutory language "significant limitation of use," the expert failed to provide a qualitative assessment of plaintiff as compared to a normal person and thus plaintiff failed to meet her burden for these categories).

iii. Miscellaneous

As explained above, the entire focus of analysis under either of these categories is the measurable, objective impact that a particular injury had on the plaintiff. The actually specific diagnoses of that injury are not relevant – the whole focus is on whether or not a particular injury limited the plaintiff to a degree more than "minor." The following are some examples of facts that touch on this point:

- "Proof of a herniated disc, without additional medical evidence establishing that the accident result in significant physical limitations, is not alone sufficient to establish a serious injury." *Pommells v. Perez*, 4 N.Y.3d 566, 574 (2005).

- Pain alone is insufficient evidence that an injury qualifies under these categories. *Scheer v. Koubek*, 70 N.Y.2d 678, 679 (1987); *Griffo v. Colby*, 118 A.D.3d 1421, 1422 (4th Dep't 2014).

- Even surgery, by itself, does not automatically mean an injury qualifies under these categories. *Scarincio v. Cerillo*, 195 A.D.3d 1266 (3d Dep't 2021)(Defendant granted summary judgment despite Plaintiff having carpal tunnel surgery because of no evidence that surgery actually produced sufficient limitations); *Lopez v. Morel-Ulla*, 144 A.D.3d 504 (1st Dep't 2016)(Plaintiff failed to raise issue of fact regarding knee injuries even though she had surgery because there were no documented limitations).

- Emotional/psychological injuries, such as PTSD, can constitute a serious injury under these categories so long as the plaintiff establishes the limited effect of said injury. *See Hill v. Cash*, 117 A.D.3d 1423, 1425 (4th Dep't 2014)("casually-related emotional injury, alone or in combination with a physical injury, can constitute a serious injury"); *see also Krivit v. Pitula*, 79 A.D.3d 1432 (3d Dep't 2010); *Haque v. City of New York*, 97 A.D.3d 636 (2d Dep't 2012).

90/180

The final listed category of serious injury under Article 51 is what is commonly known as the "90/180" category. The full description of this type of serious injury is:

> "[A] medically determined injury or impairment of a non-permanent 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

N.Y. Ins. Law §5102(d).

i. "Medically Determined Injury"

There must be objective medical proof of an injury for it to qualify under the 90/180 category. *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345, 357 (2002). This means that, as a starting point, the plaintiff must have documented medical evidence supporting the existence of an injury in the first place; they cannot simply rely on their own opinion that they themselves suffered an injury. *See Pierre v. Nanton*, 279 A.D.2d 621 (2d Dep't 2001); *Moore v. Gawel*, 37 A.D.3d 1158 (4th Dep't 2007); *Womack v. Wilhelm*, 96 A.D.3d 1308 (3d Dep't 2012).

There is no requirement as to what type of injury is at-issue. As such, relatively vague injuries such as "whiplash" and "strains" or "sprains" can qualify under this category so long as that condition is objectively documented by a medical professional. *Cook v. Peterson*, 137 A.D.3d 1594 (4th Dep't 2016)(citing *Bowen v. Dunn*, 306 A.D.3d 929 (4th Dep't 2003).

ii. "Non-Permanent"

Often overlooked is the express statement in the wording of 90/180 that such an injury be "non-permanent." Thus, if all of the relevant medical evidence indicates that a plaintiff's alleged injury is permanent, it actually cannot, as a matter of law, qualify under the 90/180 category of Article 51. *See Martinez v. City of Buffalo*, 149 A.D.3d 1469, 1472 (4th Dep't 2017)(Court dismissed 90/180 claim because all of plaintiff's doctors diagnosed his injuries as permanent).

iii. "Substantially All of the Material Acts of Person's Daily Activities"

Plaintiff must have been "curtailed from performing his usual activities to a great extent rather than some slight curtailment." Licari v. Elliot, 57 N.Y.2d 230, 236 (1982). This means that the person must not have been able to do their usual activities, not just that doing so was uncomfortable or difficult. *See Berk v. Lopez,* 278 A.D.2d 156 (1st Dep't 2000)(Plaintiff's testimony that she had to lay down on floor of office to help with pain did not show that she was categorically unable to work and thus she did not qualify under 90/180); *Gonzalez v. Green*, 24 A.D.3d 939, 940 (3d Dep't 2005)(Defendant met burden to dismiss 90/180 category when plaintiff's medical records showed that plaintiff's physicians "placed no restrictions on her, instead providing her only with a neck brace and the suggestion that she take a strong dosage of Motrin).

