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Tort Becomes PIP: The New Right to Recover Excess "Allowable Expenses" from At-Fault Drivers

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Under Michigan's original no-fault law, 1972 PA 294, third-party auto tort cases did not include claims for medical expenses, because injured people had lifetime medical expense coverage through their first-party personal protection insurance (PIP) benefits. Lawyers involved in the auto tort case only had to concern themselves with noneconomic damages, excess economic loss for long-term income loss, and excess survivor's loss benefits in death cases. What was covered for up to a lifetime as an "allowable expense" under MCL 500.3107(1)(a), based on thousands of Michigan appellate decisions over the last 40 years, was left to lawyers handling first-party litigation to fight about. Not anymore.

In addition to eliminating the requirement that all motorists purchase lifetime allowable expense coverage, the 2019 no-fault "reform" amendments (2019 PA 21 and 22), established a new statutory right for injured persons to recover medical expenses from at-fault parties in auto tort cases. MCL 500.3135(3)(c). Under the explicit statutory language, at-fault parties in auto crashes can be held liable for past, present, and future allowable expenses that are defined in MCL 500.3107(1)(a) and are not otherwise covered under an injured person's no-fault coverage.

This article explains some of the basic principles of the statutory right to recover allowable expenses in auto tort cases, and identifies some unanswered questions and ambiguities, to help bench and bar better understand this new, complicated, and uncertain liability frontier.

Applicable Allowable Expense Principles

Under MCL 500.3135(3)(c), a plaintiff can pursue, "[d]amages for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110, *including all future allowable expenses* and work loss, *in excess of any applicable limit under section 3107c* or the daily, monthly, and 3-year limitations contained in those sections, or without limit for allowable expenses if an election to not maintain that coverage was made under section 3107d or if an exclusion under section 3109a(2) applies." (Emphasis added.) This specific language makes it clear that at-fault parties can be held liable for all past, present, and future allowable expenses that are not covered under the injured person's "first-party" coverage.

Notably, there is no guidance in the statute or existing first-party case law about litigating future projections of allowable expense claims in an auto tort case. This will have to be addressed through future litigation. Meanwhile, auto tort cases involving allowable expenses claims must apply all other established definitions and principles of allowable expenses benefits under MCL 500.3107(1)(a).

Based on the language of MCL 500.3107(1)(a) and extensive appellate case law, allowable expenses go well beyond typical medical and rehabilitation services. They have been accepted to include: commercial and noncommercial in-home attendant care and supervision; various form of ongoing rehabilitation services, vocational rehabilitation, medical mileage, handicap-accessible home and vehicle modifications; case management services; guardianship and conservator services, etc. Thus, when an injured person has the right to seek allowable expenses in their auto tort case and is going to have further treatment or surgery, their damages that could be pursued in the tort case include any other reasonably necessary expenses associated with that treatment or surgery, *e.g.*, additional rehabilitation, durable medical equipment, home accommodations, homecare assistance and supervision, etc. Ultimately, an attorney handling an auto tort case will have to assess the full range of products, services and accommodations that may be reasonably necessary for an injured person's care, recovery, or rehabilitation.

In addition, attorneys handling auto cases should be mindful of the detailed judicial constructions of allowable expenses, especially over the last 15 or so years, including:

- *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 535; 697 NW2d 895 (2005), defined expenses for recovery or rehabilitation as "costs expended in order to bring an insured to a condition of health or ability *sufficient to resume his preinjury state"*. (Emphasis added.) *Griffith* also explained the term "care" "must have a meaning that is broader than 'recovery' and 'rehabilitation' but is not so broad as to render those terms nugatory." *Id.* Both "recovery" and "rehabilitation" refer to an underlying injury; likewise, the no-fault statute as a whole applies only to an "injured person." The Court concluded, "It follows that the Legislature intended to limit the scope of the term 'care' to expenses for those products, services, or accommodations whose provision is necessitated by the injury sustained in the motor vehicle accident." *Id.* "Care", therefore, "may encompass expenses for products, services, and accommodations that are necessary because of the accident but that may not restore a person to his preinjury state." *Id*. *Griffith* has never been overruled, so its statutory construction of the scope of allowable expenses should also be considered in auto tort cases involving allowable expense claims.

