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# Tort Thresholds, Auto Claim Behavior and Auto Choice Reform: Are Tort Thresholds Working?

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# TORT THRESHOLDS, AUTO CLAIM BEHAVIOR AND AUTO CHOICE REFORM: ARE TORT THRESHOLDS WORKING?

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## I. INTRODUCTION

For over a generation, injuries arising from motor vehicle accidents occurring in Minnesota have been controlled by the “No-Fault Automobile Insurance Act.”<sup>1</sup> Since it was originally enacted, the Minnesota No-Fault Automobile Insurance Act has undergone

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1. MINN. STAT. § 65B.41(1996).

a number of legislative amendments and has been interpreted by the courts. Significant parts of the Minnesota No-Fault Automobile Insurance Act are the provisions that relate to tort thresholds. As will be shown, ample case law provides guidance as to dealing with tort thresholds.

Within the last several years, empirical studies have been published based on information gathered from the late 1970s to the present, discussing the effects of no-fault insurance generally, tort thresholds, and the costs of motor vehicle accident insurance.<sup>2</sup>

In 1997, in the first session of the 105th Congress, a bill entitled the "Auto Choice Reform Act of 1997" was introduced in the United States Senate.<sup>3</sup> The "Auto Choice Reform Act" has been touted as a means of cutting costs for auto insurance premiums and promoting choice for those procuring auto insurance.

This paper will discuss tort thresholds in Minnesota, empirical studies on automobile claims and motor vehicle accident insurance and the "Auto Choice Reform Act of 1997."

## II. TORT THRESHOLDS

### A. Case Evaluation

As with any tort case, the motor vehicle accident case must be properly evaluated. The overwhelming majority of cases will be minor and will involve an insignificant amount of economic damages largely comprised of medical expenses and wage loss.<sup>4</sup>

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2. See INSURANCE RESEARCH COUNCIL, AUTO INJURIES: CLAIMING BEHAVIOR & ITS IMPACT ON INSURANCE COSTS (1994); Stephen J. Carroll & James S. Kakalik, *No-Fault Approaches to Compensating Auto Accident Victims*, 60 J. RISK & INS. 265 (1993); INSURANCE RESEARCH COUNCIL, TRENDS IN AUTO INJURY CLAIMS, ANALYSIS OF CLAIM COSTS (1996); INSURANCE RESEARCH COUNCIL, TRENDS IN AUTO INJURY CLAIMS, ANALYSIS OF CLAIM FREQUENCY (1996); James K. Hammitt & John E. Rolph, *Limiting Liability for Auto Accidents: Are No-Fault Tort Thresholds Effective?* 7 LAW & POL'Y 493 (1985); INSURANCE RESEARCH COUNCIL, TRENDS IN AUTO INJURY CLAIMS, ANALYSIS OF CLAIM FREQUENCY (2d ed. 1995); INSURANCE RESEARCH COUNCIL, TRENDS IN AUTO INJURY CLAIMS, ANALYSIS OF CLAIM COSTS (2d ed. 1995); Jeffrey O'Connell, et al., *The Costs of Consumer Choice for Auto Insurance for States Without No-Fault Insurance*, 54 MD. L. REV. 281 (1995); Jeffrey O'Connell, et al., *The Comparative Costs of Allowing Consumer Choice for Auto Insurance In All Fifty States*, 55 MD. L. REV. 160 (1996); Jeffrey O'Connell, et al., *Consumer Choice In The Auto Insurance Market*, 52 MD. L. REV. 1016 (1993).

3. Auto Choice Reform Act of 1997, S.625, 105th Congress, 1st Sess. (1997).

4. See INSURANCE RESEARCH COUNCIL, AUTO INJURIES: CLAIMING BEHAVIOR & ITS IMPACT ON INSURANCE COSTS 31 (1994).

If a party is injured in a motor vehicle accident, and she wants to recover economic and non-economic damages from those responsible for causing the accident, she must prove three essential items:

1. Negligence;
2. Cause; and
3. One of the tort thresholds.<sup>5</sup>

As to negligence and cause, Minnesota is a comparative fault state. In order for a claimant to recover, the claimant must be 50%, or less, at fault.<sup>6</sup> This article will not focus on proving negligence and causation for motor vehicle accident cases. Instead, it will focus, in part, on tort thresholds.

