CIRCUMVENTING THE VERBAL THRESHOLD LIMITATION OF N.J.S.A. 39:6A-8(A)

In the words of a noted Torts Professor, "Never drop your briefcase and run". This lesson is no more apt than when faced with a "Verbal Threshold" case. Consider the following scenario:

On August 18, 1989, Plaintiff is operating his motor vehicle and is stopped with his left directional signal activated when he is struck in the rear by a tractor-trailer owned by XYZ Inc. and operated by its employee, John Doe. As a result, plaintiff sustains "soft tissue" injuries, undergoes several months of chiropractic care and is discharged with minor residuals. Plaintiff's personal automobile policy contains the "Verbal Threshold" option which plaintiff had selected at his last policy renewal.

Many practitioners, faced with this situation, and a turn-down by the liability carrier, would counsel their client against instituting a lawsuit since the prospects of recovery are slim and the costs of litigation great. Still others, would settle their client's claims for "nuisance value". A careful examination of the law and facts, however, would lead some practitioners to the realization that plaintiff's claims are not governed by the Verbal Threshold.

N.J.S.A. 39:6A-8(a), the Verbal Threshold section, provides in pertinent part that:

> Every owner, registrant, operator or occupant of an automobile to which section 4, 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 who is subject to this subsection and who is either a
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> person who is required to maintain the coverage mandated by this act, or is a person who has a right to receive benefits under section 4 of P.L.1972, c. 70(C. 39:6A-4),as a result of bodily injury, arising out of the ownership, operation, maintenance or use of such automobile in this state, unless that person has sustained a personal injury which results in death...

The first line of this section indicates that the exemption from liability applies to every owner, operator or occupant of an automobile to which section 4 (39:6A-4) PIP benefits apply.

In the within case, the vehicle operated by defendant is not an automobile as defined at N.J.S.A. 39:6A-2(a):

> "Automobile"means a private passenger automobile of a private passenger or station wagon type that is owned or hired and is neither used as a public or livery conveyance for passengers nor rented to others with a driver; and a motor vehicle with a pickup body , a delivery sedan, a van, or a panel truck or a camper type vehicle used for recreational purposes owned by an individual or by husband and wife who are residents of the same household, not customarily used in the occupation, profession or business of the insured other that farming or ranching.

Defendant was operating a tractor trailer at the time of accident which is not a private passenger automobile, station wagon, pickup truck, delivery sedan, van, panel truck or camper

type vehicle. Accordingly, under the plain language of the statute, Defendant XYZ Inc. and its employee are not entitled to the protection of N.J.S.A. 39:6A-8(a) since the vehicle involved in the accident was not an "automobile" as defined by the Legislature.

In Newson v. The Hertz Corp., 164 N.J. Super. 141 (App. Div. 1978), overruled on other grounds, the Appellate Division dealt with a similar situation in deciding whether the $200.00 Tort Threshold of prior law applied to plaintiff's claim for non-economic loss.

The Court wrote:

> Even if Newson has received personal injury protection benefits, her claim for pain, suffering and disability would not be barred as against the owner and operator of an automobile to which N.J.S.A. 39:6A-4 applies (an automobile covered by no-fault insurance) if her medical expenses were $200 or more or if her bodily injuries were other than "soft tissue" injuries. N.J.S.A. 39:6A-8 (citations omitted). But admittedly, the vehicle owned by Hertz and driven by Lopez was a truck. Presumably it was not a vehicle included within the definition of an automobile in N.J.S.A. 39:6A-2. ... It is not therefore entitled to the limitation of liability provided by N.J.S.A. 39:6A-8. Newson at 144.

Based upon the plain language of the relevant statutes and the cited case, plaintiff's claims are not governed by the Verbal Threshold exemption. Plaintiff's rights of recovery, therefore, are based upon common law.

The rationale for concluding that the Verbal Threshold exemption does not apply in the above scenario, is equally

applicable in other circumstances. Arguably, in the case where the defendant is an out-of-state insured, whose carrier is not authorized to do business in the State of New Jersey, or where the striking vehicle is a taxi or limousine, the same reasoning applies and the harshness of the Verbal Threshold limitation may be avoided. In the former instance, involving an out-of-state insured, the argument against the verbal threshold is predicated upon the fact that the out-of-state policy does not provide section 4 benefits. If the out-of-state insurer is authorized to do business in New Jersey, then that policy would be amended to conform to New Jersey law and the verbal threshold selected by the plaintiff would apply. In the latter situation, involving a taxi or limousine, the argument is premised upon the language of N.J.S.A. 39:6A-2(a).

Similarly, if the tortfeasor is an uninsured motorist or a hit-and-run motorist, an equally effective argument can be made in support of the exclusion of the verbal threshold defense. Since an uninsured motor vehicle is, by definition, a vehicle to which a policy of insurance does not apply, Section 4 benefits cannot be applicable, and the verbal threshold should not apply. Defense counsel would undoubtedly argue that the insurer is entitled to all of the defenses which would be available to the tortfeasor, including the verbal threshold defense. However, since the insurer can take no better rights than the tortfeasor, this argument should not be persuasive to the Court.

In practice, a motion for summary judgment should be made in the appropriate case seeking judgment that the verbal threshold does not apply. Since there usually will be no questions of material fact at issue, the motion is ripe almost from the outset of the litigation. Basic facts, such as the characterization of the tortfeasor's vehicle or his status as an uninsured motorist are usually obvious and not at issue. In the soft-tissue/chiropractic case described at the outset of this article, an Order ruling the verbal threshold inapplicable was entered. Unfortunately, the trial court did not write an opinion and the decision is unreported.

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