- *Johnson v Recca*, 492 Mich 169; 821 NW2d 520 (2012), and *Douglas v Allstate Ins Co*, 492 Mich 241; 821 NW2d 472 (2012), simultaneously expanded upon the principles established in *Griffith* and assertions about what services constitute allowable expenses under MCL 500.3107(1)(a), rather than replacement services under MCL 500.3107(1)(c). *Johnson* at 180 ("separate and distinct categories of PIP benefits.") For example, the Court held, "even if Mrs. Douglas's claimed supervision of plaintiff does not restore plaintiff to his preinjury state, testimony given at trial indicates that arguably at least some of this claimed supervision was for plaintiff's care as necessitated by the injury sustained in the motor vehicle accident and not for ordinary and necessary services that every Michigan household must undertake." *Douglas* at 264. Furthermore, actually feeding an injured adult constitutes "care" under MCL 500.3107(1)(a) ("The need to have someone feed the injured person would not have existed absent the injuries * * *.") *Johnson* at 181, footnote 7. On the other hand, food preparation for an adult does not amount to "care" for purposes of MCL 500.3107(1)(a) ("Cooking was required both before and after plaintiff's injury * * * .") *Johnson* at 181. The Court ultimately acknowledged, in some situations, there are "expenses for products or services that are required after the injury in a manner indistinguishable from those required before the injury", which therefore cannot be "*care"* under MCL 500.3107(1)(a). *Johnson* at 180. Further, while

an injured person can recover excess allowable expenses in an auto tort case, the *Johnson* Court held that based on MCL 500.3135(3)(c), an injured person cannot recover excess replacement services in their tort case. *Johnson* at 172, 197.

- *Admire v Auto-Owners Ins Co*, 494 Mich 10, 31-32, 34; 831 NW2d 849 (2013), held that the base cost of an injured person's handicap-accessible van was not an allowable expense. The Court announced that an analysis had to be made whether the expense could be categorized as an *"expense of a wholly different essential character"*, a *"combined product"*, or an *"integrated product"*. *Admire* at 27-30 (Emphasis added.) These concepts crafted in *Admire* go well beyond the statutory language of MCL 500.3107(1)(a), but they have not been overruled.

Causation Standards

Causation of allowable expenses has been further addressed in many appellate PIP opinions, which could have significant implications for allowable expense claims in auto tort cases. Although MCL 500.3107(1)(a) does not include explicit causation language, appellate courts have acknowledged that the "arising out of" causation standard applicable to issues of entitlement to PIP benefits under MCL 500.3105(1) applies to issues regarding whether a person's need for a particular allowable expense benefit sufficiently relates to the care, recovery or rehabilitation of a person's auto injuries. For purposes of entitlement issues under MCL 500.3105, it is well established that based on "arising out of" causation, an injured person is not required to establish that the vehicle crash was the "direct", only or even proximate, cause of an otherwise allowable expense for the trier of fact to decide whether it "arises out of" the accident. See, e.g., *Thornton v Allstate Ins Co*, 425 Mich 643, 659-660; 391 NW2d 320 (1986) (causal connection must be "more than incidental, fortuitous or 'but for'" under MCL 500.3105[1]); *Bradley v Detroit Automobile Inter-Ins Exch*, 130 Mich App 34, 42; 343 NW2d 506 (1983) (lane switching in traffic); *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 634; 563 NW2d 683 (1997) (slipping on ice while entering parked vehicle). In cases such as *Scott v State Farm Mut Auto Ins Co*, 278 Mich App 578, 586–587; 751 NW2d 51 (2008), *vacated in part and lv den* 482 Mich 1074; 758 NW2d 249 (2008), *order vacated and lv den on reconsideration* 483 Mich 1032; 766 NW2d 273 (2009), the *"arising out of"* causation standard has been applied to allowable expense benefits under MCL 500.3107(1)(a). Under this standard, if the person's auto injury was one of the significant causes for the injured person needing a particular expense, the no-fault insurer is responsible for 100% for that expense under MCL 500.3107(1)(a). An insurance company is not able to diminish its liability for payment of allowable expenses under MCL 500.3107(1)(a) by seeking to allocate a portion of those expenses to non-accident causes.