It has been said that the No-Fault Automobile Insurance Act has placed an "additional element of the cause of action" for motor vehicle accident cases. Obviously, the logical next step is to determine what is this additional element that must be proved in order to recover against a third party from a motor vehicle accident case. The thresholds are set forth in Minnesota's No-Fault Automobile Insurance Act.<sup>7</sup> The thresholds are described in jury instructions as follows:

#### MEDICAL EXPENSE THRESHOLD

The reasonable value of medical supplies and hospital and medical expenses necessary for treatment of the plaintiff, up to the time of trial, includes the following:

- (1) The reasonable expenses incurred by the plaintiff for medical supplies and hospital and medical services; plus
- (2) The value of free medical or surgical care or ordinary and necessary nursing services performed by a relative of the plaintiff or member of the plaintiff's household; plus
- (3) The amount by which the value of medical services or products provided exceeds the amount of medical expense benefits paid for those services or products, if the plaintiff was charged less than the average reasonable amount charged in Minnesota for similar services or products.

You must separately determine the expenses that were in-

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5. See *Murray v. Walter*, 269 N.W.2d 47, 50 (Minn. 1978).

6. See MINN. STAT. § 604.02 (1996); *Olson v. City of St. James*, 380 N.W.2d 555 (Minn. Ct. App. 1986).

7. MINN. STAT. § 65B.51, subd. 3 (1996).

curred for diagnostic x-rays and the expenses that were incurred for rehabilitation, unless those expenses were incurred for rehabilitative occupational training or physical therapy.

#### DISFIGUREMENT THRESHOLD

A disfigurement is that which impairs or injures the appearance of a person.

#### PERMANENT INJURY THRESHOLD

A permanent injury is one from which it is reasonably certain a person will not fully recover. Such injury may improve or worsen, but must be reasonably certain to continue to some degree throughout the person's life.

#### 60-DAY DISABILITY THRESHOLD

Disability means that the injured person is unable to engage in substantially all of the person's usual and customary daily activities, for 60 days. Sixty days does not mean 60 consecutive days. It is sufficient if the total number of days of disability was 60 days.<sup>8</sup>

In addition, if a death arises out of the motor vehicle accident, a tort threshold has been met.<sup>9</sup> Simply put, a claimant seeking to recoup non-economic damages from a third party must prove that, as a result of the motor vehicle accident, the claimant suffered one of the following:

1. Health care expenses in excess of \$4,000;
2. Permanent injury;
3. Disability of 60 days or more;
4. A scar;
5. Death.

In other words, even if the claimant was a passenger or admittedly has no causal fault in a motor vehicle accident, that claimant will not recover non-economic damages unless one of these tort thresholds are met. So, when evaluating whether a claimant has a viable action against a third party for non-economic damages, keep in mind the claimant must prove negligence, cause, and one of the tort thresholds. If all of these items cannot be proved, the claim-

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8. MINNESOTA DIST. JUDGES ASS'N COMM. ON JURY INSTRUCTION GUIDES, MINNESOTA JURY INSTRUCTION GUIDES (CIVIL) JIG 600 (Michael K. Steenson & Peter Knapp, reps.) in 4 MINN. PRACTICE 402-05 & Spec. Verdict Form No. 8, at 167-68 (3d ed. 1986 & Supp. 1997).

9. See MINN. STAT. § 65B.51, subd. 3(4)(b)(3) (1996).

ant's action for non-economic damages will fail.

## *B. Pleading*

### *1. Claiming Non-Economic Damages*

Since the No-Fault Act came into existence and was subsequently interpreted by the various appellate courts, it has become as clear as spring water that the claimant must plead not only negligence, causation and damage, but also must plead an additional element of her cause of action, namely, that one of the tort thresholds has been met. That tort threshold must be pled regardless of whether the claimant is asserting a claim for non-economic damages by way of complaint or counterclaim.<sup>10</sup> It is interesting to note that when the Minnesota Rules of Civil Procedure were initially adopted, proposed "forms" were published with the Minnesota Rules of Civil Procedure to give attorneys and others advice as to how to plead a given action. Those forms have not been updated since 1951. Form 8 of the Minnesota Rules of Civil Procedure presently reads as follows:

- (1) On June 1, 1948, in a public highway called University Avenue, in St. Paul, Minnesota, defendant negligently drove a vehicle against plaintiff, who was then crossing said highway.
- (2) As a result, plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of \$1,000.

WHEREFORE, plaintiff demands judgment against defendant in the sum of \$10,000.00 and costs.<sup>11</sup>

This 1951 form, contained within the 1998 Minnesota Rules of Civil Procedure, is misleading. It is amply clear that persons seeking economic and non-economic damages arising from the negligent operation of a motor vehicle, must plead and prove a tort threshold before they are entitled to recover any damages.<sup>12</sup> "The tort threshold is an additional element of the negligence action de-

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10. See *Murray v. Walter*, 269 N.W.2d 47, 50 (Minn. 1978).

