

**SFA**

BILL ANALYSIS

Senate Fiscal Agency

Lansing, Michigan 48909

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**Senate Bill 352 (as passed by the Senate)****Sponsor: Senator Dick Posthumus****Committee: Commerce and Technology****Date Completed: 7-2-87****RATIONALE**

In 1972, provisions were added to the Insurance Code to establish a "no-fault" automobile insurance system. A no-fault system is designed to remove tort liability for economic loss, and to limit tort liability for noneconomic loss, that arises from the use or operation of a motor vehicle. Thus, no-fault insurance provides benefits without regard to fault for unlimited medical expenses and limited wage loss.

Under Michigan's no-fault system, a person is subject to tort liability for noneconomic loss only in the event that an injured person died or suffered a "serious impairment of body function" or permanent serious disfigurement. Because the law does not define "serious impairment of body function", the term has received sometimes divergent judicial interpretations. The Michigan Supreme Court addressed the issue in 1982 in Cassidy v McGovern, holding that the determination is one for the trial court, not the jury, and that a "serious impairment of body function" is to be measured by an objective standard that looks at the effect of an injury on the "person's general ability to lead a normal life".

Cassidy did not settle the issue, however: the Court of Appeals subsequently published some 40 opinions on the subject, some of which reached conflicting legal and factual conclusions. In December 1986, the Supreme Court again considered the matter in DiFranco v Pickard, ruling that "serious impairment" is a question for the jury, not the court, and rejecting the "general ability to lead a normal life" test.

Many people now claim that DiFranco will have a detrimental effect on no-fault auto insurance in Michigan. They argue that, under the threshold as interpreted by DiFranco, insurers must not only pay more in claims but also defend more lawsuits, which in turn will raise consumers' premiums. To avoid an imminent rate hike, they contend, the Cassidy "normal life" test should be instituted statutorily, with determination of "serious impairment" being made a matter of law for the court.

**CONTENT**

Senate Bill 352 would amend the Insurance Code to:

- Provide guidelines for determining whether an injured person suffered "serious impairment of body function" in an action for noneconomic loss caused by the ownership, maintenance, or use of a motor vehicle.
- Require that the determination be a question of law for the court.
- Set a three-year statute of limitations on such an action.

Under the Code's no-fault provisions, "death, serious impairment of body function, or permanent serious disfigurement" is the threshold that must be met in order

to recover for noneconomic loss. The bill specifies that a person would not have suffered serious impairment of body function "unless the person has suffered an objectively manifested impairment of an important body function which affects his or her general ability to lead a normal life".

The bill also would prohibit the commencement of a no-fault action later than three years after the date of the accident that caused the injury (except as provided in the Revised Judicature Act for certain legal "disabilities", e.g., infancy or insanity, that toll the statute of limitations, that is, allow an action to be brought within a certain period of time after the statute has run).

MCL 500.3135

**BACKGROUND****History**

The basic feature of no-fault insurance laws is compulsory motor vehicle insurance, which permits the insured to recover benefits directly from his or her insurer, without regard to fault, for certain economic losses sustained as a result of a motor vehicle accident. In Michigan, an injured person may obtain personal injury protection (PIP) benefits for all allowable medical expenses, and wage loss for up to three years, within specified limits. Benefits for survivor's loss also are available for up to three years within certain limits. In addition, the law limits an injured person's common-law right to recover damages from the negligent owner or operator of the vehicle; tort liability is abolished in Michigan except for "bodily injury" claims to recover the following, if the claims are not paid voluntarily by the insurer:

- Losses that were intentionally caused.
- Damages for allowable expenses, work loss and survivor's loss not covered by the no-fault law.
- Damages for noneconomic loss if the injured person suffered a threshold injury.

In designing Michigan's no-fault system, the Legislature specified that a person is subject to tort liability for noneconomic loss only in the event that an injured person died, suffered a serious impairment of body function, or suffered permanent serious disfigurement. In adopting this "verbal" threshold, the Legislature rejected other proposed body impairment thresholds, such as a monetary threshold of \$5,000 in medical bills, which would have to be amended periodically to reflect medical cost inflation. The Legislature also rejected a requirement that the impairment of body function be permanent, major, or extensive, or that the body function impaired be a significant one.