For tort cases involving excess allowable expenses, the tortfeasor would be liable for any injuries proximately caused by their negligence. M Civ JI 36.06. The unanswered question under the statutory revisions is whether the tortfeasor is liable for all allowable expenses that "arise out of" those proximately caused injuries? That should be the result because arising out of has been recognized as the causation standard applicable to allowable expenses under MCL 500.3107(1)(a).

Allowable Expenses and Accountability

Attorneys handling auto tort cases must also consider how to best raise allowable expenses in the context of holding at-fault parties accountable. In the past, juries in no-fault PIP cases were typically instructed that the right to recover allowable expenses is part of Michigan's no-fault insurance system. M Civ JI 35.01. This could trigger subjective attitudes from jurors who think negatively of insurance companies, or perhaps believe that awarding the full amount of the injured person's allowable expenses burdens the no-fault insurance system and contributes to the rising cost of everyone's auto insurance.

Now, in auto tort cases involving allowable expense claims, payment may be persuasively connected to providing some justice for the seriously injured person and accountability for the consequences of the at-fault parties' wrong-doing.

It is not entirely clear to what extent jurors will learn about no-fault insurance limits and the insurance buying "choices" of the parties involved. For example, liability insurance may be admissible if offered as "proof of agency, ownership, or control, if controverted, or bias or prejudice of a witness." MRE 411. But, due to the specific prohibition on referencing insurance coverage in tort cases under MCL 500.3030, "except as otherwise provided by law", trial courts will likely do everything possible to minimize and/or eliminate references to the parties' no-fault limits in auto tort cases.

PIP Opt-Outers Can Recover <u>All</u> Allowable Expenses

Medicare recipients and persons with qualified health insurance coverage now may opt out of buying allowable expense coverage. See MCL 500.3107d and MCL 500.3109a(2). People who opt out cannot recover allowable expense benefits through their first-party insurance. Based on MCL 500.3135(3)(c), however, they clearly have the right to seek recovery of all past, present, and future allowable expenses in their tort case.

Because opt-outers have such a broad right to recover all their allowable expenses in tort, significant liens will be asserted in their auto negligence cases, especially by Medicare or ERISA health insurance plans. These lienholders will seek reimbursement of all medical expenses paid in relation to the person's injuries. In many cases, assuming these liens are enforceable, they will greatly diminish the amounts seriously injured opt-outers can recover for their own noneconomic damages.

When Do Allowable Expenses Exceed PIP Limits?

Opt-outers can clearly recover all past, present and future allowable expenses in an auto tort case. Also, because lifetime no-fault coverage does not have any dollar "limit", those who have it will never have the right to pursue allowable expenses from at-fault parties in an auto tort case. For those who have chosen capped no-fault coverage, however, it is not clear when their right to recover allowable expenses in an auto tort case is activated.

MCL 500.3135(3)(c) specifies that the right of injured people with capped no-fault coverage to recover allowable expenses in an auto tort case depends upon establishing that the expenses sought are "in excess of any applicable limit under Section 3107c * * *." Unfortunately, the statute provides no further explanation regarding how to determine whether medical expenses sought in a tort case actually exceed those limits.

For a plaintiff's accrued allowable expenses, has the excess threshold been reached based on the amount no-fault insurance actually paid for the injured person's medical care? Or is it based on the amount the providers charged for their medical care? The outcome of this issue will have an enormous impact on how these claims are pursued and when they become viable. Further, by July 2021, new no-fault provider fee schedule will take effect that will drastically reduce providers' rate of reimbursement compared to the amounts they actually charge. MCL 500.3157.

In tort cases where the injured person is receiving ongoing treatment but has not yet exceeded their chosen PIP limit, the injured person's attorney should continually monitor whether the excess threshold has been reached. Furthermore, when the excess threshold has not yet been reached, any life care plan should project when it will be and factor that date into the plan and overall analysis.

For injured people with capped, coordinated PIP coverage who have health insurance is the excess threshold reached when the plaintiff exhausts all coverage available through health insurance and under their coordinated capped PIP choice plan? Should at-fault parties essentially get the benefit of the injured person's health insurance

coverage? How long, if at all, should the injured person's health insurance coverage be factored into whether the excess threshold has been exceeded? The 2019 no-fault amendments provide no guidance on answering these questions.