11. MINN. R. CIV. P. Form 8.

12. See *Nemanic v. Gopher Heating & Sheetmetal, Inc.*, 337 N.W.2d 667, 670 (Minn. 1983).

scribed in § 65B.51, subd. 1, which must be pleaded and proved to recover damages for non-economic detriment."<sup>13</sup>

A prudent claimant, then, should plead the typical negligence, cause and damage matters but should also plead the additional element of a tort threshold having been met. Such tort threshold may be pled as follows:

Pursuant to Minn. Stat. § 6513.51, subd. 3, (1990), plaintiff has met one or more of the prerequisites necessary to recover damages for non-economic detriment.<sup>14</sup>

A claimant, by Complaint or Counterclaim, should plead negligence, cause, damages and that additional element that one of the tort thresholds have been met. Such a well-pled claim should state a claim upon which relief can be granted.

## 2. *Defending against Non-Economic Damages*

When answering a claim for non-economic damages, there are some defenses that should be asserted in addition to the typical defenses asserted under Minnesota's Comparative Fault Statute.<sup>15</sup> Two allegations ought to be considered for inclusion in an answer. The first defense is as follows:

The plaintiff has failed to prove one of the prerequisites necessary to maintain an action under Minn. Stat. § 6513.51, subd. 3, (1990).

This affirmative allegation puts the plaintiff on notice that the defense is claiming that the tort thresholds have not been met and, accordingly, the claims for non-economic damages (i.e., "all dignitary losses suffered by any person . . . , including pain and suffering, loss of consortium, and inconvenience"<sup>16</sup>) are not recoverable. The defense to the claim for economic damages should also, where appropriate, make the following affirmative allegation:

The defendant is insured pursuant to the provisions of the Minnesota No-Fault Insurance Act, Minn. Stat. § 65B.41 (1996) *et seq* and pursuant to Minn. Stat. § 65B.51, is entitled to have deducted from any recovery, the value of ba-

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13. *Nemanic*, 337 N.W.2d at 669 (citing *Murray v. Walter*, 269 N.W.2d 47, 50 (Minn. 1978)).

14. 1 MAYNARD PIRSIG, PIRSIG ON MINNESOTA PLEADING § 490 (5th ed. 1987); see *Moose Club v. LaBounty*, 442 N.W.2d 334, 338 (Minn. Ct. App.), *review denied*, (Minn. 1989).

15. MINN. STAT. § 604.02 (1996); see MINN. R. CIV. P. 8.02 & 8.03.

16. MINN. STAT. § 65B.43, subd. 8 (1996).

sic or optional economic loss benefits paid or payable or which would be payable but for any applicable deductible.<sup>17</sup>

This affirmative allegation should preserve the right to claim a no-fault off-set after a verdict has been rendered.

### C. *Discovery of Threshold Information*

#### 1. *Written Discovery*

After issue is joined, written discovery should be interposed to ferret out information regarding the tort thresholds. Towards that end, it is advisable for the claimant to serve interrogatories asking for all facts upon which the defense premises its position that tort thresholds have not been met. Expert witness interrogatories should be served pursuant to the Rules of Civil Procedure.<sup>18</sup> Where appropriate, a claimant may want to interpose request for admissions, seeking an admission that one or more of the tort thresholds have been met.<sup>19</sup>

Conversely, a person defending against a motor vehicle accident claim ought to serve interrogatories inquiring about all of the health care expenses incurred, whether the claimant missed work, sustained a scar, or was otherwise unable to engage in her normal or usual customary activities. It would be prudent to demand authorizations for the release of the claimant's no-fault insurance records, workers' compensation records, unemployment or reemployment records, medical or other health care information, school records, employment and/or personnel records. These records should show the amount of health care expenses incurred, whether someone has been disabled and unable to work or attend school, and whether someone had a pre-existing, or subsequently acquired, disability.<sup>20</sup> Most importantly, an independent medical examination of the claimant ought to be performed.<sup>21</sup>

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17. MINN. STAT. § 65B.51, subd. 1 (1996).

18. MINN. R. CIV. P. 26.02(d).

19. See MINN. R. CIV. P. 36.

20. See *Nemanic v. Gopher Heating & Sheetmetal, Inc.*, 337 N.W.2d 667 (Minn. 1983); *Lindner v. Lund*, 352 N.W.2d 68 (Minn. Ct. App. 1984); *Kissner v. Norton*, 412 N.W.2d 354 (Minn. Ct. App. 1987); *Safinia v. Kruse*, No. C8-96-1623, 1997 WL 118200 (Minn. Ct. App. Mar. 18, 1997), *review denied*, (Minn. May 28, 1997).

