THE "NEW" VERBAL THRESHOLD: BUT IS IT IMPROVED?

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I. Introduction

It has been over twenty-five years since New Jersey embraced the concept of no-fault auto insurance. The resulting relationship has hardly been a match made in heaven. After making a number of adjustments throughout the years, the legislature recently revamped the no-fault law in yet another attempt to accomplish what appears to be two divergent objectives: reducing premium costs and maintaining one of the highest levels of benefits in the country.

One of the primary features in most no-fault insurance laws is the trade-off between receiving prompt medical benefits without regard to fault and limiting the right to sue for non-economic loss, or "pain and suffering."[1] Since New Jersey's adoption of no-fault auto

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[1] Non-economic loss is defined as "pain, suffering and inconvenience." N.J. STAT. ANN. § 39:6A-2(i) (1990).

insurance in 1972, the State has tinkered with the limitation on lawsuits several times in an effort to rein in costs arising from minor accidents. However, none of the various plans have successfully limited the number or related costs of lawsuits for pain and suffering. The most recent legislation addressing the "lawsuit threshold" again purports to limit the costs associated with auto accident related lawsuits.[2] This Article will trace the history of the various tort thresholds in each of its incarnations since 1972. In addition, this article will examine the likelihood that the latest version of the tort threshold can do what previous versions could not: lower the cost of New Jersey drivers' auto insurance premiums.

II. Background

The state's experience with no-fault automobile insurance can hardly be termed an unmitigated success. In 1972, responding to rising automobile insurance costs and long delays in receiving compensation under the tort system then in existence,[3] New Jersey enacted its first no-fault auto insurance law, which mandated a 15% reduction in auto insurance liability premiums.[4] Under this framework, medical benefits for those injured in automobile accidents were shifted from a third-party, or tort system of compensation, to a first-party insurance system. The goals of the Legislature in enacting this reform were fourfold: (1) Providing prompt and efficient benefits to all accident victims (the *Reparation* objective); (2) reducing or stabilizing automobile insurance premiums (the *Cost* objective); (3) making insurance coverage readily available (the *Availability* objective); and (4) streamlining judicial procedures for third-party claims (the *Judicial* objective).[5]

Among other things, the law provided unlimited first-party medical expense coverage, or personal injury protection (PIP), and

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2 *See* 1998 N.J. Laws ch. 21, § 1.

3 *See* Rybeck v. Rybeck, 141 N.J. Super. 481, 489 (Law Div. 1976), *appeal dismissed*, 150 N.J. Super. 151 (App. Div. 1977), *certif. denied*, 75 N.J. 30 (1977).

4 *See* N.J. STAT. ANN. § 39:6A-18 (1990).

5 *See* Gambino v. Royal Globe Ins. Co., 86 N.J. 100, 105-06 (1981).

established a verbal threshold or an alternative $200 threshold in order for claimants to sue for pain and suffering.[6] While the primary objective of reparation[7] was met by the unlimited first-party coverage for medical expenses through PIP benefits, the original no fault law failed to reduce either the number of auto-related lawsuits or premium costs.[8] The anticipated savings never materialized for the simple reason that the alternative $200 threshold did not deter lawsuits.[9] As a result of providing unlimited no fault medical coverage with no meaningful limitation on tort suits, insurers were unable "to make up their increased medical payments by saving on legal costs, as anticipated from the desired decrease in suits."[10] This fact, coupled with runaway national inflation,[11] caused premiums to

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6 *See* N.J. STAT. ANN. § 39:6A-8(a) (repealed 1988), *reprinted in* HISTORICAL AND STATUTORY NOTES, N.J. STAT. ANN. § 39:6-8 (emphasis added). The statute states:

> *Every* owner, registrant, *operator* or occupant of an automobile to which ...personal injury protection coverage, regardless of fault, applies, and every person or organization legally responsible for his acts or omissions, *is hereby exempted from tort liability for noneconomic loss* to a person ...as a result of bodily injury ...*if the bodily injury is confined solely to the soft tissue of the body and the medical expenses* incurred or to be incurred by such injured person or the equivalent value thereof for the reasonable and necessary treatment of such bodily injury *is less than $200.00, exclusive of hospital expenses, X-rays and other diagnostic medical expenses.*

Id.(emphasis added).

The bill sent to the floor by the Assembly Insurance Committee permitted a person to sue for pain and suffering for serious injury. *See id.* This was defined as "death, permanent disability, permanent significant disfigurement, permanent loss of any bodily function or loss of a body member in whole or in part," or an injury resulting in over $500 in medical expense costs. *See id.* Contemporaneous newspaper articles credit the trial lawyers for lowering the proposed threshold even further, to $200. Herb Jaffe, *Assembly Adopts No-Fault Bill*, THE STAR-LEDGER (Newark), May 16, 1972, at 1; *See also* Herb Jaffe, *GOP Clash Delays Assembly No-Fault Vote*, THE STAR-LEDGER (Newark), May 12, 1972 at 12.

7 *See Gambino*, 86 N.J. at 106 (citing N.J. STAT. ANN. § 39:6A-1, *et seq.)* ("The reparation objective was viewed as the primary purpose of an automobile insurance system and was given priority by the Commission in formulating the proposals which served as the basis for the PIP statute....").

8 *See* Emmer v. Merin, 233 N.J. Super. 568, 572 (App. Div. 1989).