The area where this portion of 90/180 comes up is in the context of the plaintiff's employment. Case law strongly suggest that a plaintiff's injuries will not, as a matter of law, qualify under the 90/180 category unless they were medically kept out of work for ninety of the one-hundred-eighty days after an accident. The rationale for this is logical – work is typically the largest portion of one's day, so an injury that "prevents" a person from doing "substantially all" of their usual activities must naturally affect their work. A sampling of such case law is as follows:

- *Tully v. Ken-Ton Union Free Sch. Dist.*, 207 A.D.3d 1215 (4th Dep't 2022)(Plaintiff's testimony indicated that she could not do *all* of her work activities, but that she did indeed work, fatal to her claim under 90/180 because it only evidenced a "slight curtailment" as opposed to affecting her usual activities to a "great extent.")

- *Thorton v. Husted Dairy, Inc.*, 134 A.D.3d 1402 (4th Dep't 2012)(defendant met summary judgment burden on 90/180 by showing plaintiff was cleared to return to work within 90 days of accident)

- *Carpenter v. Steadman*, 149 A.D.3d 1599 (4th Dep't 2017)(defendant entitled to summary judgment on 90/180 when plaintiff testified that "she did not take any time off from her work . . . although she left early on 'several occasions'")

- *Ehlers v. Byrnes*, 147 A.D.3d 1465 (4th Dep't 2017)(defendant entitled to summary judgment when plaintiff missed eight weeks of work after accident and her doctors did not restrict her activities for 90 days within 180);

- Also applies to children not missing the requisite amount of school days following an accident. *See e.g. Tinyanoff v. Kuna*, 98 A.D.3d 501 (2d Dep't 2012)

Interestingly, the reverse of this idea does not appear to be true. In other words, just because a plaintiff did miss at least ninety of the days immediately after an accident, that does not necessarily mean that they automatically qualify under the 90/180 category. This is because people have lives beyond just their employment. *See Savilo v. Denner*, 170 A.D.3d 1570 (4th Dep't 2019)(Plaintiff was not entitled to summary judgment on 90/180, even though he missed more than 90 days of work, because his treating chiropractor's records during statutory period indicated that he "does not have difficulty taking care of [him]self."); *see also Johnson v. KS Transp., Inc.*, 115 A.D.3d 425 (1st Dep't 2014).

iv. "Ninety of the One Hundred and Eighty Days"

The requirement that an alleged medical, non-permanent injury limit the person to the degree necessary for ninety of the one-hundred-eighty days after the accident is a strict and "necessary condition" of the 90/180 category. *Licari v. Elliot*, 57 N.Y.2d 230, 236 (1982). The evidence either for or against an injury qualifying under this category must address the impact of that injury on the plaintiff during the time period. *Hint v. Vaughn*, 100 A.D.3d 1519, 1520 (4th Dep't 2012)(neither deposition excerpts nor defense IME report addressed the relevant 90/180 time period and thus there was insufficient evidence to warrant dismissal of 90/180 claim).

I. Basic Economic Loss

Article 51 precludes a plaintiff in an applicable case from recovering "basic economic loss." Basic economic loss ("BEL") is a specific term that is defined in Section 5102. Section 5102(a) states that BEL means "up to fifty thousand dollars per person of the following combined items":

1. All necessary medical expenses;
2. Loss of earnings up to two thousand dollars per month for not more than three years after the accident; and
3. "Reasonable and necessary expenses" up to twenty-five dollars per day for one year after the accident.

The rationale for not allowing a plaintiff to recover these damages is obvious : the plaintiff theoretically was able to recover those amounts through the first-party benefit system of "No-Fault." Absent this limitation, a plaintiff would otherwise be able to double recover for those losses. Instead, the law requires a person to have suffered economic damages in excess of BEL in order to seek those damages in a third-party lawsuit.

While that is reason for the existence of the limitations of Article 51 it must be stressed that actual receipt/exhaustion of No-Fault benefits is irrelevant to whether or not an individual's economic loss exceeds BEL. While, as a practical matter, it is likely that if someone exhausted No-Fault that they have loss in excess of BEL, nowhere in the statutes is that causally connection mentioned and thus it is of no consequence. Furthermore, if a plaintiff happens to forget to apply for, and thus never receives, No-Fault benefits, that also does not affect the math equation of whether or not their claimed economic damages exceed BEL and are therefore recoverable.

When challenged on a motion to have a plaintiff's economic claim dismissed due to a lack of evidence that he/she suffered economic loss in excess of BEL, the plaintiff *must* submit actual proof of financial loss beyond simply speculation or else the economic claim will be dismissed. *See Sywak v. Grande*, 217 A.D.3d 1382, 1385 (4th Dep't 2023); *Rulison v. Zanella*, 119 A.D.3d 957 (3d Dep't 1986); *Carlson v. Manning*, 208 A.D.3d 997 (4th Dep't 2022).

The most important thing to remember when analyzing an automobile plaintiff's economic loss claim is that this analysis is completely independent of any "serious injury" analysis. "[I]t is well settled . . . that a plaintiff may recover for economic loss in excess of basic economic loss without proof of serious injury." *Cook v. Peterson*, 137 A.D.3d 1594, 1599 (4th Dep't 2016).

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