21. See MINN. R. CIV. P. 35.



In *Lindner*, the Minnesota Supreme Court noted that claimant's proof was not sufficient to prove disability of 60 days or more, stating as follows:

In their Answers to Interrogatories and depositions, [the claimants] have not presented sufficient evidence to raise a genuine issue of material fact. In his deposition, [the claimant] stated he missed out on some family activities because of neck pain or headache. [The claimant] also stated that his ability to work as a truck driver was restricted because of the pain. [The claimant] indicated he was not confined to bed or hospitalized and was confined to the house for only three days. This does not reach the severity required to raise a jury issue on whether he has been unable to engage in substantially all of his usual and customary daily activities.<sup>22</sup>

It behooves the claimant to provide detailed Answers to Interrogatories specifying the number of days hospitalized, the number of days confined to bed, the number of days off work or on reduced work hours, the general interruption in one's life, the expert's opinions on permanency, whether the claimant was scarred and the claimant should provide a detailed itemization of the health care expenses incurred. That way, the claimant is proving tort thresholds and her right to recover both economic and non-economic damages.

## 2. *Depositions*

As a practical matter, depositions in motor vehicle accident cases are of little help to the claimant seeking to prove a tort threshold. Depositions can be used to prove the negligence and cause facts and can be used to accentuate the severity of an accident. To the extent they can be used to prove 60 days of disability, scars and health care expenses, the claimant may consider noticing depositions to prove these issues.

On the other hand, depositions for the person defending against a claimed tort threshold may be an invaluable tool. Depositions can be used to discover prior or subsequent accidents or unrelated, collateral causes of a claimant's disability, permanent injury or the fact that the claimant is not severely injured from the accident.<sup>23</sup>

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22. *Lindner*, 352 N.W.2d at 70.

23. *See generally* *Lindner v. Lund*, 352 N.W.2d 68 (Minn. Ct. App. 1984);

#### D. Motion Practice

In the appropriate case, the claimant may bring a motion for partial summary judgment seeking a judicial determination that a tort threshold or tort thresholds have been met.<sup>24</sup> Please note, however, that a motion for partial summary judgment on a tort threshold is akin to arguing that a claimant is entitled to a directed verdict on a tort threshold because no medical or chiropractic testimony was offered to refute a claim of permanent injury, disability, or health care expenses in excess of a given number.<sup>25</sup>

Generally speaking, issues concerning whether a tort threshold has been met cannot be resolved on summary judgment motions.<sup>26</sup> Whether an injury is permanent is generally a question that ought to be given to the jury.<sup>27</sup>

#### E. Trial

##### 1. Proving Tort Thresholds

From a claimant's perspective, it is prudent to present evidence of as many tort thresholds as is possible. That means that the claimant should produce evidence of 60 days of disability, permanent injury and health care expenses in excess of \$4,000, and that disability, permanent injury, and amount of health care expenses should all be proved through the appropriate lay and expert witnesses. Future health care expenses may not be considered toward the \$4,000 health care expense threshold.<sup>28</sup>

Disability for 60 days or more is the "inability" to engage in substantially all the injured person's usual and customary daily activities . . . . The 60 day requirement is cumulative and does not require 60 consecutive days of disabil-

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Murray v. Walter, 269 N.W.2d 47, 50 (Minn. 1978); Nemanic v. Gopher Heating & Sheetmetal, Inc., 337 N.W.2d 667 (Minn. 1983); Safinia v. Kruse, No. C8-96-1623, 1997 WL 118200 (Minn. Ct. App. Mar. 18, 1997), *review denied*, (Minn. May 28, 1997).

24. See MINN. R. CIV. P. 56.04.

25. See Gale v. Howard, 413 N. W. 2d 234 (Minn. Ct. App. 1987).

26. See Carl v. Pennington, 364 N.W.2d 455 (Minn. Ct. App. 1985).

27. See Lindner v. Lund, 352 N.W.2d 68, 70 (Minn. Ct. App. 1984); see also Carufel v. Steven, 293 N.W.2d 47 (Minn. 1980).

28. See Coughlin v. LaBounty, 354 N.W.2d 48, 51 (Minn. Ct. App. 1984), *review denied*, (Minn. 1985).

ity.<sup>29</sup>

It is not inconsistent for a jury to find that a claimant did not sustain a permanent injury but that the claimant sustained medical expenses in excess of the appropriate health care expense threshold.<sup>30</sup>

## 2. *Defending against Tort Thresholds*

Normally, one defends against a tort threshold by retaining a medical expert to examine the claimant and her medical records, and to offer opinions that no permanent injury was sustained, that the health care expenses are not causally related to the accident, or are not reasonable or necessary. The health care expert can also offer testimony on whether the claimant was disabled for 60 days, or more, or has been disfigured from the accident.