9 *See id.*

10 Frazier v. Liberty Mut. Ins. Co., 150 N.J. Super. 123, 133 (Law Div. 1977).

11 From 1974 to 1981, the annual rise in the Consumer Price Index averaged 9.4%, with half of those years registering double-digit inflation. *See* U.S. Commerce Dept., *Consumer Price Index* (1974-1981).

skyrocket.[12]

In response to these problems, the Legislature made several attempts to control costs associated with auto-related lawsuits during the ensuing years. In 1983, the $200 threshold was paired with an optional $1500 threshold.[13] Drivers who chose the higher threshold were promised a reduction in premiums in return for limiting their right to sue.[14] Although many drivers opted for the higher threshold in order to reduce their premiums, overall premiums continued to rise along with the number of auto-related lawsuits.[15] The higher tort threshold resulted in both higher PIP and bodily injury (BI) rates as injured parties merely strove to meet the new target.[16] Thus, the law had a built-in component that encouraged unnecessary medical treatment.

III. The Verbal Threshold: 1988 - Present

In 1988, New Jersey's tort threshold landscape experienced its most drastic alteration up to that time with the adoption of the "verbal threshold," which took effect January 1, 1989.[17] Simply put, the threshold to sue a tortfeasor for non-economic loss resulting from an automobile accident became one defined solely by words rather than money.[18] The statute permitted persons injured by an

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12 *See Emmer*, 233 N.J. Super. at 572.

13 *See* 1983 N.J. Laws. 362.

14 *See id.* § 14.

15 *See Emmer*, 233 N.J. Super. at 573.

16 *See id.*

17 *See* N.J. STAT. ANN. § § 39: 6A-1 THROUGH 39A: 6A-35. For a complete discussion of the history of and politics behind the enactment of the verbal threshold, see Lori A. Dvorak, *No-Fault Automobile Insurance Law: Speaking Out on New Jersey's Verbal Threshold*, 16 SETON HALL LEGIS. J. 716, 723-31 (1992).

18 Although a primary objective of the original no-fault Act was to provide prompt reparation to accident victims, see test accompanying *supra* note 5,

> [t]he reparation objective . . . has become less of a concern to the Legislature as the PIP system has been revised over the years . . . . By 1988, ensuring full recovery to those injured in automobile accidents was considered less critical than the perception of skyrocketing claims against insurance companies and concomitant

automotive tortfeasor to sue only if the injured party:

> ha[d] sustained a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or 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 that person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.[19]

It did not take long for debates to arise over the meaning of certain types of injuries in the verbal threshold statute, especially the amorphous types six through eight: 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; and 8) significant limitation of use of a body function or system. A primary issue the courts initially faced was whether the judge or jury should decide whether a plaintiff's injuries were "permanent," "consequential," or "significant." The New Jersey Supreme Court ("Supreme Court") resolved the conflict among the Appellate Division's holdings[20] when it reviewed the decision in *Oswin v.*

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skyrocketing insurance rates.

Craig & Pomeroy, NEW JERSEY AUTO INSURANCE LAW 63 (Gann 1999). Indeed, the legislature reduced PIP coverage several times by: (1) mandating deductibles and co-payments in 1988; (2) reducing the unlimited PIP benefits to $250,000 in 1990; and (3) offering PIP coverage options as low as $15,000 in 1998. *See* N.J. STAT. ANN. § 17:28-1.1 (1999).

19 N.J. STAT. ANN. § 39:6A-8(a) (1990). The types of injuries described in the statute were borrowed verbatim from New York's threshold law, N.Y. INS. LAW § 5104(a) (Consol. 1985), which permitted suits only for "serious injuries" as defined by the language adopted by New Jersey. Although the 1988 Act does not use the term "serious injury," the courts have recognized that only serious injuries may pierce the threshold. *See* Oswin v. Shaw, 129 N.J. 290, 315 (1992).

20 Compare Oswin v. Shaw, 250 N.J. Super. 461 (App. Div. 1991), with Brown v. Puente, 257 N.J. Super. 203 (App. Div. 1992) and Siriotis v. Gramuglia, 254 N.J. Super. 223 (App. Div. 1991). The Appellate Division in *Oswin* relied heavily on Governor Kean's Conditional Veto Message for its decision:

Shaw.[21] In *Oswin*, the Court looked for guidance in New York case law, that had interpreted the state's parallel threshold provisions.[22] The *Oswin* Court adopted what can be characterized as a "summary judgment plus" standard. The Court stated that "[t]he question of whether an injury is 'serious' is a matter for the court to decide, but disputes regarding the nature and extent of the injury will survive summary judgment *only if the plaintiff has submitted objective medical evidence to support his or her claims*."[23]

> [A] better compromise than that contained in the present bill, and one which can be supported and passed in both Houses, has been reached. That compromise is to make the verbal threshold the basic liability coverage in every automobile insurance policy the law of the land in New Jersey. At the same time, individual insureds will be permitted to opt for a monetary threshold, at a higher cost if they so choose. I recommend adoption of a zero dollar threshold option. In effect, the zero dollar threshold will allow individuals to opt into a pure fault liability system, a choice which will be reflected in their higher premiums. The purpose of the zero dollar option is to remove the incentive to inflate medical bills—thereby placing an unnecessary burden on PIP coverage—in order to reach some specified monetary threshold. I believe the citizens of New Jersey recognize that when their medical bills are being promptly paid, without regard to fault, they lose next to nothing in relinquishing the ability to sue for pain and suffering for non-serious injuries only and, consequently, the vast majority will maintain the base verbal threshold. The verbal threshold contained in this recommendation is patterned after that in force in New York State (See New York Insurance Law §§ 5102, 5104). This verbal threshold specifically sets forth those injuries which will be considered "serious." Lawsuits for non-economic injuries, such as pain and suffering, will be allowed for those enumerated "serious injuries" only. It is my intention that the term "serious injury," as defined in this recommendation, shall be construed in a manner that is consistent with the New York Court of Appeals' decision in Licari v. Eliot, 57 N.Y.2d 230, 455 N.Y.S.2d 570, 441 N.E.2d 1088 (1982). *Whether a plaintiff has sustained a "serious injury" must be decided by the court, and not the jury.* Otherwise, the bill's essential purpose of closing the courthouse door to all lawsuits except those involving *bona fide* serious injuries will be diluted and the bill's effectiveness will be greatly diminished. In addition, *strict construction of the verbal threshold is essential;* any judicial relaxation of this plain language will impede the intent of maintaining the substantial benefits of no-fault at an affordable price.