Special Analysis for Assigned Claims Plan Claimants

There is a separate issue for injured people claiming no-fault PIP benefits through the Assigned Claims Plan (ACP) and subject to the two possible ACP benefit caps. Most ACP claimants are subject to $250,000 allowable expense cap. MCL 500.3172(7)(a) and MCL 500.3107c(1)(b). A $2,000,000 allowable expense cap applies to a much smaller group of ACP claimants who have qualified health insurance, opt-out of no-fault medical expense coverage, end up losing their health insurance, and then within 30 days of that loss of health insurance, are injured in a crash before they were able to secure uncoordinated no-fault insurance coverage. MCL 500.3172(7)(b) and MCL 500.3109a(2). The question becomes whether either group of ACP claimants can recover their excess allowable expenses in an auto tort case.

The language of MCL 500.3135(3)(c) refers only to tort claims for expenses in excess of those defined or referenced in MCL 500.3107 to MCL 500.3110. The $250,000 allowable expense cap on ACP claimants is found in MCL 500.3172(7)(a). However, that section explicitly incorporates by reference expenses payable under MCL 500.3107c(1)(b). This cross-referenced provision falls within the specified statutory range for allowable tort claims under MCL 500.3135(3)(c). Therefore, the amended no-fault act can be fairly construed to permit ACP claimants to recover allowable expense claims in their auto tort case exceeding the ACP's $250,000 cap. Claimants through the ACP generally must be paid on a coordinated basis, except for Medicare and Medicaid beneficiaries and claims arising from coverage disputes. MCL 500.3172(5). Therefore, when ACP claimants bring excess allowable expense claims in their auto tort cases, the unanswered questions arise that arise in coordinated no-fault situations, as discussed above, also would arise.

For the small number of ACP claimants who would be eligible for the $2,000,000 cap, MCL 500.3172(7)(b), the analysis is slightly different. The special $2,000,000 cap for these select claimants incorporates by reference MCL 500.3107d(6)(c) and MCL 500.3109a(2)(d)(ii). Those provisions also fall within the statutory range specified in MCL 500.3135(3)(c). Accordingly, there appears to be a comparable argument that these select ACP claimants ought to be permitted to recover excess allowable expenses in auto tort cases.

No Injury Threshold Required for Michigan Residents

Under the original no-fault law, excess economic damages were never subject to the threshold injury requirement that applies to noneconomic damages. See 1972 PA 294 and 2012 PA 158, §3135(3)(c). The 2019 revisions actually expanded that right to recover allowable expenses to be "without limit for allowable expenses if an election to not maintain that coverage was made under section 3107d or if an exclusion under section 3109a(2) applies." 2019 PA 21 and 22, MCL 500.3135(3)(c). Accordingly, in auto tort cases involving opt-outers who are Michigan residents and can claim all past, present, and future allowable expenses from the at-fault parties, a third-party case may still be worth pursuing to recover the injured person's allowable expenses. The only exception to the rule is that, as further addressed below, out-of-state residents injured in Michigan crashes must prove a threshold injury to recover any of their allowable expenses in an auto tort case. MCL 500.3135(1) and (3)(d).

Pure Comparative Negligence Applies

An injured person is barred from recovering noneconomic loss damages in auto tort case when they are more than 50 percent at-fault for the crash. MCL 500.3135(2)(b). However, for purposes of economic damages for allowable expense claims in auto tort cases, pure comparative negligence applies. See MCL 500.3135(2) and

MCL 500.3135(3)(c). As further explained below, one exception to the rule is that allowable expense claims of out-of-state residents in auto tort cases are also subject to the 51% rule, rather than pure comparative negligence. MCL 500.3135(2)(b) and (3)(d). Furthermore, pursuant to MCL 600.2955a(1), intoxicated drivers who are, as a result of their impaired ability to function, 50% or more "the cause" for a crash may be completely barred from both noneconomic damages and economic damages. For all other people, pure comparative negligence appears to apply to their right to right excess allowable expenses.