There is no requirement that a defendant introduce medical testimony to refute the claim of injury if it can be accomplished by cross-examination.<sup>31</sup>

When there is a fact issue as to whether a tort threshold has been met, even where no expert has been presented to counter the claim of the tort threshold, it is for the jury to determine whether the tort threshold has been satisfied. This statement of the law was best stated by the Minnesota Supreme Court as follows:

Where an issue is raised as to whether a threshold requirement of § 65B.51, subd. 3 was satisfied, the question should be submitted to the jury as part of the special verdict . . . [E]xpert opinion, even in the absence of an adverse expert, was not conclusive on the jury, and it was not bound to accept it . . . [C]ross-examination of the plaintiff's medical expert, the sole expert at trial, may be sufficient to raise a fact question, precluding directed verdict . . . [I]n a personal injury case, where a plaintiff produces an expert witness to support the elements of his negligence cause of action, it is not mandatory for defendant to introduce an adverse medical expert to create factual issues if he can sufficiently raise such issues through cross-examination of plaintiff's expert and/or plaintiff's

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29. *Lindner*, 352 N.W.2d at 70.

30. *See Zieminski v. Caauwe*, 354 N.W.2d 553 (Minn. Ct. App. 1984).

31. *Gale v. Howard*, 413 N.W.2d 234, 236 (Minn. Ct. App. 1987); *Rud v. Flood*, 385 N.W.2d 357 (Minn. Ct. App. 1986).

past medical records.<sup>32</sup>

In sum, if the issue of a tort threshold is raised, it is for the jury to decide whether the tort threshold has been satisfied. Directed verdicts are disfavored.

As it regards uninsured motorist claims, please note that tort thresholds apply.<sup>33</sup> "Because the [claimant] is subject to the no-fault thresholds when suing the tort-feasor, and because the [uninsured motorist] insurer takes the place of the liability insurer, it is logical that the [claimant] must also meet one of the thresholds when suing the [uninsured motorist] insurer."<sup>34</sup>

### 3. *Formulating the Special Verdict*

It is very important for the claimant and the defense to submit proposed special verdicts as to those tort thresholds which they believe the jury ought to consider.<sup>35</sup> If the defense fails to raise the defense of a tort threshold in his pleading, in discovery, and fails to demand tort threshold questions on the special verdict form, the trial court may, in its discretion, rule that the issue of the tort threshold has been waived. Hence, it is very important that tort threshold questions be placed on a special verdict form.<sup>36</sup>

### 4. *Perverse Verdicts*

Sometimes the jury verdicts seem inconsistent.<sup>37</sup> Some cases are "soft tissue" in nature, are difficult to prove or disprove, and the jury is forced to rely on the credibility of the witnesses. In these cases, the credibility of lay and expert witnesses is critical.<sup>38</sup> It is in these close cases where a jury may, for example, find no permanent injury but find that the health care expense tort threshold was

32. *Nemanic*, 337 N.W.2d at 670.

33. *See Johnson v. State Farm Mut. Auto. Ins. Co.*, 574 N.W.2d 468 (Minn. Ct. App. 1998).

34. *Id.*

35. *See Coughlin*, 354 N.W.2d at 51; *Murray*, 269 N.W.2d at 50.

36. *See generally* MINNESOTA DIST. JUDGES ASS'N COMM. ON JURY INSTRUCTION GUIDES, MINNESOTA JURY INSTRUCTION GUIDES (CIVIL) JIG 600 (Michael K. Steenson & Peter Knapp, eds.) in 4 MINN. PRACTICE 403-05 & Spec. Verdict Form No. 8, at 167-68 (3d ed. 1986 & Supp. 1997).

37. *See Rud v. Flood*, 385 N.W.2d 357 (Minn. Ct. App. 1986); *Zieminski v. Caauwe*, 354 N.W.2d 553 (Minn. Ct. App. 1984); *Gale v. Howard*, 413 N.W.2d 234 (Minn. Ct. App. 1987); *Coughlin v. LaBounty*, 354 N.W.2d 48 (Minn. Ct. App. 1984), *review denied*, (Minn. 1985).

38. *See Rud*, 385 N.W.2d at 360.

met.<sup>39</sup> While it may appear inconsistent, the purpose of several tort thresholds is to give a claimant a variety of methods to prove that she has been severely injured. The fact that one threshold was proved and yet another was not proved should not be considered perverse.<sup>40</sup>

#### F. *No-Fault Offset*

Before a verdict is reduced pursuant to a party's comparative fault, a no-fault offset - a deduction for basic economic loss benefits - must be done. These offsets are usually done by stipulation or by motion within 10 days after the verdict.<sup>41</sup> After the verdict is offset with the basic economic loss benefits paid to date, the comparative fault statute is then used to determine the ultimate verdict.