Oswin, 250 N.J. Super. at 464-65 (emphasis added).

21 *See* Oswin v. Shaw, 129 N.J. 290 (1992).

22 *See id.* at 304.

23 *Id.* (emphasis added).

Ultimately, the *Oswin* Court announced a three-part requirement for plaintiffs seeking to pierce the verbal threshold under types 6, 7 or 8. First, the plaintiff "must submit *objective, credible* evidence [of a serious injury] that could support a jury finding in his or her favor."[24] Next, "[a] plaintiff must show a nexus between the injury and the disability."[25] Finally, "a plaintiff must show that 'the injury had a *serious impact* on the plaintiff and her life.'"[26]

Although enactment of the verbal threshold may have prevented some minor suits from entering the judicial system, overall the verbal threshold did not serve to accomplish the goals underlying the no-fault statute: "to reduce the amount of litigation and to hold down the cost of premiums."[27] The verbal threshold, rather than eliminating the padding of medical bills to meet a monetary threshold, merely shifted the excessive costs to expensive diagnostic testing and extended treatment procedures in an effort to produce objective credible evidence of serious injuries.[28] With virtually unlimited PIP protection, persons injured in auto accidents had an incentive to take whatever measures were necessary, no matter how non-therapeutic, to establish some objective proof of an injury.[29] The inevitable continuation in the rise of insurance costs and premiums under the verbal threshold system soon became a

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24 *Id.* at 319 *(emphasis added).*

25 *Id.* at 318.

26 *Id. (emphasis added)* (quoting *Oswin*, 250 N.J. Super. at 470).

27 *See Oswin*, 129 N.J. at 318.

28 *See* Governor's Reconsideration and Recommendation Statement to Senate, No. 3-L. 1998, ch. 21:

> By allowing recovery for injuries that are nonpermanent, i.e., that heal, and for fractures that are not serious, the statute has not served as a meaningful limitation to control premium costs. *Because the substantive standards are so nebulous*, moreover, *they have encouraged the employment of extensive and superfluous medical and chiropractic testing* and treatment in order *to establish standing to sue for pain and suffering.*

Id.(emphasis added).

29 During the seven-year period from 1988 to 1995, the latest year for which statistics are available, the average PIP claim paid in New Jersey rose an astounding 109%, from $3,594 to $7,527. *See* INSURANCE RESEARCH COUNCIL, INC., TRENDS IN AUTO INJURY CLAIMS (1996). During this same period, the average national PIP claim rose only 42%. *See id.* In 1988, the average PIP claim in New Jersey was 38% higher than its national counterpart and by 1995, insurers in New Jersey were paying 104% more than the national average for PIP claims. *See id.*

political hot button issue.[30]

IV. The 1998 Legislation: Tightening the Threshold

The verbal threshold, together with a number of other aspects of the State's automobile insurance law, was revamped again in 1998.[31] The comprehensive legislation, passed and signed into law in Spring 1998, was the culmination of more than a year of political posturing and maneuvering. The Legislature defeated several auto insurance bills in 1996, including one bill aimed at barring motorists' ability to sue and another that would have created a peer review system to review medical bills of automobile accident victims.[32]

Governor Christine Todd Whitman, facing reelection and anticipating the importance of automobile insurance reform in the impending campaign, called for comprehensive auto insurance reform in her State of the State address on January 14, 1997.[33] Governor Whitman's proposal, termed "Consumers' Choice," envisioned making four insurance options available to drivers, with the cost of each option dependent on the insured's preference for giving up or limiting his or her right to sue for non-economic losses.[34] The Legislature responded by avoiding the issue in an

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30 *See, e.g.*, Jennifer Preston, *The Whitman Agenda: The Speech*, N.Y. TIMES, Jan. 15, 1997, at B1.

31 *See* 1998 N.J. Laws ch. 21.

32 *See* S. 1365, 207th Leg. Sess. (N.J. 1996); S. 2291, 207th Leg. Sess. (N.J. 1997).

33 *See* Joe Donahue & Robert Schwaneberg, *Whitman Auto Plan Trades Driver Rights for Price Cuts*, THE STAR-LEDGER, Jan. 15, 1997 at 15.