**Case Law**

In a 1973 nonbinding advisory opinion, the Michigan Supreme Court upheld the constitutionality of the no-fault law and held that the phrases "serious impairment of body

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function" and "permanent serious disfigurement" are capable of legal interpretation. The Court stated that "juries or judges sitting without juries frequently have and do interpret comparable phrases bearing upon various facets of the law. Such findings result from denominated fact questions and thus are within the exclusive province of the triers of fact". (Advisory Opinion re Constitutionality of 1972 PA 294, 389 Mich 441)

In Cassidy v McGovern (415 Mich 494), the Court held that the meaning of "serious impairment of body function" is a matter to be determined by statutory construction, and that, "[W]hen there is no factual dispute regarding the nature and extent of a plaintiff's injuries, the question of serious impairment of body function shall be decided as a matter of law by the court. Likewise, if there is a factual dispute as to the nature and extent of a plaintiff's injuries, but the dispute is not material to the determination whether plaintiff has suffered a serious impairment of body function, the court shall rule as a matter of law whether the threshold requirement . . . has been met." The Court also ruled that "impairment of body function is better understood as referring to important body functions", and that "the Legislature intended an objective standard that looks to the effect of an injury on the person's general ability to live a normal life".

The Court in DiFranco v Pichard (427 Mich 32) rejected the Cassidy rulings, and held as follows:

- "The question of whether the plaintiff suffered a serious impairment of body function must be submitted to the trier of fact whenever the evidence would cause reasonable minds to differ as to the answer. This is true even where there is no material factual dispute as to the nature and extent of the plaintiff's injuries."
- "The Legislature did not intend to limit recovery of noneconomic damages to the catastrophically injured. The 'serious impairment of body function' threshold is a significant, but not extraordinarily high, obstacle to recovering such damages."
- "The impairment need not be of the entire body function or of an important body function. [The Act] bars recovery of noneconomic damages to those persons who suffered minor injuries, or injuries which did not seriously impair the ability of the body, in whole or in part, to function."
- "The 'serious impairment of body function' threshold contains two inquiries: a) What body function, if any, was impaired because of injuries sustained in a motor vehicle accident? b) Was the impairment of body function serious? The focus of these inquiries is not on the injuries themselves, but on how the injuries affected a particular body function."
- "In determining whether the impairment was serious, several factors should be considered: the extent of the impairment, the particular body function impaired, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors. An impairment need not be permanent to be serious."

## FISCAL IMPACT

The bill could result in a small decrease in expenditures for both State and local governments by limiting the circumstances under which a tort action could be brought against the State or local governments for motor vehicle accidents caused by the negligent action of their employees. It is difficult to know precisely the extent to which costs would be reduced, because of the lack of detailed information on the number of suits that would be affected by this bill.

## ARGUMENTS

### Supporting Argument

There must be a strong limitation on the ability to sue for automobile accident-related injuries if the no-fault system is to be successful and in balance. That is, if premiums are to be kept down, and the payment of economic damages assured, an individual should have to meet a high threshold in order to recover compensation for noneconomic injury, such as pain and suffering, mental anguish, and inconvenience. By dispensing with the more rigorous requirements that stemmed from the 1982 Cassidy decision, the Supreme Court seriously eroded the statutory threshold with the recent DiFranco decision, put the system out of balance, and actually created a hybrid system in which recovery of economic benefits continues to be guaranteed but injured parties can easily sue for noneconomic damages. The more recent decision will exclude from coverage only the most minor injuries. As parties are encouraged to bring suit, and noneconomic injuries are increasingly compensated, premiums not only must keep up with additional payments to insureds, but also must rise simply to meet increased costs of litigation. At the same time, the proportion of total funds available to compensate injured parties will be smaller. This can be illustrated by the experience of AAA of Michigan, for example: with bodily injury liability, court costs and attorney fees comprise a full 32% of premium dollars, leaving only 48% for benefits and 20% for operating expenses. With personal injury protection, on the other hand, the insurer reports that only 4% goes toward court costs and attorney fees, leaving 23% for expenses and a full 73% for benefits to injured parties. Since the cost of automobile insurance often constitutes a substantial portion of a family's or individual's budget, it is preferable that the dollars spent be used to pay for the claims of injured persons rather than the costs of litigation.

