TORT BECOMES PIP: UNDERSTANDING THE NEW STATUTORY RIGHT TO RECOVER "EXCESS ALLOWABLE EXPENSES" IN AUTO TORT CASES

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THE NEW AT-FAULT DRIVER LIABILITY FOR MEDICAL EXPENSES

- For more than 40 years under the original no-fault law, because injured people had lifetime no-fault medical coverage, at-fault drivers typically could NOT be sued for an injured person's medical expenses.

THE NEW AT-FAULT DRIVER LIABILITY FOR MEDICAL EXPENSES

- Under the reforms, if an injured person has limited no-fault coverage, or if the person opts-out from no-fault, the at-fault driver can be sued for the injured person's past, present AND future uncovered allowable expenses benefits.

THE LANGUAGE DEFINING THE STATUTORY RIGHT

The specific statutory language: MCL 500.3135(3)(c) states that in an auto tort case, 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."

TWO TYPES OF EXCESS ALLOWABLE EXPENSE BENEFITS RECOVERABLE IN TORT

Accrued Allowable Expenses

AND

Future Allowable Expenses

We have never litigated future allowable expenses, even in PIP litigation!

TORT BECOMES PIP

The pursuit of medical expenses in an auto tort case is now essentially the pursuit of allowable expense benefits from the tortfeasor that would have been otherwise recoverable in a first party action.

Medical explains claims and lifecare planning in auto tort case must be based on satisfying the elements under 3107(1)(a).

Courts must address medical expenses in auto tort cases based on allowable expense benefit statutory definition and related case law.

TORT BECOMES PIP

The language of MCL 500.3107(1)(a)

"*Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation.*"

TORT BECOMES PIP

Examples of Allowable Expenses

- Medical care
- Attendant care
- Rehabilitation
- Medical transportation
- Medical mileage
- Housing
- Case management services
- Guardian expenses

TORT BECOMES PIP

More serious injury auto tort cases involving various medical and care claims will need to address and consider the various nuanced allowable expenses benefit principles that have been historically part of first-party no-fault litigation.

Remember?

Griffith v State Farm 472 Mich 521 (2005;

Douglas v Allstate; 492 Mich 241 (2012)

Johnson v Recca 492 Mich 169; (2012)

Admire v Auto-Owners 494 Mich 10 (2013).

TORT BECOMES PIP

Does PIP Causation Apply?

Example: Under tort principles, the tortfeasor would be liable for injuries proximately caused by the negligence.

However, the tortfeasor would be liable for all medical expenses that "arise out of" from those injuries?

See Scott v State Farm – case where Court of Appeals held that allowable expenses benefits could be pursued for high-cholesterol medical treatment on the basis that the person's TBI was one of the causes that led to the person's obesity and high cholesterol.

PURE COMPARATIVE NEGLIGENCE APPLIES TO EXCESS ALLOWABLE EXPENSES

- At-fault drivers are liable for uncovered medical expenses under the doctrine of pure comparative negligence.
- Under this doctrine, a driver can be held liable for medical expenses in proportion to any percentage of their fault that is greater than zero.
- Example: Bob is 90% at fault, but Wanda is 10% at fault. Bob can sue Wanda for 10% of his lifetime uncovered medical expenses.

NO THRESHOLD INJURY NEEDED TO RECOVER EXCESS ALLOWABLE EXPENSE BENEFITS

EXCEPTION: OUT-OF-STATE RESIDENTS

- **Medical expense claims in tort are not subject to threshold injury rule (for Michigan residents);**
- Under the original Michigan No-Fault Law, excess economic damages were never subject to the threshold injury requirement that applies to noneconomic damages. The 2019 reforms did not make any changes to that basic principle.
- Exception: Out-of-State Residents

NO THRESHOLD INJURY NEEDED TO RECOVER EXCESS ALLOWABLE EXPENSE BENEFITS

EXCEPTION: OUT-OF-STATE RESIDENTS

- Out-of-state residents are typically disqualified from no-fault coverage under the reforms.
- Out-of-state residents can claim of their allowable expense benefits from the at-fault driver, so long as the out-of-state residents satisfy the two following conditions:
  - 1. The person sustained what is commonly known as a "threshold injury" as defined under the Michigan no-fault tort law principle
  - 2. The out-of-state resident was not more than 50% comparatively negligent for the crash

OPT-OUTERS CAN CLAIM ALLOWABLE EXPENSES IN TORT FROM $1

Per the language of MCL 500.3135(3)(c), people who opt-out of all allowable expenses on the first-party side can recover, in tort, all of injured person's allowable expense benefits without limitation.

"*…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…*"

WHEN ARE MEDICAL EXPENSES IN EXCESS OF THE LIMITS?:

The statutory language makes it clear that medical expenses must be in excess of the PIP choice limits set forth in MCL 500.3107c, *"…in excess of any applicable limit under section 3107…"*…

However, the law provides no further explanation regarding how to determine whether medical expenses sought in any given case actually exceeds those limits.

WHEN ARE MEDICAL EXPENSES IN EXCESS OF THE LIMITS?:

Important unanswered questions:

Is the determination of whether the excess threshold has been reached based on the amount no-fault insurance actually paid per the fee schedule for the plaintiff's medical care?

Or is the determination based on the amount the plaintiff's provider charged for the plaintiff's medical care?

What about in cases involving coordinated PIP policies?

What about family provided attendant care in excess of 56 hours per week?

There are no clear answers right now to these questions provided within the statute

WHAT ABOUT CLAIMS OF UNINSURED VEHICLE OWNERS OR REGISTRANTS?

What if someone does not buy PIP as required by 3101?

MCL 500.3135 does not provide a clear answer whether these people are disqualified from medical expense claims and, if so, to what extent they are disqualified

CAN PROVIDER CHARGES IN EXCESS OF NO-FAULT FEE SCHEDULE BE RECOVERED IN TORT CASE?

- The fee schedule provisions of Section 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:* [stated fee schedule amount]".
- This issue will depend on how the contractual relationship between the patient and provider as recognized in the post-reform era.
- This issue may come out differently depending on whether PIP limits have been exhausted by the time the provider renders the subject services.

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.

Furthermore, there are many significant ambiguities that will have to be addressed by Michigan courts.