34 *See* Robert Schwaneberg, *"Choice" a Gamble for Drivers; Whitman's Insurance Proposal Could Require Painful Decisions*, THE STAR-LEDGER (Newark), Jan. 19, 1997, at 1 [hereinafter *"Choice"*]. The Governor's proposal would have given drivers the choice of one of these four coverages:

> (1) "Economic Choice" — "In return for projected savings of 20 to 25 percent, drivers who choose this plan would give up their right to sue for pain and suffering, no matter how serious their injuries might be." *Id.*
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> (2) "Scheduled Benefits" — "Drivers who take this option would give up their right to sue for pain and suffering but would collect [modest benefits] under their insurance policies." *Id.* The plan foresaw a five to ten percent premium savings for drivers choosing this option. *See* Preston, *supra* note 30, at B1.

election year and passing limited reforms that allegedly reduced fraud in the PIP system and eliminated the surcharges that insurance companies were permitted to charge insureds for accidents or moving violations.[35]

As anticipated, automobile insurance reform became a prominent issue in the gubernatorial race between Governor Whitman and her Democratic challenger, State Senator James E. McGreevey.[36] Upon passage of the reforms in June 1997, McGreevey characterized the changes as "a betrayal of the interests of the motoring public," and called for an immediate across-the-board 10% reduction in insurance rates.[37] He proposed no corresponding reduction in benefits. Governor Whitman ordered an immediate freeze on auto insurance rates until January 1998,[38] and pushed her four-option plan that had been rejected by the Legislature earlier in the year.[39] The strident debate over insurance reform continued throughout the campaign and contributed to McGreevey's strong, but ultimately unsuccessful, showing at the polls in November.[40]

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(3) "Serious Injury Threshold" — A verbal threshold similar to that already in place, with pain and suffering suits permitted for injuries causing death, serious impairment of a bodily function or permanent and serious disfigurement. *See "Choice," supra*. Five to ten percent savings were predicted. *See* Preston, *supra* note 30, at B1.

(4) "Lawsuit Recovery" — Unlimited right to sue for pain and suffering with accompanying increase in premium costs. *See "Choice," supra.*

35 *See* 1997 N.J. Laws ch. 151; *see also* Robert Schwaneberg, *Whitman Gets Watered-Down Auto Reforms; GOP Sees a Start, Democrats a Lie*, THE STAR-LEDGER (Newark), June 27, 1997, at 21 [hereinafter *Whitman Gets Watered-Down Auto Reforms*]; Robert Schwaneberg, *Whitman Enacts Auto Insurance Reform*, THE STAR-LEDGER (Newark), July 1, 1997, at 19. Each major Legislative initiative since the passage of No-Fault in 1972 allegedly reduced fraud. *See* 1983 N.J. Laws ch. 362, § 8; 1988 N.J. Laws ch. 119, § 6; 1990 N.J. Laws ch. 8, §§ 51, 56; *see also* State Farm Ins. Co. v. State, 124 N.J. 32 (1991).

36 *See* Joe Donahue, *N.J. Kept Lead in Car Insurance in 1997 But Reforms Are Expected to End 5-Year Reign*, THE STAR-LEDGER (Newark), Mar. 25, 1999, at 21.

37 *See Whitman Gets Watered-Down Auto Reforms*, *supra* note 35, at 19.

38 *See* Robert Schwaneberg, *Whitman Freezes Insurers' Car Rates; McGreevey Labels It Election-Year Stunt*, THE STAR-LEDGER (Newark), July 2, 1997, at 1. No insurance company has received a rate increase since that announcement.

39 *See* Bruno Tedeschi and Eugene Kiely, *Drivers Get More Promises of Cuts; Candidates Trade Jabs on Insurance*, THE RECORD (Bergen Cty., N.J.), Aug. 12, 1997, at A1; *see also supra* note 34 (discussing the four-option plan).

40 *See* Deborah Kalb, *New Jersey Governor's Race: Whitman Faces Tougher-Than-Expected Challenge*, GANNETT NEWS SERV., Oct. 22, 1997.

Following her victory, Governor Whitman acted quickly to follow through on her campaign promise by joining with legislative leaders to form a bipartisan committee of Senate and Assembly lawmakers to draft an auto insurance reform package.[41] The Joint Committee on Automobile Insurance Reform conducted a series of hearings in late 1997 and early 1998 that sought to address the range of auto insurance components needing revision.[42] The hearings culminated in Senate Bill No. 3, which passed the Senate on April 2, 1998.[43] The Assembly, however, passed a different version of the bill that would ensure rate cuts for many, but would eliminate the rate caps for drivers in certain urban areas of the state, causing those persons' rates to increase dramatically.[44] Fearing a legislative stalemate, Governor Whitman urged the Senate to pass the revised bill with the understanding that she would conditionally veto it and return it with compromise provisions that would be acceptable to both Houses of the Legislature.[45] The bill, entitled the Automobile Insurance Cost Reduction Act ("AICRA"), eventually passed both Houses and was signed into law by the Governor on May 19, 1998.[46]

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41 *See* Robert Schwaneberg, *Senate Backs Panel to Study Insurance*, THE STAR-LEDGER (Newark), Dec. 2, 1997, at 20.

42 *See Public Testimony Concerning Automobile Insurance Reform, Including the Current System of Private Passenger Automobile Insurance in This State and the Factors That Contribute To Its Costs*, Committee Meeting of Joint Committee on Automobile Insurance Reform, Dec. 16, 1997; *Testimony of the Outline of the No-Fault System As It Has Developed in New Jersey Since Enactment of the "New Jersey Automobile Reparation Reform Act" and an Overview of the Components of the Current System*, Committee Meeting of Joint Committee on Automobile Insurance Reform, Jan. 5, 1998; *Testimony Regarding the Elimination of the No-Fault System or Eliminating Mandatory Insurance in General*, Committee Meeting of Joint Committee on Automobile Insurance Reform, Jan. 15, 1998; *Testimony Regarding Personal Injury Protection (PIP) Reforms and Related Issues*, Committee Meeting of Joint Committee on Automobile Insurance Reform, Jan. 22, 1998; *Testimony Regarding Recent Anti-Fraud Reforms and Additional Remedies, the Problem of the Uninsured Driver and the "Mini-Policy" Alternative*, Committee Meeting of Joint Committee on Automobile Insurance Reform, Feb. 9, 1998; *Testimony from the Commissioner of Banking and Insurance and Invited Witnesses*, Committee Meeting of Joint Committee on Automobile Insurance Reform, Feb. 23, 1998.