The recent history of automobile-related negligence suits filed also supports a higher threshold. According to the Insurance Bureau, the number of cases filed fell from approximately 13,000 in 1972, the year before the no-fault law took effect, to 8,800 in 1976-1977. The numbers started to rise again in 1980, peaking at over 13,000 in 1982-1983, but dropping again after the Cassidy decision. While these cases encompass more than just claims for noneconomic damages for a serious impairment of a body function, a correlation between these figures and the judicial ruling should not be dismissed.

Insurance Bureau figures also show that, after the enactment of the no-fault law, the number of paid bodily injury claims (for noneconomic loss and excess wage loss) rose steadily, as the courts struggled with applying a consistent definition of "serious impairment of body function". At the same time, paid claims for PIP benefits (economic loss) declined consistently until 1982. After the Supreme Court's ruling in Cassidy, paid bodily injury claims declined, while both paid PIP and paid collision claims rose.

**Response:** If statistics are going to be used to support this proposal, they should be thoroughly researched and analyzed, not simply thrown out and accepted at face value. The Insurance Bureau figures on the number of paid claims are, in fact, "fast track data", which refers to a reporting method based on only a sampling of cases. Further, the Insurance Bureau does not even have figures on the number of claims paid prior to 1977 — for approximately four years between the implementation of the no-fault law and the rendering of the Cassidy decision. In regard to the number of lawsuits actually filed, the Insurance Bureau itself admits that these cases are not

limited to claims for serious impairment of body function. There are, in fact, no data clearly showing a correlation between an increase in cases filed and the Cassidy decision. Finally, if Cassidy actually was responsible for reducing the number of cases filed, that may well be simply a result of the decision's shutting down accident victims' access to the courts.

### **Supporting Argument**

Unless the DiFranco ruling is statutorily reversed, that decision will add an average of \$22 per car to consumers' premiums, according to AAA of Michigan estimates, and that increase will come on top of the \$30 average increase already planned by the insurer for next year. Michigan's rates may soon begin to resemble rates in New Jersey, which also has a low threshold as well as the highest automobile insurance rates in the nation. Currently, the average premium paid in Michigan in 1985 was \$407, while New Jersey's was \$607, almost a full 50% higher.

**Response:** The comparison to New Jersey's rates is superficial, at best: the threshold for recovering noneconomic damages is only one of many elements that determine no-fault premiums. While this discrepancy between rate amounts may be accurate, the contrast is of little value without a comparison also of policy coverage, household budgets, earnings, cost of living, and other elements.

### **Supporting Argument**

The bill would, in effect, codify the Cassidy decision, and thus limit the number of cases that otherwise will go to trial pursuant to DiFranco. Under the bill, the issue of whether an injured person had suffered a serious impairment of body function would be a question of law for the court, not a question of fact for the jury. The phrase "serious impairment of body function", as Cassidy explained, "is not a term commonly used, for which juries would have a clear sense of the intended meaning", and, if the interpretation of the phrase must generally be submitted to the trier of fact, a trial will usually be necessary, which would thwart the law's design to reduce litigation. The Court also stated that, "... we cannot believe that the Legislature . . . intended that the limits which they created would vary according to the specific jury impaneled or the specific part of the state in which a case was to be tried". As a result of codifying that decision, a significant number of cases could be decided by a summary opinion of the court, instead of being submitted to a full-blown trial. By reducing litigation expenses in this way, the bill would enable a larger proportion of funds to be used for the payment of claims.

**Response:** Insurers' litigation expenses would be reduced if the companies didn't force accident victims to sue in order to recover noneconomic damages.

### **Supporting Argument**

The bill would shorten insurers' "long tail" on claims, by establishing a flat statute of limitations of three years after the accident on the time during which an injured party must bring a bodily injury suit. This would avoid Michigan's "discovery rule", which allows a claim to be brought many years after an accident when an individual finally discovers his or her injury. As a result, insurers' liability is completely unpredictable.

**Response:** Insurers have not demonstrated that the long tail results in any actual increase in their costs of doing business. The fact that insurers may be experiencing difficulty in calculating premiums does not alone justify the denial of benefits to parties who are unable to discover their injury within three years after an accident.

