Outside Counsel

Appellate Division's Application of 'Pommels v. Perez'

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The stringent limitations on recovery under New York Insurance Law §5102(d) (the Threshold Law) were strengthened by the Court of Appeals in 2005 in *Pommells v. Perez*[1] and, in 2006, the Appellate Division listened by dismissing an abundance of threshold claims.

Gap in Treatment

Pommells amplified the Court's holding in *Toure v. Avis Rent A Car Systems, Inc.* by establishing a nonexclusive list of contributory factors, the existence of which may interrupt the chain of causation between an accident and claimed injury, in which case the proper result may be summary dismissal.[2] In 2006, the "gap in treatment" argument was the most common ground upon which the Appellate Division dismissed serious injury claims.

The First Department has been particularly strict in dismissing these claims and has repeatedly held that a plaintiff's failure to offer a reasonable explanation for a gap in treatment or a complete cessation thereof is fatal.[3] In *Vasquez v. Reluzco*, *Rubensccastro v. Alfaro*, and *Rivera v. Benaroti*, the gaps in treatment ranged from 18 months to a lengthier three years.[4] The plaintiffs in all three cases failed to offer any explanation notwithstanding a reasonable explanation. Undoubtedly, when there exists such an unexplainable lengthy gap in treatment summary dismissal is the appropriate result. The Second Department has also reached a similar conclusion.[5] In *Caracci v. Miller*, *Bycinthe v. Kombos* and *Gomez v. Epstein*, the serious injury claims were dismissed because the plaintiffs had failed to offer any reasonable explanation for the extensive gaps in treatment, respectively a 16-month, three-year and four-year gap.[6]

Interestingly, the First Department will still dismiss a claim when an unexplained gap in treatment is merely a few months; however, the court fails to do so with the same vigor as it does with gaps in treatment lasting over a year. Specifically, the First Department will dismiss the claim but does not indicate

that such a short gap is fatal. For instance, in *Navedo v. Jaime*, the plaintiff underwent physical therapy, acupuncture and chiropractic care for a few months and then ceased treatment completely without any explanation.[7] Likewise, in *Henry v. Rivera*, the plaintiffs unaccountably ceased treatment four to five months after the accident.[8] The only reasonable conclusion in both cases is that the plaintiff's injuries were not serious enough to continue treatment and thus do not constitute a serious injury under the No-Fault Law.

Additionally, failing to offer a reasonable explanation for failure to seek treatment immediately after an accident or receiving only sporadic treatment will likely prevent a serious injury claim from surviving.

In *Milazzo v. Genser*, the plaintiff failed to seek treatment for nearly three months after the subject accident in which the serious injury was sustained.[9] The plaintiff also terminated all treatment three years before making the serious injury claim.[10] In *Park v. Champagne*, the plaintiff also failed to seek medical treatment immediately after the accident but then visited a physician six days later and thereafter received four months of physical therapy; however, the plaintiff only sporadically met with a physician, the last visit being at the plaintiff's attorney's request.[11] In both cases, the First Department found that the lack of necessity for immediate treatment and the receipt of sporadic treatment rather than continuous treatment signaled a more minor injury rather than a serious injury and thus warranted summary dismissal.

Now, the obvious question is what constitutes a reasonable explanation for a gap in treatment. Unfortunately the courts have offered little guidance on the answer to this question, but it was made clear in *Brown v. City of New York*, that a bare assertion that a plaintiff's condition plateaued and the uncertainty regarding the effectiveness of further treatment will not suffice as a reasonable explanation.[12] The Second Department in *Li v. Yun*, found that an affirmed report of a physician attesting to the plaintiff's condition but based upon an examination conducted six years prior is insufficient to serve as an adequate explanation for a gap in treatment.[13] Plaintiff's attorneys will have to be crafty and use these examples of insufficient explanations as guideposts in their pursuit of a reasonable explanation because the courts are clearly more apt to dismiss a serious injury claim due to a gap in treatment.