Under pure comparative negligence, the injured person is not barred from recovering allowable expenses even if the factfinder determines the injured person is more at-fault. *Placek v Sterling Heights*, 405 Mich 638, 661; 275 NW2d 511 (1979). Application of pure comparative negligence to allowable expense claims in tort cases could result in some complicated consequences. For example, if a defendant is seriously negligent and catastrophically injured, while the plaintiff is also seriously injured and somewhat comparatively negligent, and both parties have chosen capped PIP coverage and incur hundreds of thousands of dollars in medical expenses exceeding their own allowable expense coverage, the injured defendant could potentially countersue the plaintiff for their excess allowable expenses. Do the respective liabilities of each party for these excess allowable expenses offset their respective recoveries? Do each of them need different lawyers to prosecute their own excess allowable expense tort claims and to defend against the opposing party's claims? Moreover, what happens if the plaintiff also has a claim for underinsured motorist (UIM) benefits? Is that plaintiff's insurer in a conflict-of-interest situation when it attempts to defend itself in the UIM claim, while also having the contractual obligation to defend and represent the plaintiff in the defendant's countersuit for excess allowable expenses? Should all these claims, tort and UIM, be litigated and tried together? It is unclear how these complicated liability situations will be addressed going forward.

How Much Must a Defendant Pay for Excess Allowable Expenses?

Although MCL 500.3135(3)(c) makes it clear that a plaintiff may recover accrued and future excess allowable expenses in an auto tort case, there is no specific stated amount at-fault parties must pay for these expenses. Because MCL 500.3135(3)(c) incorporates by reference MCL 500.3107(1)(a) and does not make any reference to the fee schedule section of the no-fault law, MCL 500.3157, there is a strong argument at-fault parties are liable to pay excess medical expense based on the *"reasonable charge"* standard under MCL 500.3107(1)(a). Furthermore, under general tort law principles, the liability of negligent actors for medical expenses is based on a standard of reasonableness. See M Civ JI 50.50. The no-fault amendments do not change or modify these basic principles, and they give no explicit indication that the provider fee schedule would apply in tort cases. Accordingly, the reasonable charge standard should apply to accrued and future excess allowable expenses recoverable under MCL 500.3135(3)(c). Future medical expenses, however, will be subject to reduction to present value. See MCL 600.6306(2); M Civ JI 53.03; *Currie v Fiting*, 375 Mich 440, 455; 134 NW2d 611 (1965).

Can Charges Exceeding the No-Fault Fee Schedule Be Recovered?

As noted above, the new no-fault provider fee schedule limitations are found only in MCL 500.3157, which is not incorporated by reference into MCL 500.3135(3)(c). There is uncertainty as to whether a provider can pursue a patient directly for payment of provider charges that exceed the new statutory fee schedule. The fee schedule provisions of subsections 3157(2), (3), (6), and (7), all state that the providers who are subject to each of those provisions are "*not eligible for payment or reimbursement under this chapter, for more than the following * * *.*" (Emphasis added.) However, it is not clear whether this language prevents the provider from pursuing the patient under contract law, rather than *"under this chapter?"* If provider-patient contractual claims were to be recognized in the post-revision era, that would further bolster providers in asserting their right to be paid and/or claim a lien in the patient's tort case for charges exceeding the new MCL 500.3157 fee schedule.

If providers can pursue their charges exceeding the fee schedule, a question remains whether the injured person has crossed the excess allowable expense threshold in an auto tort case under MCL 500.3135(3)(c). Presumably, the providers' excess charges also cannot be recovered in an auto tort case unless the injured person's applicable no-fault coverage has been exhausted.