43 *See* Myra A. Thomas, *New Jersey's Auto Insurance Problem May Trickle Down*, BUS. NEWS N.J., Apr. 6, 1998, at 20.

44 *See* Robert Schwaneberg and Tom Hester, *Auto-Rate Reform Hits a Dilemma: Cutting Costs in Suburbs Will Put Burden on Poor*, THE STAR-LEDGER (Newark), April 20, 1998 at 1.

45 *See* Robert Schwaneberg, *Governor Takes Reins of Car Rate Reform Bill*, THE STAR-LEDGER (Newark), April 22, 1998, at 23.

46 *See* 1998 N.J. Laws ch. 21, amended by 1998 N.J. Laws ch. 22.

The AICRA contained numerous provisions aimed at reducing the cost of insurance.[47] Significantly, the Legislature recognized "that in order to keep premium costs down, the cost of the benefit must be offset by a reduction in the cost of other coverages, most notably a restriction on the right of persons who have non-permanent or non-serious injuries to sue for pain and suffering."[48] Included among the AICRA provisions was a revision of the verbal threshold and a corresponding 22% reduction in BI liability rates for those choosing the new verbal threshold option.[49] Pursuant to the AICRA, drivers who choose the verbal threshold option may only sue for non-economic losses incurred in an auto accident when the driver "has sustained a bodily injury which results in death; dismemberment; significant disfigurement or significant scarring;

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47 Among the myriad modifications to existing law, the AICRA introduced a certification requirement whereby every complaint brought under the threshold must be accompanied by a certification from the treating physician attesting to the seriousness of the plaintiff's condition, and imposed strict penalties for the fraudulent filing of such certifications. *See* 1998 N.J. Laws ch. 21, § 11. Moreover, the AICRA established an Office of Fraud Prosecutor within the Department of Law and Public Safety to investigate and prosecute fraud within the industry. *See id.* §§ 32 - 46. The AICRA also allowed the option to choose a "basic" insurance policy that would provide $15,000 in medical expense benefits rather than the previously mandatory $250,000 benefit level. *See id.* § 4.

The most controversial aspect of the law has turned out to be the provision that "[t]he commissioner shall set forth by regulation a statement of the basic [PIP] benefits which shall be included in the policy." 1998 N.J. Laws ch. 21, §§ 4, 6. Pursuant to that mandate the commissioner promulgated regulations on September 8, 1998, see 30 N.J. Reg. 3211(a), that drew howls of protest from some health care providers. *See* Michael Booth, *Chiropractors Put Crimp in PIP Reform*, N.J. L.J., Nov. 9, 1998, at 1 [hereinafter *Chiropractors*]; Nancy Ritter, *Auto Regulations Headed For Snag?*, N.J. LAW., Oct. 19, 1998, at 1; Rocco Cammarere, *Getting Treated May Be Big Pain*, N.J. LAW., Sept. 7, 1998, at 1. The protestors advocated the position that:

> [the regulations would] eliminate the ability of automobile accident victims to undergo therapeutic care, and [would] force all health care providers to treat their auto accident patients according to unscientific, nonsensical medical protocols or 'care paths.' These care paths will limit every future auto accident victim to predetermined methods and amounts of care.

Chiropractors, *supra*, at 10. Despite the outcry, the Department of Banking and Insurance adopted the regulations in late November, which took effect on March 22, 1999. *See* 30 N.J. Reg. 4401(a). The legal challenges to the regulations were rejected by the Appellate Division in a comprehensive 81-page decision in June 1999. *See* New Jersey Coalition of Health Care Professionals, Inc. v. New Jersey Dept. of Banking and Ins., Div. of Ins., 323 N.J. Super. 207 (App. Div. 1999).

48 1998 N.J. Laws ch. 21, § 1.

49 *See id.* §§ 11, 67a(2).

displaced fractures; loss of a fetus; *or a permanent injury within a reasonable degree of medical probability*, other than scarring or disfigurement."[50]

The law further specified that "[a]n injury shall be considered permanent when the body part or organ, or both, has not healed to function normally and will not heal to function normally with further medical treatment."[51] The word "serious" is not used anywhere in the revised threshold. The Legislature, however, provided ample evidence of its intent that only permanent *and serious* injuries should be permitted to pierce the verbal threshold.[52] This intent is stated throughout the Legislature's findings and declarations.[53] Comparing the revised verbal threshold language

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50 1998 N.J. Laws ch. 21, § 11 (emphasis added) (effective Mar. 22, 1999).

51 *Id.*

52 *See* 1998 N.J. Laws ch. 21, § 1.