### **Opposing Argument**

The size of a no-fault premium should not be the only factor considered in shaping this State's policy toward compensating injured parties. After reviewing the various options rejected by the Legislature when enacting our no-fault law, the DiFranco Court concluded that the Legislature "did not intend to limit recovery only to catastrophically injured persons", and that the serious impairment of body function threshold "is a significant, but not extraordinarily high, obstacle to recovering" noneconomic damages. If that conclusion is in fact faulty, or if public policy is to be revised, perhaps that determination deserves to be based on more than a projected rate increase that amounts to six cents per day per car.

Furthermore, although proponents of the bill speak of the system being "out of balance" and the threshold being "lowered" by DiFranco, perhaps it should first be determined exactly what balance the no-fault law was designed to achieve, before the law is amended. Moreover, the bill actually proposes a more conservative approach than even Cassidy in regard to including "serious injury" as part of the threshold, instituting a normal life test, and making the threshold determination a question of law. The bill's proponents have not made a case for codifying Cassidy, much less setting up even greater barriers to recovery for accident victims.

### **Opposing Argument**

This bill is an anti-consumer measure. While attempting to save consumers a paltry six cents per day, according to one insurer's estimate, the bill would deny insured parties the opportunity to recover fully for their injuries and would substantially diminish the benefits available under the no-fault law, and paid for by consumers' premiums. That is, although compulsory no-fault insurance requires an insured to carry minimum bodily injury coverage of \$20,000, injured parties frequently are forced to file suit against the insurer to recover noneconomic damages. Furthermore, the typical \$20,000 policy limit usually represents the maximum recoverable for pain and suffering: the insurer obviously is not obligated to pay more, and the defendant driver probably is uncollectible. Thus, the amounts in question do even begin to approach the million-dollar verdicts that juries are often accused of awarding inappropriately and that may justify limitations on recovery in other categories of insurance and areas of tort law.

### **Opposing Argument**

It would be inappropriate to deny plaintiffs the opportunity to have a jury rule on the issue of serious impairment of body function if reasonable minds could differ. Contrary to the Cassidy opinion, juries are not incapable of applying the threshold standard, and removing the issue from the jury would not lead to more consistent decisions. According to the DiFranco opinion, "Properly instructed jurors are capable of weighing evidence and using their collective experiences to determine whether a particular plaintiff has suffered an impairment of body function and whether that impairment was serious." Moreover, a trial in every case did not result prior to Cassidy, when the issue had been considered a question of fact under the Supreme Court's 1973 advisory opinion. The Court then pointed out that triers of fact are routinely required to pass on equally difficult questions, such as reasonableness, proximate cause, and gross negligence, and that the "phrases 'serious impairment of body function' and 'permanent serious disfigurement' . . . are comprised of no less commonly used or understood words of the English language, nor is the language presently before the Court less precise than

that which has been adopted to express other standards for determining tort liability". Also, to "ensure that the jury fully understands the nature of the threshold inquiry", the DiFranco opinion includes specific instructions that must be given to a jury.

Furthermore, by making the threshold determination a matter of law in all cases, the bill would go much further than even Cassidy. In Cassidy, at least, the Court held that the question of serious impairment of body function was to be decided as a matter of law when there was no factual dispute regarding the nature and extent of a plaintiff's injuries, or, if there were such a dispute, the dispute was not material to the determination whether the plaintiff has suffered a serious impairment of body function. In other cases, the issue was still to be decided by the trier of fact. The bill, however, would fail to make this distinction.

Finally in regard to leaving threshold issues to the "vagaries of juries", DiFranco points out that, "trial and appellate courts have proven to be no more consistent than juries would have been in determining whether a particular plaintiff suffered a serious impairment of body function . . . [N]o two plaintiffs are injured or recover in precisely the same manner. These conflicting results indicate that threshold issues are often questions upon which reasonable minds can differ."

**Response:** DiFranco also said that, "Without further guidance from the Legislature, we believe that juries are better suited to resolving threshold questions where reasonable minds can differ on the answer." Senate Bill 352 would supply that guidance.