### III. EMPIRICAL STUDIES

#### A. *Studies of Auto Injury Claims*

Anecdotal evidence regarding motor vehicle injury claims is of little value. In depth analyses and studies of motor vehicle claims allows for more well grounded conclusions. In 1994, the Insurance Research Council analyzed 62,000 claimants whose motor vehicle injury claims were settled in the spring and summer of 1992. The results of that analysis has been published and subsequently updated.<sup>42</sup> The major findings from the 1994 study on "Claiming Behavior and Its Impact On Insurance Cost" were divided into four areas. In relevant part, this 1994 study stated as follows:

The incidence of bodily injury liability claims increased 16% between 1987 and 1992. More injury claims were made even though there was a 12% drop in the incidence of roadway crashes severe enough to produce a vehicle damage claim. Taking into account the declining acci-

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39. See *Zieminski*, 354 N.W.2d at 553.

40. See *id.*

41. See MINN. STAT. § 65B.51, subd. 1 (1996).

42. See INSURANCE RESEARCH COUNCIL, AUTO INJURIES: CLAIMING BEHAVIOR AND ITS IMPACT ON INSURANCE COSTS (1994); INSURANCE RESEARCH COUNCIL, TRENDS IN AUTO INJURY CLAIMS, ANALYSIS OF CLAIM COSTS (1996); INSURANCE RESEARCH COUNCIL, TRENDS IN AUTO INJURY CLAIMS, ANALYSIS OF CLAIM FREQUENCY (1996); INSURANCE RESEARCH COUNCIL, TRENDS IN AUTO INJURY CLAIMS, ANALYSIS OF CLAIM FREQUENCY (2d ed. 1995); INSURANCE RESEARCH COUNCIL, TRENDS IN AUTO INJURY CLAIMS, ANALYSIS OF CLAIM COSTS (2d ed. 1995).

dent rate, it appears that people involved in crashes were about 32% more likely to file a bodily injury liability claim in 1992 than they were five years earlier.<sup>43</sup>

This comprehensive analysis from the Insurance Research Council had four major findings which are excerpted as follows:

#### NATURE OF INJURY AND MEDICAL TREATMENT

More people are making bodily injury liability claims and those who do so allege more different kinds of injury per person than in previous years. A growing share of BI claimants reported two or more types of injuries - 42% reported two types of injuries (for example, a back sprain and a minor laceration), and another 15% reported three types of injuries (for example, a broken leg, a back sprain and a minor laceration), compared to 37% and 12%, respectively, in 1987.

\* \* \*

More claimants reported sprain/strain injuries in 1992, while fewer claimants reported non-sprain/strain injuries . . . . Claims for sprains and strains of the neck, back and other parts of the body, alone or in combination with other injuries, were filed by 83% of all BI claimants in 1982, up from 75% of claimants five years earlier. Persons making claims under the fault-based BI coverage were more likely to allege a back or neck sprain than those making claims under the non-fault-based PIP coverage.

\* \* \*

#### ECONOMIC LOSSES AND PAYMENTS TO CLAIMANTS

Average economic losses and payments to auto injury claimants have increased dramatically since 1977 . . . . The average economic loss for BI claimants rose to \$4,532 in 1992 from \$1,162 in 1977. The average economic loss for BI claimants increased in an average annual rate of 9.5% over the 15 year period, higher than the average annual medical inflation rate of 8% over the same period.

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Medical expenses accounted for about three-fourths of the total economic loss generated by persons who made claims under the BI and PIP coverages, the two major

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43. INSURANCE RESEARCH COUNCIL, *AUTO INJURIES: CLAIMING BEHAVIOR AND ITS IMPACT ON INSURANCE COSTS* 1 (1994).

sources of auto insurance payment.

\* \* \*

Rising medical expenses drive up the cost of auto injuries in two ways -through direct reimbursement of the medical bills and by leveraging the "pain and suffering" component of payments made under fault-based liability coverages. Under the BI coverage, for example, claimants incurred an average of \$4,532.00 in economic losses (75% of it medical expense) in 1992, and collected BI payments averaging \$8,460.00. The \$3,928.00 payment in excess of actual economic loss was for general damages or "pain and suffering," but the general damage portion also is determined largely by the amount of economic loss since there are no objective ways of measuring "pain and suffering." Insurance claims adjusters typically offer to settle injury claims for a multiple of the claimant's economic losses, i.e., the sum of medical expense, wage loss, and other out-of-pocket economic losses. On average, for injuries of all types, the overall payments amounts to nearly twice the amount of the economic loss. That is, for BI claimants reimbursement per dollar of economic loss average \$1.87. That means a \$100.00 increase in medical expense incurred by the claimant translates into a \$187.00 increase in the settlement value of the claim, on average, providing the claimant with a general damages payment equal to \$87.00 for each \$100.00 in economic loss.