53 *Id.* The statute states:

> Whereas, The principle underlying the philosophical basis of the no-fault system is that of a trade-off of one benefit for another; in this case, *providing medical benefits in return for a limitation on the right to sue for non-serious injuries*; and
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> Whereas, While the Legislature believes that it is good public policy to provide medical benefits on a first party basis, without regard to fault, to persons injured in automobile accidents, *it recognizes that in order to keep premium costs down, the cost of the benefit must be offset by a reduction in the cost of other coverages, most notably a restriction on the right of persons who have non-permanent or non-serious injuries to sue for pain and suffering*; and
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> . . . .
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> Whereas, To meet these goals, this legislation provides for the creation of two insurance coverage options, a basic policy and a standard policy, provides for cost containment of medical expense benefits through a revised dispute resolution proceeding, *provides for a revised lawsuit threshold for suits for pain and suffering which will eliminate suits for injuries which are not serious or permanent, including those for soft-tissue injuries*, would more precisely define the benefits available under the medical expense benefits coverage, and establishes standard treatment and diagnostic procedures against which the medical necessity of treatments reimbursable under medical expense benefits coverage would be judged; and
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> Whereas . . . fraud, whether in the form of . . . inflated claims, staged accidents, falsification of records . . . has increased premiums . . . ; and
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> . . . .
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> Whereas, The Legislature has thus addressed these and other issues

with the prior language reveals that the primary change is the telescoping of former injury types six through nine into one type of injury: "permanent."[54]

V. "Permanent Injury" — What Does It Mean?

In the not-too-distant future, New Jersey courts will determine the parameters of the new verbal threshold law. At that time, the debate will center upon the meaning of "permanent injury." This apparently simple phrase will likely turn out to be anything but simple to define.

The resolution of this issue will determine whether the 1998 reforms are hollow promises (like in 1972) to be followed by steep rate increases or will actually deliver the mandated 22% reduction in BI liability rates. The first and most obvious place to seek meaning in the term "permanent injury" is the definition contained in the statute itself.[55] The AICRA specifically states that "[a]n injury shall be considered permanent when the body part or organ, or both, has not healed to function normally and will not heal to function normally with further medical treatment."[56] Clearly, this definition should eliminate any injuries that previously pierced the threshold under types eight and nine because those types did not require the injury to be permanent. However, it is not clear whether injuries previously characterized as type six or seven are still actionable.

There are at least two competing arguments. Gerald H. Baker, a member of the Board of Governors of the American Trial Lawyers Association-New Jersey, has offered one interpretation.[57] According

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> in this comprehensive legislation designed to preserve the no-fault system, while at the same time reducing unnecessary costs which drive premiums higher.

Id.

54 The new language also attempts to allow recovery only for serious fractures. *See id.*

55 *See* Wingate v. Estate of Ryan, 149 N.J. 227, 236 (1997). "The first consideration when interpreting a statute is the statute's plain meaning." *Id.*

56 1998 N.J. Laws ch. 21, § 11.

57 *See* Gerald H. Baker, *How Insurance Reform Changes the No-Fault Game*,

to Baker, "the [verbal threshold] statutory amendments will virtually eliminate summary judgment motions in verbal threshold cases."[58] Baker reasons that the literal language of the revised threshold simply requires a doctor, under penalty of perjury, to certify that the patient's body organ or part has not healed and will not heal to function normally, in order to establish a *prima facie* case and raise a genuine issue of material fact.[59] Moreover, Baker contends that the three-part *Oswin* requirement to meet the verbal threshold no longer applies.[60] According to his argument, the legislature provided the safeguards it desired by defining permanent injury and by requiring a doctor's certification.[61] In addition, Baker argues that the legislature's failure to explicitly incorporate *Oswin's* requirement of proof of "serious impact" provides further evidence of the Legislature's intent to abrogate the subjective standard set forth by the Supreme Court in *Oswin*.[62]

However, Baker's article, far from constituting a "literal" interpretation of the statute, ignores crucial Legislative language and history, and utterly fails to address how the 22% savings mandated by the legislature will materialize. Indeed, evidence presented by doctors to the Department of Banking and Insurance during the adoption of the PIP medical protocol regulation[63] demonstrated that many law firms and health care providers collude to inflate claims and pierce the verbal threshold for insignificant injuries.[64] Therefore, the doctor-certification process will not only fail to reduce premiums, but will likely increase them if the certification immunizes a plaintiff from a summary judgment motion.

The second argument begins with the recognition that when construing a statute, courts must "effectuate the legislative intent [of the statute] in light of the language used and the objects sought to be

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N.J. L.J., Jan. 25, 1999, at S-4.

58 *Id.* at S-6.

59 *See id.* at S-6 through S-7.

60 *See id.* at S-5.

61 *See id.* at S-6 through S-7.

62 *See id.* at S-5 through S-6. Baker also argues that this is due on its reliance on Florida's verbal threshold, which does not require proof of "serious injury." *See id.*

63 *See* N.J. ADMIN. CODE tit. 11, § 3-4.

64 *See* Appendix of Respondent Dept. of Banking and Ins. at 57-59, 115-17, 145-51 and Interveners-Insurers' Appendix at 74-83, 95-97, New Jersey Coalition of Health Care Professionals, Inc. v. New Jersey Dep't of Banking and Ins., Div. of Ins., No. A-2558-98T3 (N.J. Super. Ct. App. Div., filed May 5, 1999).

achieved."[65] Thus, meaningful statutory interpretation requires a court to "discern the intent of the Legislature not only from the terms of the Act, but also from its structure, history and purpose."[66] The language, structure, history and purpose of AICRA all emphasize the Legislature's intention that the lawsuit *limitation* should be construed broadly so as to eliminate many of the lawsuits that are now permitted.

Most significantly, the explicit language in the Act, the statute's preamble, twice equates the phrases "permanent" and "serious."[67] In other words, the revised lawsuit threshold "will *eliminate* suits for injuries which are *not serious or permanent*, including those for soft tissue injuries," and there must be "a restriction on the right of persons who have *non-permanent or non-serious* injuries to sue for pain and suffering."[68] This legislative equation of "permanent" and "serious" is not surprising because the old verbal threshold definition also did not use the term "serious injury," yet the Supreme Court interpreted the law to require it.[69] Accordingly, when the Legislature redefined the verbal threshold and *restricted* its application, it reasonably assumed that at a minimum, the same interpretation would apply.[70] Furthermore, the Legislature, in its statement describing the Act, stated that the new verbal threshold was intended *"to further limit* the number of lawsuits filed and thereby *reduce premiums* for bodily injury coverage."[71] Significantly, the statement concluded that, "no provision in this bill

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65 Merin v. Maglaki, 126 N.J. 430, 435 (1992) (citing State v. Maguire, 84 N.J. 508, 514 (1980)).