### **Opposing Argument**

It is not axiomatic that legislatively overruling the DiFranco decision and codifying Cassidy would reduce litigation. As the Supreme Court pointed out in DiFranco, "The 'general ability to live a normal life' standard has proven to be as difficult to apply as the threshold it was designed to clarify. It is also unclear what types of injuries are 'objectively manifested.'" What constitutes an "important" body function also is an inherently subjective determination. Further, one should remember that Cassidy is the decision that spawned approximately 40 published Court of Appeals decisions that ultimately led to DiFranco. The legal instability of Cassidy is amply demonstrated in data supplied by the Michigan Trial Lawyers Association: during the 10 years from the enactment of the no-fault law until Cassidy, there were approximately 25 appellate decisions, for an average of 2.5 per year; since Cassidy, however, through May 1987, there have been approximately 85 appellate decisions, for an average of almost 20 per year.

### **Opposing Argument**

Although the bill would require that an injury be "objectively manifested", that phrase has been interpreted in various ways and it is not clear which interpretation the bill would encompass. According to DiFranco, the "objectively manifested" requirement stems from a discussion in Cassidy that was subsequently misconstrued in a 1984 Court of Appeals decision, Williams v Payne (131 Mich App 403), which distinguished objectively manifested injuries from objectively manifested symptoms. The Williams Court found that, although the plaintiff's symptoms were objectively manifested, the injuries were not objectively manifested because they "were not subject to medical measurement". The defendants in DiFranco urged the adoption of the Williams interpretation, arguing that an injury was not objectively manifested if the injury itself could not be directly demonstrated through the use of accepted medical tests or procedures, but had to be diagnosed on the basis of the plaintiff's subjective complaints, a physician's clinical impressions, or the symptoms resulting

from the injury. The Court in DiFranco, however, pointed out that although broken bones seen on x-rays clearly satisfy the Williams interpretation, that case had proven to be an "almost insurmountable obstacle to recovery of noneconomic damages in soft tissue cases". Instead of applying Williams, the Court held that "plaintiffs must introduce evidence establishing that there is a physical basis for their subjective complaints of pain and suffering", and that neither Cassidy nor the no-fault law limits recovery of noneconomic damages to plaintiffs whose injuries can be seen or felt. The Court concluded that, "[T]he . . . threshold requires the plaintiff to prove that his noneconomic losses arose out of a medically identifiable injury which seriously impaired a body function. The Cassidy Court required no more than this."

### **Opposing Argument**

While it may be true that DiFranco lowered the threshold, the clarity provided by that opinion could actually reduce litigation. By eliminating much of the subjectivity and ambiguity, establishing a clear two-step inquiry into what constitutes serious impairment of a body function, and enumerating the factors to be considered in making that determination, perhaps DiFranco will actually avert disputes, or at least encourage settlements. Furthermore, although more cases may be filed after the DiFranco decision, it is not inevitable that more cases will go to trial. DiFranco dictates a jury trial only if reasonable minds could differ regarding whether the plaintiff had sustained a serious impairment of body function. In fact, cases already are being thrown out under DiFranco.

### **Opposing Argument**

Although DiFranco may have lowered the Cassidy threshold, which the Supreme Court found to be unfair and unworkable, DiFranco did not lower the original no-fault threshold, which had served the State well for 10 years until Cassidy. Statistics show that the original threshold was effective in reducing the number of tort cases without significantly interfering with the right of seriously injured victims to seek compensation: as of 1982, the last full year before Cassidy, the number of automobile tort lawsuits represented only 5.7% of the total suits filed; a decrease from the 9.9% in 1973, amounting to a total reduction of approximately 44% in the number of automobile negligence lawsuits compared to total suits filed. Other pre-Cassidy statistics, according to the Michigan Trial Lawyers Association, come from a 1981 study revealing that only 6% of Michigan accident victims met the original no-fault threshold, and a 1980 study showing that tort payments under the Michigan no-fault law were 30% less than the average no-fault state.

In addition, increased filings do not necessarily translate into additional verdicts for the plaintiff: of the five cases consolidated in the DiFranco decision, the Supreme Court affirmed three holdings for the defendant, remanded one case for further proceedings, and ordered the entry of judgment for the plaintiff in only one.

