

**THE "NEW" PERMANENCY STANDARD UNDER
NEW JERSEY'S AUTOMOBILE INSURANCE COST REDUCTION ACT**

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Introduction

In a continuing effort to balance the need for affordable insurance with the need to provide adequate compensation to tort victims, New Jersey's private passenger automobile insurance system has continued to evolve since the adoption of the no-fault statute in 1972. To this end, in 1988, New Jersey's legislature first provided drivers with the choice of opting to pay lower premiums in exchange for restricting the types of injuries for which a tort action may be brought. In order to reduce the skyrocketing costs associated with automobile insurance and reduce rates, in 1998 the State legislature adopted the Automobile Insurance Cost Reduction Act ("AICRA").² Among other things, AICRA further restricted the right to sue for non-economic damages for those New Jersey drivers choosing the "limitation on lawsuit" or "verbal threshold" option. In exchange, insureds choosing the option receive significant premium savings on their automobile insurance policies.

Overview of New Jersey's "Verbal Threshold" Law

Before an action for non-economic damages may be maintained by an insured who has elected the verbal threshold option, the insured must prove by objective medical evidence that he or she has sustained a "serious" injury. AICRA eliminated the more subjective categories of injury under prior law and recognized the following six categories of injury as meeting the threshold:

bodily injury which results in death; dismemberment; significant disfigurement or significant scarring; displaced fractures; loss of a fetus; or a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.³

A "permanent injury" is one in which "the body part or organ, or both, has not healed to function normally and will not heal to function normally with further medical treatment."⁴

Prior to AICRA, a plaintiff selecting the option could maintain a cause of action for non-economic damages only if he or she could demonstrate an objectively determined injury which met one of the categories listed within the statute and that the injury had a "serious impact" on his or her life. The serious impact test, first set forth by the New Jersey Supreme Court in 1992 in *Oswin v. Shaw*,⁵ provided that a plaintiff must prove a serious life impact in addition to proving a statutorily compensable injury in order to meet the verbal threshold. After the adoption of AICRA, the appellate court in *James v. Torres*⁶ held that in order to assert a claim for non-economic damages for claims *post*-AICRA, a plaintiff must continue to show a permanent injury meeting the revised statutory criteria that seriously impacts his or her life. The appellate court, in affirming the trial court's decision that the statute as amended incorporated the approach of prior case law, stated:

[t]he entire thrust behind the passage of AICRA was to reduce the number of litigated claims and, thus, to bring stability to automobile insurance premiums. If courts were to permit claims to go forward even in the absence of proof of a serious impact on a plaintiff's life, it would run counter to this legislative purpose.⁷

On June 14, 2005, the New Jersey Supreme Court issued two decisions, *DiProspero v. Penn* and *Serrano v. Serrano*,⁸ overruling *James* and its progeny and holding that AICRA eliminated the long-established "serious impact" test set forth in *Oswin*. Thus, under AICRA, a plaintiff need only establish a permanent injury in order to overcome the threshold.

On their face, the *DiProspero* and *Serrano* decisions render it easier for a plaintiff to vault the threshold and recover non-economic damages for any injury which can be described as permanent by a physician since a plaintiff no

longer must establish a serious life impact. Approximately one month after the *DiProspero* and *Serrano* opinions were released, the appellate court issued a decision directing that the new standard apply to all prejudgment matters pending in the trial courts and to all matters pending on appeal, *i.e.*, all "pipeline" cases.⁹ While noting the possible "tsunami effect" on the administration of justice, the court placed the burden of its decision on the doorstep of the legislature. There are at least four bills which have been introduced and are pending before the New Jersey Legislature to address the impact of the decisions, but it is unlikely that the bills will be acted upon before the fall of 2005. In the meantime, the trial courts now must apply *DiProspero* and *Serrano* to pending cases. The decisions do not automatically guarantee plaintiffs a favorable result. The New Jersey Supreme Court clearly contemplated AICRA's more stringent standard of permanency. Whether a more stringent standard of permanency will be enforced remains to be seen.