\* \* \*

When BI claims are categorized by size of economic loss, it becomes apparent that the leveraging effect of medical expense and wage losses has a stronger impact on the less serious injuries. For claims where economic losses were less than \$2,000, the average BI payment was equivalent to more than \$3.00 in payment for every dollar of economic loss incurred. Payment amounts increase with severity of injury, but the payment per dollar of economic loss declines. That means claimants with less serious injuries receive proportionally greater compensation for "pain and suffering" than claimants who suffer much more serious injuries.

\* \* \*

#### ATTORNEY INVOLVEMENT

Attorney involvement in auto injury claims has increased

significantly over the 15-year period between 1977 and 1992, rising from 31% for all coverages combined in 1977 to 46% in 1992 . . . . For BI claimants country-wide, the percentage with attorneys rose from 47% in 1977 to 55% in 1987 and to 57% in 1992. For PIP claimants, the percent represented rose from 17% in 1977 to 31% in 1987 and 1992.

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Countrywide, about 19% of BI claims involved the filing of a lawsuit, but nearly all of the lawsuits were settled before the cases went to trial. Only 1% of BI claimants were involved in lawsuits that went to court, and 40% of those court cases were settled before reaching a verdict. Thus, only about six-tenths of 1% of all BI claims are decided by a judge or jury.

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#### ATTORNEY INVOLVEMENT AND THE CLAIM PROCESS

High levels of attorney involvement in auto injury claims are associated with high auto insurance costs.

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The study documents several reasons why the involvement of attorneys is associated with higher auto injury costs. One is that claimants with attorneys report more different types of injuries than claimants without attorneys. . . . Another reason is that claimants with attorneys incur much higher medical bills, even for injuries of the same type and similar degrees of severity. Represented claimants made much greater use of chiropractors, physical therapists and out-patient visits to MDs.

For all types of injury combined, BI claimants with attorneys incurred economic losses (mostly medical bills) averaging \$6,391.00 per person and collected gross BI payments averaging \$11,939.00. By contrast, BI claimants without attorneys incurred economic losses averaging \$1,755.00 and collected BI payments averaging \$3,262.00. That's a difference in gross payment of \$8,677.00. Thus, if a BI claimant does not have access to health insurance or auto insurance MP coverage, the total BI settlement of \$11,939.00 would result in a net payment to the claimant of only \$1,608.00 after the payment for attorney fees and the cost of medical expenses. Nonrepresented claimants



netted \$1,507.00 (\$101.00) less after paying for their much smaller economic losses. *Putting it another way, it costs the auto insurance system an extra \$8,677.00 when an attorney was involved, but the represented claimant received only \$101.00 more net benefits.* The rest went mainly to the attorney and to the medical providers who treated the claimant.<sup>44</sup>

It appears that the increase in claim frequency and increase in claim costs experienced through the 1980s leveled off around 1992 and has been dropping slightly since 1992. The Insurance Research Council noted as follows:

After steady increases in injury claims compared to property damage claims through the 1980s, the trend appears to have stabilized between 1992 and 1995. The latest data show Americans make 29.5 bodily injury (BI) liability claims for every 100 property damage (PD) claims. This index - the ratio of the number of BI to PD claims paid - measures the likelihood of an injury claim being paid, given the occurrence of an accident serious enough to cause some vehicle damage. Between 1980 and 1992, the number of BI claims per 100 PD claims increased 64% . . . . In other words, a person involved in an accident that produced a PD claim in 1992 was 64% more likely to have a BI claim than a similar person in 1980. However, since 1992, the number has moved in a narrow range from 29.4 in 1992 to 29.3 in 1993, 29.1 in 1994, and 29.5 in 1995.<sup>45</sup>

That same report discussed claim severity. It noted that the average amount paid per BI claim in the early 1990s was \$10,587.00 but declined to \$9,917.00 in 1995.<sup>46</sup>

In another study, the Insurance Research Council calculated the average bodily claim payments by state for the year 1993. In 1993, in Minnesota, the average bodily injury payment was \$19,532.00 - the fifth highest average BI claim payment of all 50 states.<sup>47</sup>

To summarize all of this information, it appears that the number and costs of auto injury claims rose dramatically from the late 1970s through the 1980s until about 1992. Since that time the

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44. *Id.* at 2-7 (emphasis supplied).

45. INSURANCE RESEARCH COUNCIL, TRENDS IN AUTO INJURY CLAIMS, ANALYSIS OF CLAIM FREQUENCY 1 (1996).

46. *See id.* at 2.

47. *See* INSURANCE RESEARCH COUNCIL, TRENDS IN AUTO INJURY CLAIMS, ANALYSIS OF CLAIM FREQUENCY 5 (2d ed. 1995).

number of claims and the costs for claims has plateaued or dropped slightly.