66 Jiminez v. Baglieri, 152 N.J. 337, 346-47 (1998) (quotations omitted).

67 *See* 1998 N.J. Laws ch. 21, § 1.

68 *Id.* (emphasis added). As to the actionable nature of soft tissue injuries, compare the intended result of the new law to the Court's interpretation of the previous version: "Although our requirement of objective, credible evidence will eliminate many soft-tissue injuries, we do not presume that plaintiffs alleging such injuries are necessarily barred from recovery." Oswin v. Shaw, 129 N.J. 290, 319 (1992).

69 *See Oswin*, 129 N.J. at 318-19 (1992).

70 *See* Chase Manhattan Bank v. Josephson, 135 N.J. 209, 227 (1994) ("[W]e presume that the Legislature is familiar with existing judicial statutory interpretations."); Toogood v. St. Andrews at Valley Brook Condominium Ass'n, 313 N.J. Super. 418, 423 (App. Div. 1998). "The Legislature is deemed knowledgeable of judicial interpretations of its enactments. Its failure to disagree with the longstanding interpretation of the term ...[is] powerful evidence that the Legislature agrees with the interpretation of [the term]." *Id.*

71 1998 N.J. Laws ch. 21, Leg. Statement.

is intended to repeal otherwise applicable case law,"[72] manifesting the Legislature's understanding that the *Oswin* requirements remain in effect, contrary to Baker's implied repeal argument.

The AICRA also mandates a premium reduction of at least 22% for bodily injury liability coverage for those who choose the new verbal threshold option.[73] The only possible way this major mandated reduction can be accomplished is if there is a drastic cutback in the number of verbal threshold lawsuits that currently make it through the courts. The Governor's statement to the Senate clearly enunciates this objective:

> *The 1988 verbal threshold has not worked.* By allowing recovery for injuries that are nonpermanent, i.e., that do not heal, and for fractures that are not serious, the statute has not served as a meaningful limitation to control premium costs...*Senate Bill No. 3 replaces the existing lawsuit threshold,* under which temporary, nonserious injuries qualify, *with a requirement* that fractures be displaced and *that other injuries be serious enough never to heal sufficiently to regain normal function.* In other words, *the injury must be to a "body part or organ" (as opposed to "tissue,"* which was consciously omitted from the definition in negotiations) and must be permanent in order for the injured party to have standing to sue.[74]

The Governor's conditional veto message also anticipated and expressly rejected the trial lawyers' claims that a doctor's certification precludes the entry of a summary judgment. The Governor stated that, "*[t]he certification* is intended as an anti-fraud measure to assure legitimacy; it is necessary to state a claim, not sufficient to establish one, and *will be subject to challenge through the normal discovery and summary judgment process.*"[75]

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[72] *Id.*

[73] *See* 1998 N.J. Laws ch. 21, § 67(a)(2). Bodily injury liability coverage insures a driver from suits brought by those injured in an accident for the driver's alleged negligence.

[74] *See* Governor's Reconsideration and Recommendation Statement to Senate, No. 3-L. 1998, ch. 21 (emphasis added).

[75] *Id.* (emphasis added).

Governor Whitman also unequivocally stated that Florida law should not be used as a guide in interpreting the New Jersey verbal threshold law despite the similarity in language.[76] First, because Florida does not define "permanent injury," there is no requirement that the injury be to a body part or organ and that it be serious enough so that it will never again heal and regain normal function.[77] Second, while Florida permits suits based on subjective accounts of pain, the New Jersey law explicitly states that the permanent injury cannot be based on subjective accounts of pain.[78] Finally, Florida law requires only some evidence of permanency, that may be provided by the patient alone, while New Jersey law states that "permanency must be attested by the treating physician under penalty of perjury, must be based on objective clinical evidence, and may not rely upon experimental testing or the subjective impressions of the patient."[79] The Supreme Court has stated that an Executive Statement is "strong evidence of legislative intent where it led directly to the legislation we are called upon to construe."[80]

An examination of the New Jersey Tort Claims Act ("NJTCA")[81] provides additional support for a restrictive interpretation of the verbal threshold. Although the NJTCA limits lawsuits for pain and suffering only "in cases of *permanent* loss of a bodily function, permanent disfigurement or dismemberment,"[82] the Supreme Court interpreted the Act to require "that a plaintiff must sustain a permanent loss of the use of a bodily function *that is substantial*."[83] In *Brooks v. Odom*,[84] the Supreme Court concluded

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76 *See id.*

77 *See id.*

78 *Id.*

79 *Id.*

80 *Oswin*, 129 N.J. at 308 (citations omitted). The Court in *Oswin* did not follow Governor Kean's statement concerning jury trials because there was nothing in the legislation that supported his interpretation. *See id.* Here, Governor Whitman detailed several cogent reasons in the law itself to support her statement. *See* Governor's Reconsideration and Recommendation Statement to Senate, No. 3-L. 1998, ch. 21

81 N.J. STAT. ANN. §§ 59:1-1 through 56:14-4 (1992). The Tort Claims Act defines when and how suits may be brought against public entities and their employees. *See* Brooks v. Odom, 150 N.J. 395, 402 (1997). "The purpose of the Act was to reestablish the general rule of the immunity of public entities from liability for injuries to others." *Id.*

82 N.J. STAT. ANN. § 59:9-2(d) (1992) (emphasis added).

83 *Brooks*, 150 N.J. at 406 (emphasis added).