Pre-Existing Condition

A pre-existing condition can also interrupt the chain of causation between an accident and claimed injury and result in summary dismissal in favor of a defendant. The analyses for both a gap in treatment and pre-existing condition are similar in that for each scenario a plaintiff must offer a sufficiently reasonable explanation that dispels a defendant's argument that a contributory factor interrupted the chain of causation. Particularly, in order for a plaintiff to defeat a pre-existing condition argument the plaintiff must "adequately address how the plaintiff's current medical condition in light of his or her past medical history is causally related to the subject accident."[14]

In *Figueroa v. Castillo*, *Moore v. Sarwar*, and *Carter v. Full Service Inc.*, the plaintiffs suffered summary dismissal because all were involved in prior accidents before the subject accidents and were unable to adequately address how their current injuries were the result of the subject accidents rather than prior accidents.[15]

In *Bycinthe, Gomez, Mullings v. Huntwork* and *Caldwell v. Grant*, defense experts found that each plaintiff's physical state was attributable to pre-existing degenerative conditions.[16] However, each plaintiff failed to address the defense expert's findings beyond asserting in conclusory terms that the injuries sustained were serious and resulted from the accident rather than a degenerative condition.[17] Thus, the courts dismissed the serious injury claims finding that a bare assertion that the injuries were caused by the subject accident was simply speculative.[18]

Conclusion

The appellate division decisions in response to *Pommells* should raise a signal to all plaintiffs that recovery under the No-Fault Law is difficult and challenging. There is no indication to the contrary that the courts want to freely permit serious injury claims to go forward. Only those claims that meet the strict criteria set forth in *Toure* and *Pommells* have a chance of surviving summary dismissal. Thus, defendants should be alert to any unexplained gaps in the plaintiff's treatment or any pre-existing conditions that the plaintiff suffers from, and plaintiffs should be prepared with a reasonable and adequate explanation for any gap in treatment as well as expert testimony that sufficiently links the cause of the plaintiff's injuries to the accident.

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Endnotes:

1. *Pommells v. Perez,* 4 NY3d 566; 797 N.Y.S.2d 380 (2005).

2. *Pommells*, 4 NY3d at 572; 797 N.Y.S.2d at 383; *Toure v. Avis Rent A Car Systems, Inc.*, 774 N.E.2d 1197, 98 N.Y.2d 345 (2002).

3. *Vasquez v. Reluzco*, 28 AD3d 365, 366; 814 N.Y.S.2d 117, 119 (1st Dept. 2006); *Rubensccastro v. Alfaro*, 29 A.D.3d 436; 815 N.Y.S.2d 514, 515 (1st Dept. 2006); *Rivera v. Benaroti* 29 A.D.3d 340, 342, 815 N.Y.S.2d 44, 46 (1st Dept. 2006).

4. Id.

5. *Caracci v. Miller*, 823 NYS2d 681 (2d Dept. 2006); *Bycinthe v. Kombos*, 29 A.D.3d 845, 846; 815 N.Y. S.2d 693, 694 (2d Dept. 2006); *Gomez v. Epstein*, 29 A.D.3d 950, 951; 818 N.Y.S.2d 101, 102 (2d. Dept. 2006).

6. Id.

7. *Navedo v. Jaime*, 32 AD3d 788, 790; 822 N.Y.S.2d 43, 45-6 (1st Dept. 2006).

8. *Henry v. Rivera*, 2006 NY Slip Op 8668; 2006 N.Y. App. Div. Lexis 13760 (1st Dept. 2006) .

9. *Milazzo v. Gesner,* 33 AD3d 317; 822 N.Y.S2d 49, 50 (1st Dept. 2006).

10. Id.

11. *Park v. Champagne*, 824 NYS2d 84 (1st Dept. 2006).

12. *Brown v. City of New York*, 29 AD3d 447; 815 N.Y.S.2d 88 (1st Dept. 2006).

13. *Li v. Yun*, 27 AD3d 624; 812 N.Y.S.2d 604, 605 (2d Dept. 2006).

14. *Style v. Joseph*, 32 AD3d 212, 214; 820 N.Y.S.2d 26, 28 (1st Dept. 2006).

15. *Figueroa v. Castillo,* 2006 NYSlipOp 8669 (1st Dept. 2006); *Moore v. Sarwar,* 29 A.D.3d 752, 753; 816 N.Y.S.2d 503, 504 (2d Dept. 2006); *Carter v. Full Service Inc.,* 29 A.D.3d 342, 344-45; 815 N.Y.S.2d 41, 43 (1st Dept. 2006).

16. *Bycinthe,* 29 AD3d at 846; 815 N.Y.S.2d at 694; *Gomez,* 29 A.D.3d at 951; 818 N.Y.S.2d at 102; *Mullings v. Huntwork,* 26 A.D.3d 214, 215; 810 N.Y.S.2d 443, 444 (1st Dept. 2006); *Caldwell v. Grant*, 31 A.D.3d 1154, 1155; 818 N.Y.S.2d 700, 701 (4th Dept. 2006).

17. Id.

18. Id.