Unfair Treatment of Out-of-State Residents

The 2019 amendments gutted the no-fault rights of out-of-state residents injured in Michigan crashes. These non-residents are now disqualified from recovering no-fault benefits for their injuries, unless they own a vehicle that is both registered and insured in Michigan. MCL 500.3113(c). This disqualification applies whether or not the out-of-state resident was insured under an out-of-state policy issued by an insurer authorized to sell auto insurance in Michigan (formerly known as a "section 3163 certified insurer"). Under MCL 500.3135(3)(d), the allowable expenses of an out-of-state resident may be recovered in tort, but only if the out-of-state resident sustains a threshold injury (*i.e.*, death, serious impairment of body function or permanent serious disfigurement). Furthermore, all economic loss and noneconomic loss damage claims by out-of-state residents are subject to the 51% comparative negligence rule, meaning they are not recoverable in a tort case when an out-of-state plaintiff is found to be more than 50% at fault. See MCL 500.3135(2)(b). In addition, "security" for payment of no-fault benefits is required by a nonresident owner or registrant of a vehicle not registered in Michigan if the vehicle is operated in Michigan for an aggregate of more than 30 days in any calendar year. MCL 500.3102(1). Ultimately, there is no question out-of-state residents are treated badly under the 2019 amendments with respect to both their first-party no-fault benefits and their tort rights.

Potential Expanded Liability for Tortfeasors Opting-Out of PIP Coverage

There is a separate question whether opt-outers who are defendants in tort actions have the benefits of the tort immunities set forth in the no-fault act, or whether they can be held fully liable in tort for all economic and non-economic damages they negligently cause. The tort immunities available to an insured defendant are set forth in MCL 500.3135(3), which states, "tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101(1) was in effect is abolished except as to * * *." MCL 500.3101(1) requires that, "[e]xcept as provided in sections 3107d and 3109a, the owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance and property protection insurance as required under this chapter, and residual liability insurance." Security, however, is "only required to be in effect during the period the motor vehicle is driven or moved on a highway." MCL 500.3101(1). Does a defendant who has opted out of the statutory mandate to carry no-fault PIP coverage have the same tort immunities as those persons who have continued to pay into the PIP system by purchasing no-fault coverage? Tort immunity under the no fault act was based on the legislative compromise that people who purchase no-fault insurance will be allowed to benefit from a partial shield from tort liability, except as otherwise set forth by the statute. MCL 500.3135; *Citizens Ins Co of America v Tuttle*, 411 Mich 536, 546-547; 309 NW2d 174 (1981). If an opt-outer does not pay into that system, an argument can be made that they should not get the benefits of the tort immunities at all and could be held liable for all common-law damages that would be typically recoverable in a negligence action.

Can Uninsured Owners or Registrants Recover Allowable Expenses?

Under MCL 500.3113(b), an injured person is disqualified from first-party no-fault benefits when injured while operating an uninsured motor vehicle or motorcycle of which the injured person is the owner or registrant. Whether they are also disqualified from recovering allowable expenses in an auto tort case does not have a clear answer. It could be argued that all the person's allowable expenses could be claimed in the auto tort case under MCL 500.3135(3)(c), because there is no applicable "*limit*" when the person is uninsured and all those expenses

would be "in excess of any applicable limit under §3107c". Furthermore, MCL 500.3135(2)(c) and (4)(e) impose specific penalties for uninsured owners and registrants in the form of barring them people from recovering noneconomic loss and mini-tort vehicle damage claims. The Legislature, however, did not amend §3135(3)(c) to also bar uninsured people from recovering allowable expenses in an auto tort case. Accordingly, there is a plausible argument that they are not disqualified for pursuing allowable expenses in third-party cases. On the other hand, MCL 500.3135(3)(c) seems to indicate that opt-outers are the only class of plaintiffs the Legislature has permitted to recover allowable expenses when there was no PIP coverage applicable. Furthermore, it does not seem fair or sensible to allow uninsured drivers to recover allowable expenses in tort. Ultimately, this issue will require litigation and it is unclear how it will be decided.

Conclusion

In the years ahead, there will be a great deal of controversy regarding how the statutory right to recover allowable expenses in auto tort cases is pursued and litigated. Practitioners should never assume that pursuing those expenses, or defending against them, will be easy or straightforward.

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1. Following enactment of the 2019 no-fault revisions, I have worked extensively with my law partners George Sinas and Tom Sinas (also my father and brother) to understand and analyze the changes, as well as to write and speak about them. Accordingly, I acknowledge and thank George and Tom for their contributions to this analysis. Furthermore, this article was published in Michigan Association for Justice's 2021 Spring Quarterly Journal. As part of that publication process, Attorney Susan Wright edited this article. I thank her greatly for her work and insights.