**Response:** Increased filings still mean that defendants must pay additional expenses of litigation.

### **Opposing Argument**

Unlike many areas of proposed legislation, where one can simply guess what the courts would do with a particular concept, it is clear what effect a return to the Cassidy rule would mean to the victims of automobile negligence. In one case that was taken to the Court of Appeals, the trial court had applied Cassidy and ruled against a man who had sustained permanent brain damage that was manifested by prolonged unconsciousness, post-traumatic epilepsy, personality change, memory impairment, and

double vision. Knight v Elliott, Court of Appeals Docket No. 86760 (2-19-87) A few examples of how the Cassidy decision was applied by the Court of Appeals include cases in which the following individuals were held not to have met the serious impairment of body function threshold:

- A man who sustained a bilateral inguinal hernia, was required to undergo two abdominal operations requiring 10 days of hospitalization, was placed under permanent weight-lifting restrictions, and continued to suffer chronic pain. Routley v Dault, 140 Mich App 190 (1984)
- A woman who sustained two severe fractures of her humerus (upper arm bone), was hospitalized, had her arm immobilized in a cast, experienced impairment of arm function for several months afterward, and continued to experience pain with arduous activity. Kroft v Kines, 154 Mich App 190 (1986)
- A woman who sustained a broken back (compressive fracture of a vertebra), was hospitalized and required to wear a back brace, and was expected to continue to experience pain when bending over for the rest of her life. Walker v Caldwell, 148 Mich App 827 (1986)

### Opposing Argument

Many who contend that the system is out of balance seem to assume that the no-fault law was based on the premise that savings from limited tort liability were meant to fund the economic benefits the law guarantees, as well as to reduce consumers' premiums. While it is clear that the system was designed to assure the payment of some claims, reduce premiums, and eliminate the inefficiency found in an adversarial system, it is not certain that those benefits were supposed to result from the tort limitation. As the DiFranco opinion points out, some states' no-fault laws place no restrictions on the ability to recover damages for noneconomic losses.

**Response:** DiFranco also states that the no-fault law "permits the insured to recover benefits directly from his insurer, regardless of fault for certain economic losses", and, "In return, the injured person's common-law right to recover damages from the negligent owner or operator of the motor vehicle is limited" (emphasis added). In 1983, the Court also had described the law as legislation "designed to increase the cost effectiveness of insurance by redefining the scope of the insured person's liability" (emphasis added).

### Opposing Argument

The bill would codify a Supreme Court decision that the Court itself has rejected. After tinkering with the law in 1982, the Court four years later considered the pre-Cassidy and the post-Cassidy systems and concluded that it had made a mistake. In particular, one of its most egregious errors was to revise the statutory threshold itself. That is, instead of simply interpreting the phrase "serious impairment of body function", the Cassidy Court in effect created a new standard: impairment of a serious body function. The Court realized and reversed its mistake in 1986.

### Opposing Argument

Requiring an injury to interfere with a person's general ability to live a normal life, in order to meet the threshold, presents the problem of defining a "normal life" and determining how that standard would have to be applied. A test that simply compared the activities the plaintiff was able to perform before and after the accident could reward the malingerer or hypochondriac, while penalizing the person who could not afford to miss work or who tried to function despite the pain. A test that compared the plaintiff's post-accident activities and abilities to a hypothetical person's "normal life" also would be

unworkable, and determining which activities are essential to living a normal life would be equally impossible. According to the DiFranco opinion, "there is simply no such thing as a 'normal life'", and the "general ability to live a normal life" test, as applied by the Court of Appeals, has proved to be an almost insurmountable obstacle to recovering noneconomic damages". The Court concluded that, "Rather than clarifying what injuries are sufficiently serious to meet the 'serious impairment of body function' threshold, the test has obfuscated the true nature of the threshold inquiry."

### Opposing Argument

A flat three-year statute of limitations would be fundamentally unfair and would function solely to cut off claims for injuries a victim did not and could not know about within that medically brief time. The Michigan Supreme Court has addressed this issue and held that expiration of the statute of limitations before a claimant could reasonably have known he or she had a claim is unconstitutional.

**Response:** It should be kept in mind that the flat statute of limitations would apply only to suits for noneconomic damages. An injured party's medical expenses would still be recoverable under the no-fault law.

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