Providing "Objective Clinical Evidence" of a "Permanent" Injury

The compensable injuries under the verbal threshold set forth in AICRA are relatively clear with the exception of the "category six" injury where a plaintiff suffers "a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement."¹⁰ The statute defines "permanent" as "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."¹¹ A plaintiff seeking damages under this section must file a certification by a board-certified physician within 60 days of receipt of a defendant's answer, which states under penalty of perjury that the plaintiff has suffered a "permanent" injury based on "objective clinical evidence."¹² Objective clinical evidence can include medical testing, but such testing must be performed in compliance with medical protocols established by statute.¹³ Moreover, "[s]uch testing may not be experimental in nature or dependent entirely on subjective patient response."¹⁴

To date, the objective clinical evidence standard has not been difficult for plaintiffs to meet because diagnostic testing thresholds essentially have been replaced with the words of a physician set forth in a certification mirroring the statute.¹⁵ In *DiProspero*, however, the Court emphasized that AICRA requires that "objective clinical evidence" be examined with careful scrutiny. Such evidence must meet "rigorous standards," "intended to ensure that only honest and reliable medical evidence and testing procedures would be introduced to prove that an injury meets the threshold,"¹⁶ strengthening the objective clinical evidence requirement and suggesting the possibility that the objective clinical evidence standard should have enough "bite" to continue to make it difficult for plaintiffs electing the verbal threshold to recover pain and suffering damages for frivolous injuries.

In rejecting *Oswin's* "serious impact" standard, which produced sometimes inconsistent and often irreconcilable results, the *DiProspero* Court noted that the six injuries set forth in AICRA are serious by their very nature, because the Legislature already determined them to be serious.¹⁷ Consequently, inquiry by a court into the "seriousness" of an injury is unnecessary. Instead, there should be an overall tightening of and emphasis on the objective standards the Legislature left intact.¹⁸ The *DiProspero* decision thus supports a strengthening of the objective clinical evidence requirement in order to effectuate the Legislature's intent to eliminate subjectivity and provide careful, objective guidelines by which to measure permanency.

In keeping with this general interpretation, the Court in *Serrano* also referenced the "precise language of the new statute" and the fact that "the Legislature defined the degree to which it restricted the right to sue for non-economic damages."¹⁹ The Court in *Serrano* similarly emphasized that..."on its face, the limitation on lawsuit threshold forecloses a recovery for frivolous injuries."²⁰ The Court continued, stating that the elimination of lawsuits for frivolous injuries is achieved "by requiring a plaintiff to prove by objective clinical evidence, supported by a physician certification, under penalty of perjury, an injury fitting into one of the six statutorily defined threshold categories."²¹

Accordingly, New Jersey trial courts no longer will determine whether an injury has a serious impact on a plaintiff's life, but must take a close look at the clinical evidence presented in order to decide its credibility and determine whether the injuries are frivolous. The emphasis previously placed on proving a "serious impact" now should be placed on testing the credibility of the evidence regarding whether an injury will heal to function normally.

The "New" Permanency Standard: Will the Injury "Heal to Function Normally"?

New Jersey case law testing the validity of the objective clinical evidence submitted by a plaintiff claiming a permanent injury is sparse, although developing. However, at least two cases are helpful in determining how the tightened permanency standard referenced in *DiProspero* and *Serrano* may be applied by the courts.

In the first, *Jacques v. Kinsey*,²² the plaintiff alleged that he suffered from muscle spasms for four months after an automobile accident. The trial court held that while evidence of muscle spasm constituted objective clinical evidence, it was not sufficient to overcome the threshold set forth in AICRA because, as the spasm dissipated with treatment, the evidence did not "support a finding that [the plaintiff's] neck and back do not function normally and that the condition is permanent."²³ Moreover, the court called this type of injury "the very type of non-serious soft tissue injury that the Legislature sought to exclude with the verbal threshold statute."²⁴

In the second case, *Compere v. Collins*,²⁵ decided before the New Jersey Supreme Court settled the issue in *DiProspero* and *Serrano*, the court concluded that because the serious impact prong of *Oswin* did not survive AICRA, the permanency of the injury as defined in AICRA, namely that the "body part or organ, or both, has not healed to function normally and will not heal to function normally with further medical treatment,"²⁶ must be evaluated. In determining the permanency of the plaintiff's injuries there, the court indicated that the issue should turn on how the word "normally," as used in the definition of permanency, is applied.²⁷ The court examined the medical evidence, together with the injury itself, and reviewed the plaintiff's testimony as to the impact of the injuries on his life. For example, the court considered the plaintiff's testimony that he could no longer squat or run, exercise or play basketball socially, and that he experienced pain when doing odd jobs around the house. The *Compere* court considered this type of evidence, *i.e.*, the plaintiff's testimony as to the impact of the injury on his daily life, in determining permanency. There, the court held that the jury's award was proper in light of the doctor's credible evidence that the injury was permanent considered together with the plaintiff's own testimony that he continued to have pain and could no longer perform certain physical activities he previously enjoyed.