### *B. Tort Thresholds Work*

There are a number of states that have no-fault automobile insurance. In the abstract of one article entitled *No-Fault Approaches to Compensating Auto Accident Victims*, the author noted as follows:

... [N]o-fault can yield substantial savings over the traditional system, or may increase costs substantially, depending on the no-fault plan's provisions. Regardless of plan provisions, all no-fault plans reduce transaction costs, match compensation more closely with economic loss, reduce the amounts paid in compensation for non-economic loss to less seriously injured people, and speed up compensation.<sup>48</sup>

No-fault systems typically also involve some sort of tort thresholds. Tort thresholds can vary widely. A 1995 study concerning the effectiveness of tort thresholds stated as follows:

"No-fault" automobile insurance plans are designed to supplant the tort system by requiring motorists to purchase no-fault insurance and allowing victims to file liability insurance claims in tort suits only if their injuries exceed a legislated "tort threshold." While thresholds vary among states, many are satisfied if the victim incurs medical expenses as low as a few hundred dollars. Using the insurance claims data, we estimate the effectiveness of several states' thresholds. We find that tort thresholds are surprisingly effective: modest tort thresholds reduce the number of successful tort claimants by half, and the strictest thresholds may exclude nine-tenths of potential claimants. Moreover, we find little evidence of claimants "padding" their claims to exceed dollar thresholds.<sup>49</sup>

Minnesota has what would likely be described as "strict" tort thresholds. Its requirement that health care expenses exceed \$4,000 is the exception, not the norm. Most health care expense tort thresholds are substantially less. Studies performed by the Institute for Civil Justice and the Insurance Research Council all seem

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48. Stephen J. Carroll & James S. Kakalik, *No-Fault Approaches to Compensating Auto Accident Victims*, 60 J. RISK & INS. 265 (1993).

49. James K. Hammitt & John U. Rolph, *Limiting Liability for Auto Accidents: Are No-Fault Tort Thresholds Effective?* 7 LAW & POL'Y 493 (1985).

to indicate that there are benefits to having no-fault insurance and that there are benefits to having tort thresholds.

#### IV. AUTO CHOICE REFORM ACT OF 1997

In April of 1997, a bill was introduced in the United States Senate entitled the "Auto Choice Reform Act of 1997."<sup>50</sup> The "Choice Auto Insurance System" has been described as follows:

Under a Choice Auto Insurance System, policy owners elect to be insured under the traditional system or a specified no-fault plan. Those who opt for tort retain traditional tort compensation rights and liabilities. Those who choose no-fault neither recover it, nor are liable to others, for non-economic losses for less serious injuries incurred in auto accidents. The plan does not affect existing insurance coverage for property damage resulting from auto accidents.<sup>51</sup>

Stephen Carroll's statement to the Senate was in response to a study performed by Mr. Carroll and others. That study basically states that the proposed Auto Choice Reform Act would give auto insurance policy owners a choice between staying under their current State's system or electing an absolute no-fault system.

In Minnesota, the premium savings, under Auto Choice Reform, would save policy owners who switch to absolute no-fault 30% on their premiums. As to those policy owners who only have mandatory coverages, in Minnesota, those minimally insured policy owners would save in excess of 60% on premium. The conclusion from this study was stated as follows:

The Choice Plan can deliver on its promise to offer dramatically less expensive insurance to policy owners willing to give up access to compensation for non-economic loss without affecting those who want to retain access to compensation for all their losses, both economic and non-economic. If insurers pass their cost savings onto policy owners, the adoption of a Choice Plan would allow

*Policy Owners* who are willing to waive their tort rights to save approximately 30%, on average, on their automobile insurance premiums;

*Policy Owners* who prefer to retain their full tort rights

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50. Auto Choice Reform Act of 1997, S.625, 105th Congress, 1st Sess. (1997).

51. See Statement of Stephen Carroll to the Commerce, Science, and Transportation Committee of the United States Senate (July 17, 1997).

to do so, at essentially the same cost as under their State's current system.<sup>52</sup>

In sum, it appears that the Auto Choice Reform Act of 1997 is good legislative policy. Those people who purchase auto insurance policies at the minimal levels will save. Their savings would then be available to be spent on other more important needs. In addition, those who want to retain their present auto insurance system, with full tort rights, may choose to do so.

## V. CONCLUSION

In Minnesota, tort thresholds must be pled and proven before a claimant may recover non-economic damages. While nationwide the frequency of auto claims and the amounts paid to resolve auto claims has ceased rising, in Minnesota insurers pay more to resolve bodily injury claims than in other states. Tort thresholds do work nationally and in Minnesota. The proposed Auto Choice Reform Act would result in a reduction in insurance premiums in Minnesota.

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52. *Id.* at 7.