84 150 N.J. 395 (1997).

that although the plaintiff experienced pain and permanent limitation of movement in her neck and back, her ability to function both in her employment and as a homemaker demonstrated that her injuries were not "substantial" and therefore precluded recovery.[85] Although the revised verbal threshold, like the NJTCA threshold, does not explicitly state a requirement that the injury be substantial, the reasoning adopted by the *Brooks* Court is consistent with the definition of "permanent injury" in AICRA, and its stated intent to limit lawsuits and reduce BI liability premiums by 22%.

Several NJTCA cases put a gloss upon the meaning of "permanent injury" in the context of tort limitations. In *Collins v. Union County Jail*,[86] decided the same day as *Brooks*, the Supreme Court held that a permanent post-traumatic stress disorder, a psychological injury, may be sufficient to qualify as a "permanent loss of a bodily function" under provisions of the NJTCA.[87] This is true when the injury results from "an aggravating and intrusive [physical] assault," even when not accompanied by residual physical injury.[88]

In *Hammer v. Township of Livingston*,[89] the plaintiff had been struck while walking across the road by a vehicle operated by the Township's fire chief. The Appellate Division held that the plaintiff could not meet the "permanent loss of a bodily function" standard where she conceded that the fractures and lacerations she sustained in the accident had healed completely and where her subjective complaints of residual pain were unsupported by objective medical evidence.[90] The plaintiff claimed that her post-traumatic stress disorder constituted a permanent loss of a bodily function that was substantial. However, the court rejected the claim based upon the psychiatrist's report that she suffered only mild distress, and because the record failed to demonstrate that the disorder prevented the plaintiff from living an ordinary life.[91]

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85 *See id.*

86 150 N.J. 407 (1997).

87 *See Brooks*, 150 N.J. at 406 (citing N.J. STAT. ANN. § 59:9-2(d)).

88 *Id.* The aggravating circumstance in the case was the perpetration of a rape by a corrections officer upon the plaintiff, an inmate.

89 318 N.J. Super. 298 (App. Div. 1998).

90 *See generally id.*

91 *See id.* at 306-07.

In addition to the support for a restrictive interpretation of the meaning of "permanent injury" provided by the cases decided under the NJTCA, the *Oswin* requirements also remain in place to accomplish the legislative goals of reducing lawsuits and lowering premiums. Specifically, *Oswin*'s requirement that a plaintiff submit objective, credible evidence of an injury is explicitly incorporated in the new law.[92] Moreover, the objective, clinical evidence must be performed in accordance with the medical protocols and valid diagnostic tests set forth in the administrative code.[93] Second, *Oswin*'s requirement that there be a nexus between the injury and the disability is nothing more than the ordinary proximate cause analysis that occurs in any personal injury suit. Finally, the requirement that a plaintiff show that the injury has a serious impact on her life necessarily follows from both the *Oswin* and *Brooks* decisions, in order to give meaning to the legislature's intent to limit the number of lawsuits and reduce premiums.

VI. Conclusion

The revised verbal threshold is intended to substantially limit the number of lawsuits brought as a result of auto accidents. In return, New Jersey drivers have been promised significant reductions in their auto insurance premiums. This intended scenario will become a reality only if the sought after limitations on lawsuits actually take effect. The only reasonable interpretation of the Act leads to the conclusion that the bar to piercing the verbal threshold has been raised by this new law. Accordingly, a plaintiff claiming a permanent injury should now have to demonstrate four elements to pierce the verbal threshold:

(1) The plaintiff's injury must be to a body part or organ. Soft-tissue injuries no longer qualify;

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92 1998 N.J. Laws ch. 21, § 11 ("The [physician's] certification *shall* be based on and refer to objective clinical evidence.") (emphasis added).

93 *Id.* (referring to N.J. ADMIN. CODE tit. 11, § 3-4).

(2) The plaintiff's injury must be permanent and substantial. This requirement eliminates all suits that were previously allowed for long-lasting, but non-permanent injuries. It also eliminates all suits for injuries that are not substantial under the *Brooks v. Odom* standard;
(3) The plaintiff's injuries must have a serious impact on the plaintiff's life. It is possible to conceive of injuries that, while fitting within the statute's definition of permanent and are substantial, do not have a serious effect on a person's day-to-day life. Applying the reasoning of *Oswin v. Shaw*, a plaintiff should not be permitted to recover for such injuries; and
(4) A plaintiff must continue to provide objective clinical evidence of an injury. This evidence must be in accordance with the standards set forth in N.J. ADMIN. CODE tit. 11, § 3-4, where applicable. Mere subjective complaints of pain have been, and continue to be, insufficient to pierce the threshold.

It necessarily follows that summary judgment motions to weed out non-serious injuries that do not meet the above criteria are a necessary element to meet the Cost, Availability and Judicial Objectives of the no fault law.

The threshold portion of New Jersey's no-fault law, has failed to fulfill its purpose of limiting lawsuits for over a quarter of a century. Moreover, the no-fault law can only work when it is interpreted to accomplish its goal: deterrence of non-substantial, non-serious injuries arising from auto accidents. Time will tell whether the mandated 22% BI liability rate reduction is as illusory as the 1972 mandated 15% rate reduction or whether it will end New Jersey's role as the most expensive state in the country to buy auto insurance.