Following a *Compere*-analysis (which *DiProspero* and *Serrano* track closely), the same criteria formerly used to determine serious impact now can be used to analyze whether an injury will heal to function "normally" or is "permanent" under AICRA. *Jacques* and *Compere* support the proposition that *DiProspero* and *Serrano* do not render the actual impact of an injury on the plaintiff's life irrelevant. Rather, as addressed by the courts in *Jacques* and *Compere*, the objective clinical evidence should be carefully scrutinized to determine whether the injury is permanent and will not heal to function normally. In this regard, the impact of the injury can shed light on whether an injury has, in fact, "healed to function normally."

Conclusion

While *DiProspero* and *Serrano* invite the conclusion that the elimination of the serious impact standard will lower the standard necessary to overcome the verbal threshold, the emphasis instead should shift to whether an injury will heal to function normally. Recent decisions implementing *DiProspero* and *Serrano* direct the trial courts to determine the sufficiency of proofs on the issue of permanency.²⁸ While such cases still may be dismissed at the summary judgment stage, the issue currently remains open whether a properly prepared physician's certification alone will be held automatically to constitute *prima facie* evidence of permanency, sufficient to meet AICRA's more stringent standard.

Endnotes

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² N.J.S.A. 39:6A-1.1 *et seq.*

³ N.J.S.A. 39:6A-8a.

⁴ *Id.*

⁵ 129 N.J. 290 (1992).

⁶ 354 N.J. Super. 586 (App. Div. 2002), *certif. denied*, 175 N.J. 547 (2003). *See also*, *Rios v. Szivos*, 354 N.J. Super. 578, 580 (App. Div. 2002).

⁷ *Id.* at 594.

⁸ *DiProspero v. Penn*, 183 N.J. 477 (2005); *Serrano v. Serrano*, 183 N.J. 508 (2005).

⁹ *Beltran v. DeLima*, Nos. A-6056-03T2, A-6673-03T1, 2005 WL 1606438, at *3,4 (N.J. App. Div. Jul. 11, 2005).

¹⁰ N.J.S.A. 39:6A-8a.

¹¹ *Id.*

¹² *Id.*

¹³ *See* N.J.S.A. 39:6A-4a and N.J.S.A. 39:6A-4.7.

¹⁴ N.J.S.A. 39:6A-8a.

¹⁵ *See* Marisa L. Farraro, *New Jersey and the Verbal Threshold: Imperfect Together*, 54 RUTGERS L. REV. 707, 724 (2002).

¹⁶ 183 N.J. at 489.

¹⁷ *Id.* at 497-98.

¹⁸ *Id.* at 500-01 (AICRA allows only *displaced* fractures and *significant* scarring and specifically requires "a threshold vaulting injury to be proven by 'objective clinical evidence.' ").

¹⁹ 183 N.J. at 508.

²⁰ *Id.*

²¹ *Id.* at 518.

²² 347 N.J. Super. 112 (Law Div. 2001).

²³ *Id.* at 124.

²⁴ *Id.* at 126.

²⁵ 352 N.J. Super. 200 (Law Div. 2004).

²⁶ N.J.S.A. 39:6A-8a.

²⁷ 325 N.J. Super. at 211 (noting that N.J.S.A. 39:6A-8a was amended to eliminate the more subjective verbal threshold categories but does not indicate a "quantum of reduction of function necessary to fall below the range of 'normal.' ").

²⁸ *See, e.g., Beltran v. DeLima, supra*, 2005 WL 1606438. *See also, Juarez v. J.A. Salerno & Sons*, 379 N.J. Super. 91 (App. Div. 2005) (there is nothing in *DiProspero* or *Serrano* that modifies plaintiff's obligation to establish his injury "was sufficiently serious as a matter of objective evaluation - as well as permanent - to warrant inclusion under the bargained-for 'limitation-on-lawsuit' coverage").